The Judicial Reform Process in the Peace Support Operation in Afghanistan

By
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"THE JUDICIAL REFORM PROCESS IN THE PEACE SUPPORT OPERATION IN AFGHANISTAN"

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Thesis

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Abstract

Decades of war fighting have left Afghanistan in a deplorable state. Conflicts with the Soviet-Union, Mujahedeen and Taliban have made Afghanistan a hard place to survive.

The international community neglected Afghanistan for decades, but all stopped following the terrorist attacks on the 11 of September 2001. The UN has issued various Security Council Resolutions condemning these attacks, but at the same time also has expressed it's commitment to the re-establishment of governance, security and economic and social development in the country of Afghanistan.

In the past, the UN has taken up these reform pillars in various ways. UN integrated missions consist of various components including military civilian police, criminal justice, civil affairs, human rights and disarmament, demobilisation and repatriation. The UN has even exercised the function of government, together with other specialised organisations as, for example, in the United Nations Mission in Kosovo (UNMIK). A fundamental difference between the UNMIK and the United Nations Mission to Afghanistan (UNAMA) is that UNAMA recognises the sovereignty of Afghanistan and does not take over any executive governmental powers. The UNAMA Mission in Afghanistan is a “light” version, because of its limited involvement and encouragement of Afghan ownership for political reconciliation and economic development. The light footprint concept left donor nations each with a specific role: The disarmament of illegally armed groups by Japan, rule of law establishment by Italy, training of Afghan National Police and Army by Germany combined with USA and Counter-Narcotics operations by the UK. ISAF provides the security in Afghanistan since 2003.

The development strategy is governed by various documents. The leading document is the Afghan National Development Strategy (ANDS) and the Afghan Compact, issued by the Afghan government, which sets out an agenda for the next five years. The Strategy consists of three pillars (security, governance and rule of law, economic and social development). The Afghan Compact sets out timelines for the goals to be achieved, whilst the ANDS proposes the strategy to how these goals are materialised.

ISAF’s responsibility is the first pillar, but without a functioning rule of law in the country, security is hard to maintain, and vice versa. Without prisons, judges, prosecutors, human rights, legal aid, the transfer of detained persons during the conflict remains a tricky issue, particularly when one considers the conundrum facing ISAF of handing over a known threat to an ineffective system of justice. However, it is not ISAF’s mission or mandate to improve this area.
After a slow start with the Judicial Reform Commission, Italy’s progress in the judicial reform process is progressing with the “Justice for All” plan. The plan is aimed at establishing a broader programme with detailed institutional need, benchmarks, cost assessment and timelines and can be incorporated within the ANDS. The reform process has various programmes, such as training the Afghan judiciary, building the necessary infrastructure including courthouses and prisons, the training of law enforcement officials, codification of laws and incorporating informal law structures.

Afghanistan still has a long way to go and many challenges lay ahead. Opium production is soaring, human rights abuses are rampant, and land issues remain unresolved. Opposing militant forces, former war criminals and drug lords have negative influence in the government decision-making process. Whilst the funding of the mission remains light, many issues need still to be addressed. Afghanistan has very strong potential for improvement, if and as far as the international community remains committed to it in the long-term.
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The judicial reform process and the rule of law in the peace support operation in Afghanistan

1. Objective, aim and methodology

1.1. Aim and objective

The aim of this thesis is to examine the judicial reform process and the establishment of the rule of law in the peace support operation (PSO) in Afghanistan. PSO’s have developed since Dag Hammarskjöld’s introduction of the peacekeeping missions. Nowadays a PSO is multifaceted and covers a variety of peace building and enforcement measures, interacting with local players and international organisations like NATO, The Organization for Security and Co-operation in Europe (OSCE), the African Union (AU).

The UN is challenged to implement complex peace building mechanisms, such as rebuilding an entire judicial system and establish stability in a country where armed conflict is ongoing. This encompasses the building of penitentiary institutions, educating judges, codifying law, creating public awareness by information campaigns etc. It involves co-operating and co-ordinating with different stakeholders in the country.

The thesis examines the different stakeholders, the various organisations working in Afghanistan and addresses the current challenges facing Afghanistan regarding the rule of law and the judicial reform process. It will also specifically look at the role NATO (a primarily military organisation) can perform in the establishment of rule of law and judicial reform activities.

1.2. Research methodology

The research material is derived from publicly accessible sources. Interviews with personnel currently or recently deployed in Afghanistan have taken place. In this regard, my sincere gratitude goes to Mrs. S. Parvanta, PhD, project assistant at the Professional Development Institute of the American University of Afghanistan, Mrs. S. Chayes, entrepreneur in Afghanistan, Kandahar and mr. M. de Sitter, Political Adviser to the Commander Joint Forces Command Brunssum. Also, NATO unclassified material on the International Security Assistance Force (ISAF) mission has been used for this thesis.
2. Introduction

2.1. Afghanistan’s history of warfare

Afghanistan’s history as a nation started in 1747 when the country territorially united and established its first monarchy. The borders were drawn up by the then British and Russian empires to create a buffer state amongst them. While most countries prospered during the period of industrialization in the 18th and 19th century, it didn’t bring as much development to the Afghan monarchy. Only after Amir Rahman Khan assumed power in 1880, having fought a successful (third) war against the British, did the country begin to flourish. The reign of Amanullah was established in 1919 when Afghanistan built up modern institutions of government, developed secular education and even encouraged women to remove their veils, among other reforms.

Despite these positive developments, Afghanistan was difficult to hold together as a single entity. It was divided between modernists and conservative Afghan factions and between the Pashtun and non-Pashtun ethnic groups. Their differences have never been completely reconciled. From 1929 to 1973 King Nader Shah and his son Zahir Shah ruled conservatively and peacefully until cousin Mohammad Daoud overthrew the government in a bloodless coup. The Daoud government lasted only five years after being overthrown by a violent communist uprising in 1978. From that point, Afghanistan would remain in continuous armed conflict.

From 1979 until 1989, Soviet military forces occupied Afghanistan. It met with a fierce resistance group called Mujahedeen, who received military support from the US and Pakistan to counter the communist influence in Afghanistan. Similarly Saudi-Arabia and Iran backed anti-regime forces for religious, strategic and political reasons. It was especially the rural Afghan society and its institutions that suffered enormously under this conflict. Afghanistan witnessed massive movements of internally displaced persons (IDP), empty villages especially in rural areas and the uprising of local warlords. The Soviet Union’s attempt to transform the traditional society to a communist based society brought the country to a complete collapse. Centralized planning and controls weren’t effective in Afghanistan, mainly due to the fact that the Afghans were accustomed to tribal governance and the existence of warlordism. The Afghans did not trust the central government. After nearly a decade of Soviet

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1 The first war was fought from 1839 until 1842 and the second from 1878 until 1880.
occupation, the Geneva Accords were signed in 1988, which led to the withdrawal of the Soviet forces in 1989. The Accords failed to address post conflict issues, which left the country with an ineffective government and hyperinflation.

The regime of the communist President Najibullah, which survived on the strength of a Soviet-supplied life-support system, was no longer able to purchase the loyalty of militias, which stood between it and its opponents to the Afghan resistance. In 1992, the UN requested Najibullah to step down and let a transitional authority to take over. These plans were thrown into disarray. Mujahedeen forces entered Kabul and seized power. The *Mujahedeen* alliance became increasingly fragmented by ethnic and power rivalries, marking Afghanistan’s further descent into warlordism. Factional fighting continued until 1994, with various indiscriminate attacks on the capital city Kabul. In this year the *Taliban*, young students from Pakistan’s refugee camps and educated in *madrasas*, seized power in Kandahar. Under the leadership of Mullah Omar, it was these students who ultimately stepped up and seized power in Afghanistan at the end of 1994.

The Taliban installed a radical Islamic regime, which was recognised in 1997 only by Saudi Arabia, United Arab Emirates and Pakistan. The regime committed widespread serious human rights violations. The movement could count on the support of the conservative Pashtun population in the east of the country, while it harshly repressed Tajik, Uzbek and Shia forces of the Northern Alliance. Its political agenda attracted, consequently, significant foreign attention, especially because of their brand of radical Islam. As such, the Al Qaeda found a safe haven for training camps in Afghanistan.

After the terrorist attacks of 11 September 2001 on American soil, Coalition Forces together with the Northern Alliance removed the Taliban from power and an interim government was established. The Emergency *Loya Jirga* in June 2002 allowed for a smooth and orderly transfer of power to a legitimate transitional government (the Transitional Islamic State of Afghanistan) led by Hamid Karzai, to rule Afghanistan for a further two years. Until now the country has been for three decades in armed conflict leaving it as one of the world’s poorest nations.¹

### 2.2. Root causes of the conflict

The state in which Afghanistan is today, is partly due to the way the international community has treated it. After the withdrawal of the Soviet Union and the subsequent abandonment of the country by the US, Saudi-Arabia and Pakistan, Afghanistan became incredibly unstable and poor.

