

Nation-Building in Afghanistan: Lessons Identified in Military Justice Reform

Major Sean M. Watts¹

Captain Christopher E. Martin²

Following the ouster of the Taliban regime, the international community and representatives of what would form the Afghan Interim Authority concluded the 2001 Bonn Agreement.³ Building on international commitments through United Nations Security Council Resolutions⁴ and a 2002 Tokyo donors' conference,⁵ three coalition partners emerged as lead nations to help restore the rule of law in Afghanistan.⁶ Under the Bonn Agreement, Italy would lead efforts to assist the Afghans with civilian justice reform and reform of the Afghan Ministry of Justice.⁷ Germany would lead and coordinate assistance to train and reform Afghan national police forces.⁸ The United States assumed primary responsibility to assist rebuilding the Afghan National Army (ANA).

The U.S. effort continues today under the overall operational leadership of Combined Forces Command-Afghanistan (CFC-A),⁹ headquartered in the capital city of Kabul. Colocated with CFC-A, the Office of Security Cooperation-Afghanistan (OSC-A) conducts direct coordination with the Afghan Ministry of Defense (MOD) and the ANA.¹⁰ The Office of Security Cooperation-Afghanistan staff sections work directly with their MOD and ANA counterparts to foster staff

¹ Associate Professor, International and Operational Law Department, U.S. Army Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Major (MAJ) Watts participated in a military justice training mission for Afghan National Army (ANA) lawyers in Kabul, Afghanistan, hosted by the Office of Military Cooperation, Afghanistan (OMC-A). The authors wish to thank Lieutenant Colonel (LTC) Paul Kantwill and LTC Ian Corey for their helpful review and comments.

² Country Program Manager, Defense Institute of International Legal Studies (DIILS). Since February 2004, DIILS has conducted an ongoing series of seminars and training missions for Afghan Ministry of Defense and Afghan National Army lawyers, at the request of OMC-A. Captain (CPT) Martin has participated in nine of these missions since February 2004. In 2006, he will participate in a yearlong DIILS mission to Afghanistan to train Afghan judges and lawyers on the new military justice system.

³ Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, U.N. Doc. S/2001/1154 (Dec. 5, 2001), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N01/678/61/IMG/N0167861.pdf?OpenElement> [hereinafter Bonn Agreement].

⁴ United Nations Security Council Resolution 1378 (14 November 2001) reflected ongoing international support for establishment of a new government in Afghanistan, and called on member states to support the formation of a transition administration and new government, including "quick impact" projects and long-term social and economic assistance. S.C. Res. 1378, ¶ 1, U.N. Doc. S/RES/1378 (Nov. 14, 2001), 41 I.L.M. 505 (2002). United Nations Security Council Resolution 1383 welcomed the Bonn agreement and called on donors to "reaffirm, strengthen and implement their commitment to assist with the rehabilitation, recovery and reconstruction of Afghanistan . . ." S.C. Res. 1383, U.N. Doc. S/RES/1383 (Dec. 6, 2001).

⁵ The Ministry of Foreign Affairs of Japan, International Conference on Reconstruction Assistance to Afghanistan (Jan. 21-22, 2002), available at http://www.mofa.go.jp/region/middle_e/afghanistan/min0201/summary.html (providing conclusions of the 21-22 January 2002 conference in Tokyo, Japan). This was the first international donors' conference to pledge financial and other assistance to the Afghan Interim Authority.

⁶ Article II of the Bonn Agreement states that "[t]he Interim Administration shall establish, with the assistance of the United Nations, a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions." Bonn Agreement, *supra* note 3, art. II (2); see also UN Development Programme—Afghanistan, Democratization and Civil Society Empowerment Programme, http://www.undp.org.af/about_us/overview_undp_afg/dcse/dcse.htm#jud_ref (last visited Apr. 20, 2006) (providing a summary of judicial and other reform efforts).

⁷ See Italian Ministry of Foreign Affairs, L'impegno Italiano in Afghanistan, http://www.esteri.it/eng/4_27_54_25_254.asp (last visited Mar. 17, 2006) (providing a description of the Italian government's assistance efforts in Afghanistan).

⁸ German Embassy—Kabul, Germany's Contribution to the Reconstruction of the Afghan Police and Justice System (Mar. 29, 2005), http://www.kabul.diplo.de/en/03/Wiederaufbau/Polizeiaufbau_Seite.html (providing a description of German efforts in security sector reform).

⁹ See Combined Forces Command—Afghanistan, <http://www.cfc-a.centcom.mil/> (last visited Mar. 17, 2006). By the summer of 2006, overall operational leadership in Afghanistan is expected to transfer from CFC-A to the North Atlantic Treaty Organisation (NATO), which commands the International Security Assistance Force (ISAF). The NATO has been slowly expanding its role in Afghanistan since 2003 and operates under the authority of UN Security Council Resolutions 1386, 1413, 1444 and 1510. See NATO, *NATO in Afghanistan*, <http://www.nato.int/issues/afghanistan/index.html> (last visited Feb. 17, 2006). The specific mission of the OSC-A legal advisors is not expected to change.