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¹ 170 out of 174 in the UNDP’s Human Development Index, making Afghanistan one of the least developed countries in the world. National Human Development Report, UNDP 2004, p. 2.
The country’s history – including the recent rise of Islamic extremism and the attack on the US by terrorists - shows that it performs as a pivot for international relations. Thus, the entire world has a strong interest in Afghanistan’s reconstruction, longer-term development and avoidance of further conflict. The current commitment of the international community in the development of Afghanistan is shown by the continuous efforts of NATO’s ISAF mission\(^3\) from 2001, United Nations Assistance Mission in Afghanistan (UNAMA)\(^4\) since 2002, the G8 countries’ and International Organisations’ financial pledges in 2002\(^5\) and the participation of hundreds of non-governmental organisations.

The denial of human rights\(^6\), such as discrimination against minorities, the poor quality of education, continued threats from the burgeoning drug economy and criminality and the attacks from opposing militant forces makes it a challenge to rebuild Afghanistan into a secure and stable State. One approach is the re-establishment of respect for human rights. On the basis of these rights enable the people can demand accountability, strengthens good governance and the rule of law.\(^7\)

The following root causes can be identified. First of all there is an underdeveloped human rights culture, along with a lack of traditions of democracy, state-building and civil society participation. Furthermore the young governance structures are still in the early stages of development and unable to curb political insecurity. The shortages of human resources that can propel democratic reforms are lacking. There are wide variations in socio-economic indicators, by gender, region and rural-urban divide. A further cause of conflict is the weakened social infrastructure that exists in Afghanistan. Also socio-cultural traditions exist that result in widespread marginalisation based on gender, social status or ethnicity. Finally, there are two other root causes for poverty and the denial of human rights. There are obsolete industrial and agricultural technologies and practices that harm the environment and there is a culture of unsustainable resource use that must be reversed. As an example, logging practice has destroyed 98% of forest countrywide. The past ten years have caused permanent ecological and agrarian destruction, that Afghanistan may never recover from.\(^8\)

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3 Established on the 20\(^{th}\) of December 2001 by UNSCR 1386(2001)
4 Established on the 28\(^{th}\) of March 2002 by UNSCR 1401(2002)
5 The International Conference on Reconstruction Assistance to Afghanistan, Tokyo, 21-22 January 2002
6 Afghanistan is party to six of seven major international human rights instruments but, given decades of conflict, it has not been able to fulfill its reporting obligations under the ratified human rights treaties. The Government has, however, recently re-committed itself to reporting and has prominently incorporated human rights in the new Constitution.
2.3. Development priorities

Four requirements have been identified to address the aforementioned causes for conflict. The first theme is to provide an enabling environment for participatory governance. There are several challenges to face in order to achieve this environment. For example, corruption within the government and internal and external threats from local commanders and extremists inhibit correct political processes. In the meantime, civilian society in Afghanistan is weak and revolves mostly around family, tribe and community. There exists a need to stimulate participation in governance through civil society activities and organisations, in order to generate legitimate demands, articulate social needs, and enhance state accountability in realising basic rights. Not only is the civil society weak, but also the institution capacity of the central and local government. The Afghan civil service remains large and cumbersome, including the problem of “ghost employees” listed on the payrolls of Ministries without actually working. Part of the government’s problem lies in “centralisation”. Due to the geographical layout and climatic conditions and the traditional lack of a central government, a purely Kabul-governed Afghanistan is a precarious notion. Finally challenges lay ahead with the media. There is no tradition of a strong, independent media to fulfil the role of independent guarantors of human rights, monitors of public policy and channel for the views of citizens.

There has been progress in raising governmental revenue and improved efficiency in planning and spending. Public sector reforms are leading to better trained, better paid and more motivated bodies of high performance in the administration. The risk remains that due to the expenditure of the international community, which acts as a second public sector, talented Afghan candidates are drawn from the civil service pool towards these secondary public services due to the higher wages and better conditions. Secondly, the government has to improve its own economic management by raising revenue to ensure that dependency on foreign aid to fund its budget can be phased out.

A second requirement is peace, security and justice. Current challenges to peace and security come from three sources: the resurgence of Taliban and al-Qaeda activity along the south-eastern border; the huge increase in poppy production and trade; and constraints to reconstruction, particularly with regard to disarmament, demobilisation and reintegration of armed factions, as well as the development of capacity in the security / law enforcement and judicial sectors. Afghanistan is also one of the countries with the highest numbers of explosive remnants of war. A final challenge to the establishment of peace, security and justice are the contested allocation of natural resources, particularly land and water. It plays a central role in increasing insecurity and conflict at both individual and community levels across Afghanistan.

The third area of interest is economic development and growth. Economic growth is vital to the rights of survival, livelihood, protection and participation. Economic development leads to
reduction of poverty and violence. Therefore the focus of the international community is set to create more employment for the Afghan people. Although no specific survey has been conducted, the unemployment rate is assessed to be very high. The unemployment among youth is especially significant and a cause for concern.

The current weak state of the Afghan government is a major constraint for economic development, especially for the small and medium enterprises, industrial and mining sectors and agriculture/livestock sectors. In particular, people tend to look at the opium economy as providing a strong incentive to Afghans to cope with hardship. The consequences of this are inevitably a weaker rule of law, which contribute to vulnerability, especially for the poor farmers. Key to a flourishing economy are support services, such as a key infrastructure, market access and access to financial services, which are lacking in Afghanistan.

Finally the lack of advanced entrepreneurial skills, knowledge and technology make the economy hard to thrive. Most relevant for the marginalized groups (the poor, the landless, ethnic minorities, returnees and IDPs, children, people with disabilities and women) is an equitable access to resources. Even with economic development, the cause for conflict remains if the economic wealth is not evenly distributed. Finally, in a country where more that 80 percent of the population relies on the natural resource base to meet daily needs, widespread environmental degradation poses an immense threat to livelihoods and poverty reduction. Sustainable use of natural resources is, therefore, crucial, together with the managing of disaster risks.

A final theme in the fourfold development strategy of the UN is the development of social well-being. The population in Afghanistan is increasing very rapidly (2.5 percent per year). But average life expectancy, however stands at only 44.5 years, 20 years less that the regional average for South-Asian countries. Mortality rate of maternal deaths is high and mainly caused due to the lack of proper health care. Therefore the focus here is on the availability of or access to quality education, health care and food. Main challenges in this area are the institutional capacity and the lack of qualified teachers and training. Also the socio-cultural tradition is inhibiting access to education of girls. The same issues apply to health care.

IRC Labour Market Information Survey 2003. See also UNDP Common Country Assessment for the Transitional Islamic State of Afghanistan, October 2004
3. Conceptual Framework of the UN Mission in Afghanistan

3.1. The concept of integrated, multidimensional missions

The concept of integrated, multidimensional missions is a response to the failure of traditional peacekeeping missions to provide for the long-term establishment of peace. Classic UN peacekeeping and humanitarian responses proved insufficient to support a sustainable “war to peace” transition. Multidimensional integrated missions are designed to streamline UN peace support processes and ensure that the objectives of all UN forces and agencies are channelled towards a common overarching goal. A good example in this sense is the UN mission in Haiti. Troop Contributing Nations responded promptly to the request to deliver troops and - when UN forces in Haiti took control of Cité Soleil, an area previously controlled by armed gangs, the local population welcomed the liberation. At the same time – for obvious reasons – they had enormous expectations of how the UN would improve living conditions and give people a better future. The problem was that there was no plan to provide for this. As such, integrated missions try to combine military actions with humanitarian and development efforts. Purely military functions are combined with human development functions. In some cases (in the UN mission to Timor Leste, UNMIT) this could mean that humanitarian aid is being delivered while ensuring a cease-fire is being obeyed.

The term “multidimensional” refers to the idea that the various disciplines of peace-building are combined. An example of this is the United Nations Mission in Liberia (UNMIL): a multidimensional operation composed of political, military, civilian police, criminal justice, civil affairs, human rights, gender, child protection, disarmament, demobilisation and reintegration, public affairs, support components and an electoral component.

From straightforward observer missions to complex multidimensional missions, most missions now consist of political, military civilian police, criminal justice, civil affairs, human rights, disarmament, demobilisation and repatriation, public information and support components. In certain cases, the UN has even exercised the function of an interim government, together with other specialised organisations. For example, the United Nations Mission in Kosovo (UNMIK) exercised all the governmental functions together with the help of the European Union and the OSCE.

13 United Nations Interim Administration in Kosovo (UNMIK), established on 10 June 1999 by UNSCR 1244(1999)
Multidimensional missions are the result of the ending of the Cold War, which was a dramatic change in the strategic context for UN peacekeeping. The UN needed to do more than straightforward observer missions and had to actively engage in peace-building operations. Also the nature of conflicts has changed over the years. Inter-State conflicts do not occur as frequently as Intra-State conflicts do. This type of conflict required a different, often more complex, response from the UN. Although the military remain the backbone of most peacekeeping operations, peacekeeping now includes a more ‘civilian face’ such as administrators and economists, police officers and legal experts as well as and other civilian actors.

The UNAMA mission was established on 28 March 2002. Although the mandate was broadened later to reflect the needs of the country, its mandate still remains narrow. UNAMA does not have a security pillar neither does it cover all the key sectors. The security pillar is covered by a separate military structure (ISAF). A militaristic approach as opposed to a more integrated approach is increasingly seen as problematic. The mandate and footprint show that UNAMA is designed on the premise that the Afghan government is sovereign. As such, UNAMA does not have any executive powers. Its role is to advise and assist the Afghan government but does not direct the government to implement policy. UNAMA provides political and strategic advice for the peace process; providing good offices; assisting the government to implement the Afghanistan Compact, the Afghanistan National Development Strategy (ANDS) and the National Drugs Control Strategy, promoting human rights; providing technical assistance; and continuing to manage and coordinate all UN led humanitarian relief, recovery, reconstruction and development activities in Afghanistan. The activities of UNAMA outlined in these resolutions are impressive, but arguably over-ambitious, considering the size of the mission. The international community preferred a ‘light expatriate footprint’ to ensure that the Afghans have a leading role in post-conflict recovery. Further analysis of the UNAMA mission will be provided in Chapter 4.

3.2. Developing rule of law in UN missions

The rule of law had been defined by the UN as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers,  

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14 Its mandate, which was established on 28 March 2002 by UNSCR 1401(2002) had to be re-examined after the completion of the Bonn process. The mandate was further defined by UNSCR 1662(2006) on the 23rd of March 2006 and UNSCR 1747(2007) on the 12th of September 2006 and elaborated in UNSCR 1806(2008) on the 20th of March 2008.
participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”.

Rule of law consists of basically three aspects: judiciary, police enforcement and correctional facilities. Rule of law is one of the core activities of peace building. Without rule of law no basis can be laid for security sector reform. The corollary is that a lack of rule of law is a root cause for conflict.

Rule of law requires a trained and independent judiciary. The independence of the judiciary should be guaranteed by the State and incorporated into national legislation. Other elements to guarantee independence fall under the headings of security of tenure and pay, in other words individual and institutional freedom from unwarranted interference with the judicial process.

An effective police force, with enforcement powers is the second element to the establishment of rule of law. The police force should have the capacity (infrastructure, equipment, training) and most of all not be corrupt. The salaries of the police officers should be competitive as not to tempt them into corruption. The police force has to inspire confidence and trust and a sense of security in their communities by demonstrating honesty and integrity.

The third element of the rule of law reform is the establishment of correctional facilities, which live up to basic human rights standards. The capacity of the prison facilities in the country should be adequate for the assessed prisoner population. Specific measures should be implemented to ensure protection of imprisoned women, minors, mentally ill persons and members of other vulnerable groups. In addition there should exist an independent oversight mechanism and an acceptance of international prison monitoring.

UN Deputy Secretary General, Asha-Rose Migiro has defined rule of law as “a principle of governance in which all persons, institutions and entities, public and private – including the State itself – are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms.”

Quite recently, in October 2007, the UN announced that all these aspects of UN support for rule of law will be brought under the authority of one office: the Office for Rule of Law and Security Institution, headed by a Assistant-Secretary-General under the guidance of the Under-Secretary-General in the Department of Peace-Keeing Operations (DPKO).

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16 Basic Principles on the Independence of the Judiciary, UN Seventh Congress, General Assembly Resolution 40/146, 1985
17 OECD DAC Handbook on Security Sector Reform, Supporting Security and Justice, 2007, p 199
18 Currently Mr. Dimitri Titov
Illustrative in this regard are the UN activities in Sierra Leone. From June 1998 the UN established the United Nations Observer Mission in Sierra Leone (UNOMSIL)\(^{19}\) responsible for documenting the reports of on-going atrocities and human rights abuses committed against civilians. UNOMSIL was unarmed, but protected by the ECOMOG\(^{20}\) (a military observer group). With subsequent Security Council Resolutions, the mandate expanded with military components. In 2000 the military part reached to over 11,000 personnel. Although UNOMSIL was successful, the country needed to take concrete steps to address the root causes of the conflict; including strengthening human rights and rule of law.

With UNSCR 1620 in 2005, UNIOSIL\(^ {21}\) was established, charged with strengthening rule of law, which included developing the independence and capacity of the justice system and the capacity of the police and corrections system. UNAMSIL – the successor of UNOMSIL in 1999 - has not addressed the issues, but with UNIOSIL, a 300-men and women strong civilian force, this organisation assists the Sierra Leone government to build these capacities.

Another example of the UN's attention to rule of law is the United Nations Interim Administration in Kosovo (UNMIK). The UN approached rule of law establishment in a different way. UNMIK functions as an interim administration in Kosovo. The mission would provide a transitional administration while establishing and overseeing the development of a provisional, democratic and self-governing institution. The responsibilities of these institutions, once established, would be transferred to the local administration. UNMIK was not alone in this venture. The UN Security Council charged the OSCE to establish rule of law in Kosovo. The OSCE mission in Kosovo forms a distinct part of UNMIK to establish rule of law. It is responsible for re-establishing a judicial system based on democratic principles and human rights, and developing a culture of respect for rule of law. The UNMIK police operation was tasked with two strategic goals: to provide temporary law enforcement and to establish and develop a professional, impartial local police, called the Kosovo Police Service (KPS).

The aforementioned examples show that the UN has various ways to develop rule of law in a peace-keeping operation. It can run these activities by itself, or invite other regional organizations like the OSCE or EU to assist. Furthermore it can decide to assume all governmental responsibilities (e.g. in Kosovo) or its activities can be more assisting (e.g. in Sierra Leone).

\(^{19}\) United Nations Observer Mission in Sierra Leone, established on 13 July 1998 by UNSCR (1181(1998)
\(^{20}\) The Economic Community of West African States (ECOWAS) Monitoring Group (ECOMOG) is a non-standing military force consisting of land, sea and air components, set up by member states of the ECOWAS.
4. UN and NATO’s presence in Afghanistan

Following the United States’ led military operation in the fall of 2001, the Taliban government was ousted, which marked the starting point to rebuild Afghanistan. The representatives of the Afghan people signed an “Agreement on provisional arrangements in Afghanistan pending re-establishment of permanent institutions” (the so-called Bonn agreement) on the 5th of December 2001. The agreement established the Interim Afghan Authority and provided a basis for an interim system of law and governance, employing the 1964 Constitution as its foundation. In June 2002 the Loya Jirga (Grand Council of tribal leaders) was convened and elected Hamid Karzai as president for a two-year transitional period, replacing the Interim Administration with the Transitional Islamic State of Afghanistan. Mr Karzai remained in place after the first nation-wide elections in October 2004.

The UN established in March 2002 UNAMA\(^{22}\) with the mandate to assist the Afghan government with the implementation of the Bonn Agreement. UNAMA is headed by the Secretary-General’s Special Representative (SRSG), Kai Eide, who oversees the work of two “pillars”; pillar one is responsible for political affairs, and pillar two is tasked with the coordination of humanitarian relief, recovery and reconstruction.

The UN’s involvement in Afghanistan is very different than in for example East-Timor or Kosovo. For Afghanistan the UN advocated a “light-footprint”\(^{23}\), limiting its involvement and encouraging Afghans to assume their responsibility for political reconciliation and economic development. The peace-keeping-light mode was intended to ensure space for Afghans to take the leading role in rebuilding their country. On the other hand it might also be seen as a reaction to criticism of the “outsider-dominated” approach as in Kosovo and East-Timor. UNAMA is based on a key principle that the Afghan government is sovereign. The UNAMA has no executive power in Afghanistan; it is merely assisting the government.

This light footprint approach would force donor nations to accept their responsibility for assisting Afghanistan, rather than putting the responsibility on the UN, underfunding the mission and then blaming it for the resulting failure. The SRSG has played a catalyzing role to create involvement of the G8 nations to contribute to the reconstruction efforts in Afghanistan. During the G8 Tokyo conference in 2002 the countries pledged financial and technical assistance to Afghanistan. Italy took up the task of assisting the government of Afghanistan in the rule of law area.