¹⁰ On 12 July 2005, what was formerly known as the Office of Military Cooperation—Afghanistan was renamed the Office of Security Cooperation-Afghanistan (OSC-A). Previously, OMC-A's sole role was to lead U.S. effort to rebuild the Afghan National Army. The name change reflects OSC-A's assumption of dual roles: leading ANA reform and taking the U.S. lead in supporting the German-led reform of the Afghan National Police. See *Unit Takes on New Mission*, Name, AFGHANISTAN FREEDOM WATCH, 25 July 2005, available at http://www.defenselink.mil/news/Jul2005/20050713_2054.html (copy on file with authors).

experience and build operational and doctrinal infrastructure. Under this arrangement, the OSC-A legal section coordinates military justice reform by serving as mentors to ANA judge advocates and MOD lawyers and by assisting with legal drafting. Since February 2004, the OSC-A legal section has received periodic assistance from the Defense Institute of International Legal Studies (DIILS).¹¹ Defense Institute of International Legal Studies officers and adjuncts have provided extensive instruction in international law and military justice and have participated in working groups to assist Afghan efforts to draft legislation and regulations.

Working from the outside in to help rebuild a military justice system in an environment as complex as Afghanistan's has proved a formidable challenge. Through our experience as advisors in the military justice reform effort spearheaded by OSC-A, we were able to experience these challenges firsthand. This article is intended to serve as a primer on Afghan military justice development, as well as to identify difficulties encountered during reform efforts. This article identifies several lessons key to providing effective assistance in such a demanding operating environment. Lessons range from mundane practical matters, such as the need for responsive transportation and specialized legal translators, to cultural and interpersonal complexities, such as religious sensitivities and individual work patterns and proclivities, as well as identifying fundamental (and nearly show-stopping) institutional and historical disconnects. The article concludes that justice reform missions associated with nation-building and reconstruction operations require judge advocates to develop refined skills in cross-cultural communication, flexible thinking, and, especially, an appreciation of historical and political context.

*"Different Flowers from Different Gardens"*¹²

Afghanistan's eclectic legal system is an inevitable byproduct of the country's tumultuous political history. We found that many fundamental and widely-accepted legal precepts were either not familiar to Afghan legal personnel or entirely absent from the Afghan system. After encountering difficulty relating seemingly basic criminal law concepts (at least from a Western understanding), we quickly realized that much of the failing was our own. To effectively develop a new military legal regime requires an understanding of existing systems and the history of the indigenous military justice system.

Historical Development of the Afghan Military Legal System

As stated by Colonel Mohammad Daud Hazem, an Afghan military prosecutor with twenty years of experience, the Afghan legal "system" is actually a mixture of different systems—a product of successive regimes and occupiers importing respective ideologies and systems.¹³ The histories of Afghan civil and military law are remarkably relevant to the current military justice situation.¹⁴

¹¹ See Defense Institute of International Legal Studies, <http://www.dsca.mil/diils/> (last visited Feb. 17, 2006) (explaining that DIILS is headquartered in Newport, Rhode Island and provides mobile and resident instruction in legal topics to military and civilian government representatives worldwide.). The Defense Institute of International Legal Studies is a branch of the United States Defense Security Cooperation Agency. *Id.*

¹² Interview with Colonel (COL) Mohammad Daud Hazem, Kabul University Faculty of Law graduate and current Director for Fiscal Law, General Staff (GS) Legal Department, Afghan Ministry of Defense (MOD), in Kabul, Afghanistan (July 31, 2005) [hereinafter Daud Interview] (on file with authors). Most of the historical summary in this section reflects an amalgam of interviews on 31 July 2005 with COL Daud and members of the military justice working group he spearheaded, as well as over 130 hours the authors spent with members of this working group during military justice reform sessions. Additional working group members included COL Zmari Rasikh, Deputy Director for Rules and Policy Development, GS Legal Department; COL Saed Abdul Hamid, Deputy of Acquisition and Procurement, Afghan MOD Legal Department; COL Zamanullah Mohammad Jan, Director for Legal Advice, MOD Legal Department; and LTC Gheljai Sharifi, Director for Military Courts and Legal Services, GS Legal Department.

¹³ *Id.*; see also United States Institute of Peace, *Special Report No. 117, Establishing the Rule of Law in Afghanistan* (Mar. 2004), available at <http://www.usip.org/pubs/specialreports/sr117.html> [hereinafter USIP Special Report].