\(^{22}\) UNAMA was established by UNSCR 1401(2002), 28 March 2002. Its mandate was extended, most recently on 20 March 2008 by UNSCR 1806(2008)

\(^{23}\) Rebuilding Afghanistan: The United Nations Assistance Mission in Afghanistan (UNAMA), The Henry L. Stimson Centre Speech of the SRSG L. Brahimi at the “Great Negotiator” Award ceremony, 2 October 2002
UNAMA doesn’t have a leading role in the reconstruction efforts, other than a coordination role. It maintains liaisons with Non-governmental organizations (NGO’s), International Governmental Organizations (IGO’s), G8 partner nations, ISAF and the US led Operation Enduring Freedom (OEF). It does not dictate a certain security policy; rather it focuses on developing governing capacity, respect for human rights and sustainable development.

Besides UNAMA, other UN offices and agencies are involved in specific aspects of rule of law reform. The United Nations Development Programme (UNDP) is supporting the rehabilitation of the Supreme Court, the Attorney General’s office and the Ministry of Justice. The UNDP is also supporting legal education reform. The United Nations Office on Drugs and Crime is supporting the rehabilitation of the correctional facilities.

4.1. The development strategy for Afghanistan

In January 2006 the Afghan government set out its social, economic, governance and security agendas for Afghanistan for the next five years. The agenda – called “the Afghan National Development Strategy” - is based on the UN Millennium Development Goals and serves as a Poverty Reduction Strategy Paper. The Interim version of the ANDS was presented during a two-day conference (31st of January and 1st of February 2006) together with the Afghan Compact, where the international community pledged its support to the Afghan government development strategy. The final version of the ANDS was presented two years later in May 2008.

The ANDS has two main functions, which are:

“Presenting the nation and international community with a comprehensive study of development priorities within the nation and a unified strategy (that all ministries and state agencies subscribe to) for the security, economic and social development needs of Afghanistan as a nation-state emerging from protracted civil war in 2002; and,

Synchronizing strategies between different ministries by being a central planning document, and helping bring about efficiency in projects and programs. The pillar structure of the ANDS helps categorize development needs and helps ministries,

24 Operation Enduring Freedom has its basis in UNSCR 1368(2001), 12 September 2001
25 Although UNAMA doesn’t dictate policy it does develop strategies when donor nations fail to develop these themselves. In the justice sector there was a lack of strategy and capacity. The donors looked at Italy to develop a strategy, but when no clear strategy has been coordinated among donors and stakeholders, UNAMA in early February 2004 released a “Proposal for a Long-Term Strategic Framework” that offers its view on priorities for improving the justice system, highlighting the need to strengthen capacity in the permanent institutions.
26 UNDP and Afghan Judicial Reform Commission signed a Project on Rebuilding the Justice System of Afghanistan (25 Jan 2003) This two year project was the first major step toward reforming the justice system. The first part of the project will be reconstructing and equipping the courthouses across the country; training judges and other law offices; increasing the capacity of administration of justice system; organizing seminars and training for the staff of the justice system. Strengthening the teaching and research capacity of Kabul University’s Faculty of Law and Shari’a, which is planned in the project, is part of the initial stage of judicial reform.
donors, international NGOs and the Afghan Civil Society identify areas of work and cooperation.”

The Afghan Compact commits the international community in contributing to realise this vision. The Compact sets out detailed outcomes, benchmarks and timelines for delivery, consistent with the goals set out by the ANDS. The government of Afghanistan foresees 3 pillars of activity, being: security; governance, rule of law and human rights and economic and social development together with several cross cutting areas such as the elimination of the narcotics industry.

Within the second pillar, the Afghan government gives priority to the coordinated establishment in each province of functional institutions – including civil administration, police, prisons and judiciary.27

![Diagram of ANDS Pillars of activity and cross cutting issues](source, ANDS, www.ands.gov.af)

To ensure effective implementation of the Afghan Compact, a Joint Coordination and Monitoring Board has been established to oversee the activities of both the Afghan government and the international community. The board is co-chaired by the government of Afghanistan and the United Nations.

Amongst the goals set out for the second pillar, by the end of 2010 the public administration of the government should be reformed, with clear and transparent national appointments mechanism established within 6 months after the signing of the Afghan Compact. The Afghanistan Independent Electoral Commission will oversee the voting process by the end of

27 Afghan Compact, p. 4
2008. The position of women will be strengthened by the end of 2010. The legal framework for commercial, criminal and civil law will be established in this same period.

While the institutions were established by the Bonn agreement in 2001, the ANDS sets out how these institutions will function. The security and law enforcement agencies will adopt corrective measures including codes of conduct and procedures aimed at preventing arbitrary arrest and detention, torture, extortion and illegal expropriation of property with a view to the elimination of these practices. Basic freedoms, like the freedom of expression, including the freedom of the media, will be strengthened.

Human rights awareness will be included in education curricula and promoted amongst legislators, judicial personnel and other Government agencies. The Afghan Independent Human Rights Commission (AIHRC) will monitor the implementation of these rights and the UN will track the effectiveness of the implemented measures aimed at the protection of human rights.

4.2. ISAF’s role in judicial reform activities

The UN Security Council has authorised ISAF, as enhanced in the Bonn Agreement, to assist the Afghan Interim Authority in the maintenance of security, so that it can operate in a secure environment. In order to achieve this mandate the Security Council authorized ISAF to take all necessary measures.

Read in the context of the Afghan Compact, ISAF will operate within the security pillar and will not be involved in Governance or Rule of Law and the Economic Social Development pillars. However, a strict division of tasks between the three pillars and amongst the different actors in Afghanistan is hard to maintain. A practical example is the detention of civilians who take a direct part in the hostilities. During the course of operations, ISAF might detain individuals who pose a threat to the security of Afghanistan and will hand these detainees over to the Afghan government. Troop contributing countries will hesitate to transfer detainees to the Afghan government if the Rule of Law in the country has not been fully established and where no guarantees are in place for detainees to be treated in accordance with minimum human rights standards. As such, activities within the security pillar are highly dependent on progress in the governance pillar.

There can be no secure environment if no rule of law is established. If the Afghan National Police (ANP) is not trained adequately or paid a sufficient salary, corruption will continue to flourish, which poses a serious threat to the stability and security of the country.

28 UNSCR 1386(2001), 20 December 2001, p. 2
29 Various international human rights treaties to which troop contributing nations are party to forbid the transfer of detainees to a State where there are substantial grounds for believing that there is a danger of being subject to torture. See Convention Against Torture, 1984, art. 3.
The establishment of security is therefore not solely dependent on the activities of ISAF militarily, but also on the development of rule of law. Whilst ISAF has made considerable progress in defeating the insurgency and establishing a secure environment in especially the northern and western region of Afghanistan, the development of the governance and economic and social pillars cannot be left in isolation or allowed to fall behind.

A specific remark regarding the United States role in ISAF: the United States is involved in Afghanistan in a twofold capacity. On the one hand it is part of NATO’s ISAF mission based on the UNSCR 1386(2001), on the other it is exercising its right of self-defence through the so-called “war on terror” since the attacks on the US by Al-Qaeda on the 11th of September 2001. The latter operation is referred to as Operation Enduring Freedom (OEF). CSTC-A, OEF’s Headquarters, works with the government of Afghanistan to provide advisors, mentors and trainers to help both the Ministry of Defence and Ministry of Interior organize, train, equip, employ and support the ANSF in order to defeat the insurgency, provide internal security, extend and enforce the rule of law, set conditions for economic development, and gain the trust and confidence of the citizens of Afghanistan.

The DEA – as a counter-narcotics agency - is part of OEF’s counter-terrorist operation as the opium industry funds the terrorist activities. The DEA is also contributing to the efforts of the UK in counter-narcotics operations.

The following paragraphs explain the expanded role of ISAF in the area of Rule of Law, which is primarily a role of Italy. ISAF is, in a limited fashion, able to assist these activities, but is as a military organization unfavourable and ill-equipped to lead in the judicial reform process. The primary tool to support Rule of Law activities is the Provincial Reconstruction Team also known as PRT’s, which will be explained in paragraph 4.4

4.3. ISAF’s current and future activities in the judicial reform process

Due to the nature of ISAF’s mission, ISAF’s assistance to the judicial reform process is very limited. ISAF promotes the importance of this pillar amongst the government and population through its information operation plan. In a very limited scale it conducts surveys on the rule of law regarding progress from the perception of the population. Currently ISAF is monitoring the developments in the judicial reform pillar by attending the Justice Consultative Group meetings, which are held monthly under the chairmanship of the Afghan Minister of Justice. Also, ISAF legal advisers participate in meetings chaired by the Italian Justice Project Office. Finally ISAF has direct contact with key players in the Government of Afghanistan, namely the Supreme Court, the Attorney General’s Office and Ministry of Justice.

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30 OEF’s mandate is based on UNSCR
31 www.cstc-a.com
Possible future activities might include meetings with the other international stakeholders to make effective use of its capability to reach villages in remote areas that they cannot. It currently provides security and transportation assets in support of the International Community justice programs. PRT's can lead in infrastructure rehabilitation projects. ISAF could even use its psychological / information operations capability to promote the judicial reform efforts in the community.

4.4. Provincial Reconstruction Teams (PRT's)

The PRT mission is to assist the Afghan government in extending its authority, in order to facilitate the development of a stable and secure environment in the identified area of operations and enable Security Sector Reform and Reconstruction efforts.

A PRT is a joint, integrated military-civilian organisation, staffed and supported by ISAF Troop Contributing Nations, operating at the provincial level within Afghanistan. Key objectives of PRT's are to support the government, to harmonise efforts within the objective of the ANDS and to facilitate security sector reform processes. To this end, PRT reach to provincial leaders through dialogue, mitigating likely areas of conflict and are actively engaging provincial governors, officials and civil society. They try to increase the visibility of the Government of Afghanistan’s presence in the provinces by assisting in official visits to remote districts and villages. PRTs operate in close coordination with UNAMA and security sector reform partners. The PRT do not act as an alternative to the Government of Afghanistan, but rather seek to improve the capacity of the government to govern itself. PRT’s seek to establish an environment that is stable enough for international agencies, the local authorities and civil society to engage in reconstruction, political transition and social and economic development. Therefore the PRT is not in itself the development agency, rather it assists other agencies and enables them to perform this work. PRT’s are there to provide the security by e.g. quick impact projects, providing transport, protection and engineering to the civilian element.

PRT’s are able to penetrate the more unstable and insecure areas because of its military component and are equipped to stabilize these areas because of the combined capabilities of its diplomacy, military, and economic components. The mission of a PRT is to work with all available stakeholders and resources, to bring stability to a population group by enabling the legitimacy and effectiveness of governance and government institutions.

PRT’s have become a key tool for the international community to assist Afghanistan. They represent, at the very local level, the combined will of the international community to help the government and the civil society. Due to the provincial focus and civil military resources, they have a wide latitude to accomplish their mission and extend the authority of the government.
From 5 October 2006, ISAF assumed command of all PRT’s. Until then, there were two separate military commands – Combined Forces Command Afghanistan (CFC-A) and ISAF – each commanding PRT’s in their own separate areas of operation. It remains a challenge, even under a single command, to achieve coherence between 26 PRT’s, with 14 different nations leading them and the many different nations contributing to them.

As ISAF’s mandate in the judicial reform process is limited to a supporting role, PRT’s do not themselves take direct action in these processes, but seek to establish liaison with stakeholders and to perform, where possible, reports and surveys on the progress of judicial reform.

Figure 4-2, PRT Location, source: www.nato.int

32 Germany, Sweden, Hungary, Norway, Italy, USA, Spain, Lithuania, Canada, UK, The Netherlands, New Zealand, Turkey, Czech Republic
5. Establishing the Rule of Law

The Bonn Agreement states that Afghanistan’s judicial system shall be rebuilt in accordance with Islamic principles, international standards, the rule of law, and Afghan legal tradition.\textsuperscript{33} To understand Afghanistan’s legal tradition, its practice of Islamic law and Islamic legal authorities an analysis of the legal system that has developed since 1964 until the Soviet invasion in 1979 is crucial. This period represents a period of stability where the Afghans themselves have created their own formal legal system.

The constitution of 1923, written by the ruler Amanullah who reigned in the period from 1919 to 1929, recognised two sources of law – Islamic and statutes. Traditionally Islamic laws were applied by Islamic legal scholars (‘ulama) who are respected and recognised as legitimate authorities by the community of believers based on their level of knowledge and piety. In Afghanistan they include instructors of Islamic law in madrasas (religious schools), judges, and attorneys. Training in Islamic law under a scholar at a madrasa is a prerequisite for anyone who claims the authority to interpret and apply Islamic law.

The 1923 constitution took much of the power and jurisdiction from the ‘ulama. Due to this and other factors, Amanullah’s reforms failed, but it left important legacies for Afghanistan’s legal system and tradition. The successive constitution was based in part on the 1923 constitution.

After the resignation in 1963 of Prime Minister Daoud, the constitution was rewritten in 1964. This constitution made Islam and Islamic law an important part of the government and the legal system. In areas where no law exists, Hanafi jurisprudence of the Shari’a shall be considered as law. While it seemed as a triumph for statutory law, Islamic law remained the primary body of law in most areas. Until the civil and criminal codes were enacted, Hanafi was applied by judges in all cases that were not under the statutes.

It seemed that the ‘ulama were comfortable with the areas of law under their jurisdiction and the important place that Islam continued to occupy in society. ‘Ulama retained control over significant areas of law, most laws in the country stemmed from Hanafi, and the ‘ulama kept their position as the best trained legal elites to apply the law.

The constitution created two almost completely separate legal elites. The ‘ulama had jurisdiction over most laws, coexisting with statutes that covered areas normally under the

\textsuperscript{33} Bonn Agreement (Agreement on Provisional Arrangement in Afghanistan pending the Re-Establishment of Permanent Government Institutions), 5 December 2001.
ruler’s jurisdiction. A dual court system also emerged following the 1964 Constitution as a result of the duality of law between the scholars’ law and statutes. The jurisdiction of the courts was split between them accordingly. In its turn this also affected the legal education system in Afghanistan. The duality of law meant that legal elites gravitated towards Hanafi or statutes. Those who studied Islamic law attended madrasas or the Faculty of Islamic Studies at Kabul University, while those who studied statutory law were primarily graduates of the Faculty of Law and Political Science at Kabul University.

The 1964 Constitution is being used as the baseline for constitutional reform today. The constitution made Islam and Islamic law an important part of the government and legal system, partly a result of the ‘ulama’s influence in the drafting process. After the coup d’état by Mohammed Daoud Khan, king Mohammed Zahir Shah was overthrown. Daoud established his own political party, the National Revolutionary Party. In the 1977 Constitution a one party system of government was approved by the Loya Jirga, enabling him to keep power. The constitution attempted to regulate the government and to curb the power of jurists and the authority of secular law. The changes impacted mostly upon rural Afghanistan; one of its most controversial decrees challenged the control exerted by local religious leaders over family life and social organisation. Obviously, the reforms found little support in the countryside and the opposition emerged, which led to the intervention of the Soviet Union.

After the partial retreat of the Soviet forces from Afghanistan and the election of Najibullah as president, a new constitution was adopted. Certain legacies of the Soviet era found their way into the 1987 constitution; the secret police activities and intelligence agencies had replaced ordinary criminal investigations and civilian procedure. Reports by the UN Special Rapporteur in Afghanistan reflected chaos under the Mujahedeen rule.

Under the Taliban rule, citizens were not much better off. The Taliban dismissed all women judges and replaced local judges with mullahs who agreed with the Taliban’s interpretation of the Shari’a. Ordinary appeal processes could be bypassed if the Taliban supreme leader, Mullah Omar, was to take an interest in a case. The most powerful institution was the Ministry of Enforcement of Virtue and Suppression of Vice, which was responsible for enforcing all decrees regarding moral behaviour.

Although the Afghan population showed consensus to include Islamic law in the newly drafted constitution, it did not want to return to a harsh legal system that combined an idiosyncratic interpretation of Islamic law with pashtunwali. For this reason the Bonn agreement states that international standards, Islamic law and Afghanistan’s own traditions will guide the process.

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35 Pashtun tribal code
5.1. Players in the Reform Process

There are several organisations and institutions that drive the judicial reform process in Afghanistan. Since the Bonn Agreement, the Italian government is the leader of the donor effort and coordinates with other players in this sector. Italy operates in Afghanistan through the Italian Justice Project Office (IJPO). The activities include legislative reform, construction and rehabilitation of infrastructure and the organisation of training courses for judges, attorneys and administrative tasks. IJPO does not perform these tasks itself but rather – together with the Afghan Government and UNAMA, coordinates the assistance provided by all international organisations in the field of justice.

The Bonn Agreement also created the Judicial Reform Commission (JRC) and the Justice Sector Consultative Group. The JRC - supported by the UN - guides the reform and is a facilitator among the permanent institutions and between them and the donor community. The United Nations Development Programme (UNDP) and JRC signed a Project on Rebuilding the Justice System of Afghanistan (25 January 2003) This two year project was the first major step toward reforming the justice system. The first part of the project consisted of reconstructing and equipping the courthouses across the country; training judges and other law offices; increasing the capacity of the administration of justice system; organizing seminars and training staff of the justice system and finally strengthening the teaching and research capacity of Kabul University’s Faculty of Law and Shari’a.

The JRC, with the support of UNDP, UNAMA, the Italian and US governments undertook a survey in 11 urban centres of judicial institutions, including detention facilities, in terms of their physical infrastructure, staff, and operations. The survey focused on the physical needs of courts, however it was flawed as it did not attempt to assess the caseload of the courts or identify the systemic problems in judicial system.

The Commission also reviewed the structure and functions of the justice system, facilitated law reform, strengthened technical, logistical and human resources, expanded legal aid, and promoted access to justice more generally. However due to poor coordination between the government and JRC, coupled with limited managerial experience to drive reforms, there was only limited success for the JRC and its associated Justice Sector Consultative Group. One exception was the approval by the government of the comprehensive framework for justice sector reform known as “justice for all”.

36 Bonn Agreement, 5 December 2001, para II.2
37 The Justice Sector Consultative Group consists of Afghan stakeholders and donors and meet to address priorities and obstacles.
38 The paper addressed 4 dimensions in the justice sector that need to be reformed. These are the strengthening of institutions, outreach to the population, dealing with traditional (informal) justice and linking up with other governmental programmes. Italy draws upon the work done by the Consultative group.
The Judicial Reform Commission was dissolved in mid 2005, failing predominantly to address the existing problems in the justice sector. The Justice Sector Consultative Group also failed to design and implement effectively a broad strategy. The “Justice for All” plan aimed to prepare a broader programme with detailed institutional needs, benchmarks, cost assessment and timelines. The ANDS also incorporated Rule of Law and Human Rights as one of its pillars. The Afghan Compact comprised specific goals, concrete benchmarks and timeframe for achievement regarding the respective pillars including the Rule of Law, based on the ANDS. The Justice for All plan fits in with these plans, with the programmes implemented by the end of 2010.

In order to accelerate the reform process, and improve coordination, the Afghanistan Rule of Law Coordination Meeting was held in December 2006 in Dubai, which led to the Rome Conference on the Rule of Law in Afghanistan in July 2007. At the latter conference, the Afghan government and the international donor community reached a consensus on the strategic way forward for the development of the justice sector, setting into motion a series of steps to consolidate a National Justice Systemic Strategy (NJSS) and to create a National Justice Programme (NJP). It also included an Afghanistan Reconstruction Trust Fund (ARTF) to obtain funding for 15 quick impact projects and further long term commitments. The NJSS and NJP have been approved by the President and are now part of the ANDS. Implementation of the ARTF plan remains challenging. Seven of the 15 quick impact projects are underway, while one is rejected and the remaining 7 will be part of the NJP.

The second phase will start by the end of summer of 2008. The NJP has a provincial implementation structure, which has started recruitment and is expected to be in place in the coming months. UNAMA is expanding its Rule of Law staff at the provincial level and they are coordinating their activities with the Rule of Law experts at the PRT level who are also expected to play a role in the provincial coordination mechanism and implementation of the NJP (May 2008)

5.2. Training the Afghan Judiciary

Training the Afghan Judiciary is funded by Italy and implemented by the International Development Law Organization (IDLO) and the International Institute of Higher Studies in Criminal Sciences (ISISC). The training is provided to a significant number of the judiciary in order to improve the equitable and expeditious handling of cases.

The project ran from July 2003 to December 2004 and included an 18-month training programme for 450 judges and prosecutors. The curriculum included 300 hours of training. Furthermore 50 Heads of Jurisdiction and senior officials from the Ministry of Justice were
trained. In July 2005 another project ran to train members of the Supreme Court, Office of the Attorney General, members of the Ministry of Justice and National Assembly and students at the University of Kabul.

IDLO implemented in March 2005, a 24-month legal and judicial reform project, funded by the Canadian International Development Agency (CIDA) aimed specifically at advocates in the prosecutors’ office. In March 2007 a major project was launched with a focus on sustainable capacity building. Together with the National Legal Training Center of Afghanistan, IDLO trained officials capable of training their colleagues.

IDLO has successfully tackled the problem of a lack of human and material capacity by its training and reform programmes. But there is some criticism; the donor activities have never been harmonized with the permanent Afghan legal institutions. In other words; it hasn’t had Afghan ownership. Representatives from the permanent Afghan legal institutions protested that the programme has undertaken without adequate consultation with the Afghan government and was designed with little consideration of government objectives and priorities.\textsuperscript{39} The training programmes are also seemingly Kabul-centric and it is difficult for willing participants outside of major cities to attend. One other point of critique is the funding of the programmes; the justice sector has received a mere 2% of the funding allocated to the security reform agenda.

\textsuperscript{39} Research Paper no. 22, NATO Defence College, July-August 2005
5.3. Infrastructure

The UNDP and the Afghan Judicial Reform Commission have signed a “Project on Rebuilding the Justice System of Afghanistan”. This two-year project was the first major step towards reforming the justice sector. Part of this project was focused on the reconstruction and equipping of courthouses throughout the country. Before reconstruction could begin, however, the JRC with the support of UNDP, UNAMA, the Italian and US governments conducted a survey on the current state of the judicial institutions, including detention facilities. It focused on the physical needs of the courthouses and did not attempt to assess the caseload of the courts or the problems of the system. The outcome of this survey was presented in the report titled “The Afghan Judicial System”.

The survey fails to give an accurate picture of the physical structure of the judicial institutions, and is rather general in its overview. The Supreme Court building was in a good condition, whereas the Superior Appeal Court was in a very bad state. The judicial structures in the provinces and districts were rated in three different categories.\(^\text{41}\) Most of the courthouses could be described as category B (up to 30% roof damage, light shelling or bullet impact on walls, partial fire damage. Repairs and some rehabilitative actions are needed), but at the District level the situation is much worse. In a large percentage of cases an acceptable guess indicates that sixty per cent of the buildings specifically used as Courts and Prosecution offices are completely lacking or are in such disastrous conditions to be considered non-existent.

One further aspect that needs some attention when considering the rebuilding of the judicial system is the lack of transportation methods for prosecutors and detainees travelling to courts and prisons. The absence of vehicles or public transport prevents the prosecutors from arriving in time to the scene of the crime to conduct preliminary investigations. There have also been cases in which the transfer of the prisoners attending court trials is made by horse carts.

5.4. Afghan National Police and the Rule of Law

The police are the most important tool of the state to ensure a safe and secure environment for people and to give assurances that they will be protected and treated fairly. While the

\(^{40}\) Project on Rebuilding the Justice System of Afghanistan, dated 25 January 2003

\(^{41}\) Category A: broken windows, door locks, hinges and roof tiles. No electrical power and lack of generators, no regular water supplies. Repairs are needed and alternations to restore the functionality of the electricity and water supply.

Category B: Up to 30% roof damage, light shelling or bullet impact on walls, partial fire damage. Repairs and some rehabilitative actions are needed.

Category C: Over 30% roof damage, severe fire damage, need for replacement of floors, doors and windows destroyed, all piping and wiring destroyed. Refurbishment is needed.
Afghan National Army enjoys a reasonable reputation, Afghanistan’s law enforcement bodies are seen as seriously deficient due to incompetence, corruption and a simple lack of capacity. The police are ill-equipped and lacking manpower to ensure safety in the Afghan cities and towns. The plan of the Ministry of Interior allows for 82,000 national police, but as of December 2007 this number was only 75,000. The Afghan Ministry of Interior is weak in terms of its structure and is often unable to enforce its guidelines and principle orders. Police appointments are allegedly made through payments to government officials that have power to select police officers. Corruption is widespread with often self-proclaimed police units, set up at random checkpoints to collect money from the population.

The task to (re)form the Afghan National Police has been taken up by the Germany as the lead nation G8 Partner Nation. Under Germany’s leadership the police academies were refurbished and police training centres in seven provinces were established and - together with CSTC-A - Germany has trained 40,000 Afghan National Police. CSTC-A provides for a police-training programme, with a strong emphasis in its curriculum regarding countering insurgency. It developed initiatives ranging from training and electronic salary payment, database and ID cards. CSTC-A introduced the Focused District Development program in order to give impetus to the police reform process. This program is, however, strongly aimed at reducing the pressure on army units; hence the police are trained in anti-narcotics enforcement and counter-insurgency operations.

In addition the United Nations and the European Union are involved in police reform. On 17 June 2007, the EU launched the European Union Police Mission, which assumed the duties of training and mentoring the ANP from Germany but with Germany remaining the G8 Partner Nation. The EU emphasis is somewhat different than that of CSTC-A. It focuses on mentoring and equipping the ANP, with an overarching objective to standardize and ensure coordination among different reform initiatives. In mid February 2008 it dispatched mentor teams to 9 PRT’s. UNAMA’s support to police reform is at a policy level, raising support from national authorities as well as from the international community.

To combine and coordinate the approach to police reform, an International Police Coordination Board was formed, which meets one a month under the chairmanship of the Afghan Minister of Interior.

The ANP is the face of Afghan Rule of Law. The survival and success of the ANP will be critical to Afghanistan’s viability. This fact is certainly known by the Taliban; in 2007 alone

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42 Partly due to the immense pressure from warlords and the low salary offered to the ANP (20 dollars per month. A graduated police officer makes 70 dollars a month)
43 The Security Council in its 62nd session (6 March 2008) stated that “In terms of professionalism and performance, ANP continues to lag behind ANA. Reform initiatives have been slow to take effect, corruption remains a significant problem and fiscal, personnel, materiel and weapons accountability processes remain unreliable”. A/62722, S/2008/159, p 6, para 22.
over 925 ANP were killed due to insurgent attacks. Another threat to the success of the ANP in the establishment of Rule of Law is the corruption within the ANP. There is still a long way to go in order to achieve trust in the ANP from the Afghan people.

5.5. Codification of law

Italy has requested IDLO to collect and research Afghan laws and legal documents, as part of its preparation for an assistance program in Afghanistan. This outreach search resulted in a collection, of more than 2400 texts in Dari and Pashto and 100 in English, dating from 1921 to present day, representing the greater part of the legislation produced during the last century. IDLO also compiled a detailed chronological index of the collection in English and in Dari. This collection has been entirely digitalized, included on the IDLO website and completed in October 2003.

Other activities are outsourced to organizations such as the UNDP, UNODC, United Nations Children’s Fund (UNICEF), United Nations Office for Project Services (UNOPS), United Nations Development Fund for Women (UNIFEM) and the Organization for International Migration (OIM). Italy is relying on collaboration with the PRTs throughout the country to support programs in the provinces and to monitor the results. The United States Institute of Peace (USIP) together with the American Bar Association and International Resources Group have collected authenticated versions of several key civil, penal and commercial codes and, with cooperation of Ministry of Justice and the US army, have printed and distributed 1,000 copies. The US Army delivered most of the copies to regional governors.

On the side of the informal justice sector, Italy has elaborated on a set of modules for the promotion of the people’s understanding of basic human rights principles. The modules are distributed with the help of religious authorities, justice officials and through media broadcasts and school programs.

The table below shows the international human rights instruments that the Afghan government is a party to and will implement into national legislation. The constitution, penal law code and civil and commercial codes already include many of these minimum human, social and cultural rights.

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Date of signature</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Convention on the Elimination of All Forms of Radial Discrimination</td>
<td>1983</td>
</tr>
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</table>
5.6. Informal law structures

Although decades of war-fighting have impacted upon Afghanistan’s governmental systems and institutions, a system of governance has not been entirely lacking. The traditional network of civil society, developed over the centuries, remains intact and offers the Afghan citizens autonomous, locally based structures of community authority. The system differs much from the western one of formally organised institutions.
The “informal justice sector” or “customary law sector” covers a wide variety of norms and practices, often uncodified and combined together by various influences. The Bonn agreement recognises the existence of this sector, but specifies that this system shall not be applied when inconsistent with the provisions of the 1964 Afghan Constitution or with international legal obligations to which Afghanistan is a party.

The informal system is driven by Jirgas (Persian / Dari) or Shura (Pashtu), the term is interchangeable. Jirgas function as political as well as judicial institutions, and offer an alternative basis of representative government. Certain Jirgas consist from 20 up to 65 members, and the number of villages represented by each member can vary from 1 to 26. The members are elected by a loosely defined election. Members of the Jirgas do not receive any financial remuneration.

The majority of disputes settled by the Jirgas are civil disputes, with a few family disputes and criminal cases. Jirgas use both local custom and Shari’a as their sources of law. Enforcement measures include both social pressure and referral to the civil authorities, including law enforcement. The Afghans prize the system’s notion of “fairness”. Afghans prefer the use of the informal system, as the formal governmental system is perceived as highly corrupt. On the negative side of the informal system, there is a lack of the requirement of stare decisis plus the collection and publication of decisions. Therefore, there is a sense of arbitrariness and inconsistency amongst Afghans.

It appears that in some limited areas the informal justice system also deals with criminal cases. The threat or the actual use of force (of which punishment is an expression) must be a prerogative of public powers and strongly regulated by the law. Where informal justice deals with criminal case, it is inconsistent with basic human rights and also conflict with the same laws governing Afghanistan at present.

The existence of informal justice practices in the country is as a whole a reality that has a remarkable impact on the life of individuals and the community. Leaving these practices completely out of the reach of the law could result in the tolerance of possible violations of human rights and the undermining of the legal process. This tolerance appears to be in conflict with the ICCPR “where not provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps … to adopt

44 Including customary code like Pashtunwali, local understanding of Islamic traditions in their variety of ethnic manifestations and even modern laws.
45 See boxed text for an example
It would however be a mistake to abolish the informal justice system. In post-conflict countries, where formal mechanism have disappeared or failed to function, informal systems have taken over and are often crucial to restore some degree of rule of law. These systems have an important role to play in the larger justice system. It is an effective way to reduce conflicts, when they are more focused on negotiation or mediation disputes, rather than adversarial win-lose outcomes of the formal court system. In Afghanistan, the informal system has been less corrupt and the population has more trust in the informal system rather than in the formal one. Realistically, timeframes for re-creating the justice system would need at least two decades. In the meantime the informal system is an alternative that should be considered. Going forward, it would be necessary to develop new strategies to take advantage of the informal structures and at the same time encourage appropriate reforms.

5.7. Correctional facilities

After 30 years of conflict in Afghanistan, it was not surprising that the International Crescent and Red Cross’s (ICRC) findings on the state of prisons were negative. Cells are often overcrowded and poorly maintained. Some detainees have irregular or no access to the open air, the food is of poor quality and it is impossible for prison authorities to ensure a certain degree of privacy. Due to hygiene problems, detainees often become ill.

The average ratio in many countries is one to one and a half detainees per 1000 inhabitants. Applied to Afghanistan, it would mean a future detainee population numbering between 25,000 and 30,000 people. As the prison system is unable to cope with these numbers of detainees, the detained population is relatively small. With an increase in capacity of the police and justice sector, there will be a need for increased prison capacity. Overcrowded prisons are already an issue and the future – if no action is taken – is pessimistic.

It is apparent that Afghanistan’s correctional facilities do not meet current Human Rights standards. At this stage, the constructions remain simple, only allowing basic needs such as the flow of clean water and the existence of functional sanitation. To western standards, conditions of many detention / correction facilities vary from inadequate to extremely poor in some places. There are specific programs to improve these conditions but they usually do not address the problem from a national approach but rather than try to respond to emergencies. Except for a few limited NGO projects, the UNODC is the only organisation working on prison and jail improvement projects in Afghanistan.
5.8. Afghanistan Independent Human Rights Commission

A key - but underdeveloped - independent accountability mechanism is the Afghanistan Independent Human Rights Commission (AIHRC), a state agency, identified in the Bonn Agreement and the Constitution. The AIHRC is the independent agency of the state to monitor and investigate detention centres and the performance of the administrative and legal systems.

The AIHRC’s legitimacy is based upon the Bonn Agreement and its foundation is incorporated in article 58 of the Afghan Constitution. The Commission has eight regional and three provisional offices. With funding from various sources, mainly from the UK, Switzerland, Finland, Norway, Denmark, New Zealand, Ireland, The Netherlands, the US and various IGO’s and NGO’s, the Commission received a total of 16 million US dollars from 2002 to 2005 and in 2006 alone the balance was 3.2 million US dollars.

The AIHRC has seven units to fulfil its mandate related to the protection, promotion and monitoring of human rights: the Women’s Rights Unit, the Child’s Rights Unit, the People with Disabilities unit, the Monitoring and Investigations Unit, the Human Rights Field Monitoring Unit, the Human Rights Education Unit and the Transitional Justice unit.

The greatest challenge to the work of the AIHRC is the deteriorating security situation, which inhibits full implementation of its projects. Another factor that impedes the full functioning of the AIHRC is the seemingly lack of commitment from President Karzai. In one illustrative instance the President has strongly been lobbied by conservative Ministers to curtail Afghan private TV channels, such as Tolo TV and to ban popular Bollywood TV shows, for they consider these shows as un-Islamic. It seems that President Karzai is backing the order to take these shows on the air.

In relation to the Rule of Law reform process, the AIHRC has a key task in carrying out judicial monitoring activities. In 2005 and 2006 it carried out 1137 monitoring visits to prisons and detention centres in all 34 provinces. A way forward for the AIHRC would be to expand its influence to the local dispute resolution activities of Jirgas. While recognizing these institution’s roles in local justice throughout the country, it could monitor the adherence to

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46 Art. 58 of the Constitution of the Islamic Republic of Afghanistan, 4 January 2004, “The State for the purpose of monitoring and protecting human rights in Afghanistan shall establish the Independent Human Rights Commission of Afghanistan. Every person in case of violation of his or her human rights can refer persons whose human rights have been violated, to legal authorities and assist the victims in defending their rights. The structure and functions of the Commission shall be regulated by law”

47 AIHRC Annual report 2006

48 Amnesty International (US) interview with mr. Fahim Hakim, Dept. Chair AIHRC, Kabul, April 2008 (http://www.amnestyusa.org/afghanistan)

49 Afghan TV station defies Taliban and President Karzai and keeps Bollywood soaps on air, The Times, 23 April 2008
human rights standards in these trials. The AIHRC would require at least one human rights officer for every province, if it was to pursue this course of action.
6. Conclusions

After decades of war the international community has neglected Afghanistan for many years. The population has suffered under the rule of an oppressive government, denying its population basic human rights. As a result, the country is now one of the poorest countries in the world, where women's rights are not respected, access to education is very limited and the rule of law is absent.

The attacks on the US show that Afghanistan is a pivotal country for international relations, peace and security and the international community should have a strong interest in the reconstruction of Afghanistan, long-term development and avoidance of further conflict. There are four themes that identify the root causes of conflict: the absence of a participatory governance, the security threat, the lack of economic development and growth and the development of social well-being.

These root causes have been addressed in the five-year strategy set forward in 2006 by the Afghan government, called the Afghan National Development Strategy. The Afghan government and the international community committed themselves to realise this vision. The ANDS foresees three pillars of activities: security, governance, rule of law and human rights, economic and social development and several cross cutting areas such as the elimination of the narcotics industry.

Contrary to other multidimensional, integrated missions, the UN does not have the lead role in Afghanistan. It limited itself to a coordinating role and maintains liaison with NGO's, IGO's, G8 partner nations, ISAF and the US led OEF. This approach could work effectively, but the UN need to not only coordinate at the operational level but also at the strategic level. Although UNAMA is coordinating with ISAF, chiefs of G8 lead nations programmes, EUPOL and others, the UN need to coordinate its efforts at the G8 ministerial level, the Government of Afghanistan, NATO and EU to ensure funding, commitment and fine-tune the strategic outcomes. An example where coordination could be more effective was Italy’s initial Judicial Reform Commission, which failed due to lack of commitment by the necessary stakeholders. Another example can be found with IDLO’s training programmes for judges. The justice sector has received only a fraction of the funding allocated to the reform projects.

ISAF's role in the peacekeeping mission is primarily the security sector piece, which means that ISAF assists the Afghan government in the establishment of a safe and secure environment. This is mainly achieved through counter-insurgency military operations. ISAF has established better freedom of movement throughout the country. Insurgents are not
capable of mounting and winning a direct offensive against ISAF’s forces. Attacks remain indirect and primarily by improvised explosive devices.

ISAF is – in contrast to many Kabul-centric programmes of IGO’s and NGO’s – able to reach all parts of the country. Unsurprisingly, ISAF is often requested by the international community to perform activities outside its primary task of ensuring security in the country. Provincial Reconstruction Teams are used to provide not only security to NGO’s and IGO’s but also the necessary technical assistance and material. As long as these projects are winning ‘the hearts and minds’ of the population and thus providing a more secure environment, ISAF will undertake such projects. The challenge is to avoid ‘mission creep’ in certain cases where e.g. G8 Partner Nation Italy needs to conduct a nation-wide survey on the rule of law and is requesting ISAF to perform it. ISAF is a military mission and does not have the specialist expertise to undertake such a project questioning its value.

Because the three pillars of activity as mentioned in the ANDS are not all developing at the same pace, the overall outcome is at stake. The Afghan population is aware that the international military forces are capable of defeating – militarily – the insurgents, but if ISAF forces cannot maintain their presence, insurgents re-occupy the area. The security environment can only be stable, if there is a functioning rule of law with sufficiently trained Afghan National Police and if there is some sort of economic development in the area that offer the local population alternative livelihoods other than growing poppy.

Rule of law cannot be established as a separate single project in a country. It needs to be coordinated with other activities, such as security and economic development. The size of the ANP is currently projected as 80,000 strong. The Afghan economy is unable to sustain such a force economically without the help of international funding.

The existence of two military operations – the ISAF and OEF – with separate mandates, implies some challenges in coordination. ISAF operates under a different set of rules of engagement than the much more offensive OEF mission.

With regards to the development of the ANP there has been improvement. Although the training, equipping and fielding of ANP lags behind the ANA, the trends look positive. The high level of corruption within the ANP forces have led to the creation of the “Focused District Development” training programme to create a more professional and well-trained police force in Afghanistan, district by district. The improvements within the ANP are now starting to show.

Lastly, more effort should be made to coordinate the activities of ISAF with UNAMA. ISAF can assist UNAMA’s reconstruction and development programmes by their agencies and organisations only if they are well coordinated with ISAF. ISAF might focus on a certain
district to maintain security and stability, but without subsequent development activities the district will not reach the tipping point for a permanent change. Vice versa, UNAMA efforts to coordinate the security pillar with ISAF are currently meagre. COMISAF does not have a co-chair with UNAMA and the Afghan Government in the Joint Coordination Monitoring Board security consultative group, which is peculiar as ISAF is in the lead to establish security within Afghanistan.
### Annex A: Abbreviations

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<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>AIHRC</td>
<td>Afghan Independent Human Rights Commission</td>
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<td>ANA</td>
<td>Afghan National Army</td>
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<td>ANDS</td>
<td>Afghan National Development Strategy</td>
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<td>ANP</td>
<td>Afghan National Police</td>
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<td>ANSF</td>
<td>Afghan National Security Forces</td>
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<td>ARTF</td>
<td>Afghanistan Reconstruction Trust Fund</td>
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<td>AU</td>
<td>African Union</td>
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<td>AU</td>
<td>African Union</td>
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<td>CFC-A</td>
<td>Combined Forces Command Afghanistan</td>
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<td>CIDA</td>
<td>Canadian International Development Agency</td>
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<td>CSTC-A</td>
<td>Combined Security Transformation Command – Afghanistan</td>
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<td>ECOMOG</td>
<td>Economic Community of West African States Monitoring Group</td>
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<td>EU</td>
<td>European Union</td>
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<td>IDLO</td>
<td>International Development Law Organization</td>
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<td>IDP</td>
<td>Internally displaced person</td>
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<td>IGO</td>
<td>International Governmental Organization</td>
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<td>IJOB</td>
<td>Italian Justice Project Office</td>
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<td>ISAF</td>
<td>International Security Assistance Force</td>
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<td>JRC</td>
<td>Judicial Reform Commission</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organisation</td>
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<td>NGO</td>
<td>Non-governmental organization</td>
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<td>NJP</td>
<td>National Justice Programme</td>
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<td>NJSS</td>
<td>National Justice Systemic Strategy</td>
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<td>OEF</td>
<td>Operation Enduring Freedom</td>
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<td>OIF</td>
<td>International Organization for Migration</td>
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<td>OSCE</td>
<td>Organization for Security and Co-operation in Europe</td>
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<td>PRT</td>
<td>Provincial Reconstruction Team</td>
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<td>PSO</td>
<td>Peace Support Operation</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNAMA</td>
<td>United Nations Assistance Mission in Afghanistan</td>
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<td>UNDP</td>
<td>United Nations Development Programme</td>
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<td>UNICEF</td>
<td>United Nations Children’s Fund</td>
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<td>UNIFEM</td>
<td>United Nations Development Fund for Women</td>
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<td>UNMIK</td>
<td>United Nations Mission in Kosovo</td>
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<td>UNMIL</td>
<td>United Nations Mission in Liberia</td>
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<td>UNMIT</td>
<td>United Nations Integrated Mission in Timor-Leste</td>
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<td>UNODC</td>
<td>United Nations Office on Drugs and Crime</td>
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<td>UNOMSIL</td>
<td>United Nations Observer Mission in Sierra Leone</td>
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<td>UNOPS</td>
<td>United Nations Office for Project Services</td>
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<td>UNSCR</td>
<td>United Nations Security Council Resolution</td>
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<td>USIP</td>
<td>United States Institute of Peace</td>
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Annex B: Bibliography

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Annex C: Curriculum Vitae David Nauta LL.M.

Mr. Nauta has served as a military legal adviser in the Royal Netherlands Army, Air Force and currently at NATO. In this capacity he provided legal advice and analysis on the interpretation of the mandate of missions and furtherance of all areas, inter alia, human rights and humanitarian law.

He was deployed as a legal adviser to Iraq for the Stabilization Force Iraq in 2005 where he evaluated and supervised the policy on the treatment of detainees and security internees in Iraq.

Currently Mr. Nauta is deployed as a military legal adviser at the NATO Allied Joint Force Command Brunssum, which leads the International Security Assistance Force (ISAF) in Afghanistan. He is responsible for providing legal advice on all matters of international and operational law including the law of armed conflict and human rights law while reviewing operational plans and rules of engagement. Mr. Nauta frequently provides training at the NATO School in Oberammergau on the ISAF mandate and the Law of Armed Conflict.

Mr. Nauta is fluent in Dutch, English, Italian and Spanish and has fair knowledge of German, French and Japanese. Mr. Nauta is married to Maiko Yamada and has one son Jin Nauta.