¹⁴ See NELOFER PAZIRA, *A BED OF RED FLOWERS: IN SEARCH OF MY AFGHANISTAN* 337-89 (2005); M. HASSAN KAKAR, *AFGHANISTAN: THE SOVIET INVASION AND THE AFGHAN RESPONSE, 1979-1982* (1995) (providing a more detailed political history).

Prior to 1978,¹⁵ the Afghan Army conducted military justice under a statutorily enacted “Military Courts Manual.”¹⁶ The Manual did not provide for dedicated military prosecutors, defense counsel, or military courts. Instead, commanding officers performed traditional military legal functions such as investigating alleged misconduct, establishing commissions of judges to make findings, and serving as sentencing approval authorities.¹⁷ The Afghans were eager to point out that this earlier system was somewhat similar to the U.S. Uniform Code of Military Justice (UCMJ), where convening authorities initiate courts-martial and ultimately approve or disapprove court-martial findings and sentences.¹⁸ Yet under the Military Courts Manual, results were unpredictable and judges far from independent.¹⁹

In 1964,²⁰ Zahir Shah,²¹ considered the “father of the nation,”²² enacted the first Afghan criminal procedure code.²³ Although the Code introduced Afghanistan to professional defense counsel, such counsel were rarely, if ever, employed in a manner envisioned by the Code. In 1973,²⁴ under President Mohammad Daoud Khan,²⁵ Afghanistan adopted a new civil penal code and modified the national criminal procedure code. President Daoud introduced legislation establishing, for the first time in Afghanistan, three branches of government: Executive, Legislative, and Judicial. While a promising development, Afghans did not implement the legislation before the Soviet Union toppled President Daoud’s regime and replaced it with Soviet-backed leadership in 1978.²⁶

The new Soviet-dominated regime abolished the existing constitution and established a fourth branch of government: a powerful, independent Attorney General’s office.²⁷ Special Attorneys General were created for each government agency, including the Ministry of Defense. The result was a significant blurring of military and civilian jurisdiction over a range of criminal offenses.²⁸ Suddenly, military-specific crimes took on extremely severe penalties, often death. Military jurisdiction extended to persons not traditionally subject to its reach. In 1979,²⁹ the civil and military justice systems were further conflated when the military criminal procedure code was replaced by a law on “Discovery and Investigation of Crimes.”³⁰

¹⁵ Year 1357 in the Afghan calendar. During his narrative, COL Daud referred to dates using the Afghan calendar, which since 1958 has followed a variant of the Iranian solar calendar. Other calendars used in Afghanistan have included the lunar Hegira calendar and Gregorian (Western) calendar. See FRANK PARISE, THE BOOK OF CALENDARS 167-68 (1982); PC World, Calendar Magic V13.5 shareware program, http://www.pcworld.com/downloads/file_description/0,fid,944,00.asp (providing a reliable converter between the Afghan and Gregorian calendars). Because COL Daud did not mention exact months and days, Gregorian conversions of the dates he gives are approximate. For additional information on the Afghan calendar, see The Persian Calendar, http://www.ortelius.de/kalender/pers_en.php (last visited Apr. 18, 2006).

¹⁶ An approximate translation, not the official title. See Daud Interview, *supra* note 12.

¹⁷ See *id.*

¹⁸ See UCMJ art. 60 (2005).

¹⁹ Daud Interview, *supra* note 12.

²⁰ 1343 in the Afghan calendar. See PARISE, *supra* note 15.

²¹ Also referred to as Mohammad Zahir, Zahir Shah become king at only nineteen years old after the assassination of his father, King Nadir, in 1933. Most of the political and economic changes that occurred during Zahir Shah’s rule were in fact dominated by two of his father’s three surviving brothers, Hashim Khan and Shah Mahmud Khan, who served as consecutive prime ministers. See KAKAR, *supra* note 14, at 4-6.

²² The last ten years of the King’s rule, 1963-1973, are also known as the “constitutional decade,” due to Zahir Shaha’s efforts to install democratic rule in Afghanistan. *Id.* at 10.

²³ Daud Interview, *supra* note 12.

²⁴ 1352 in the Afghan calendar. See PARISE, *supra* note 15.

²⁵ See Afghanistan.com, Mohammad Daoud Khan, <http://www.afghanland.com/history/daoud.html> (last visited Mar. 21, 2006) (providing a historical summary of President Daoud’s era). Daoud became President in 1973 after overthrowing his cousin, Zahir Shah, in a largely nonviolent military coup, and declaring Afghanistan a republic. The support of pro-Moscow communists in Afghanistan precipitated President Daoud’s rise to power. See KAKAR, *supra* note 14, at 11-12.

²⁶ *Id.*; see also MARTIN EVANS, AFGHANISTAN: A NEW HISTORY 135-36 (2001).

²⁷ Daud Interview, *supra* note 12.

²⁸ *Id.*

²⁹ 1358 in the Afghan calendar. See PARISE, *supra* note 15.

³⁰ Informal title based on a rough translation.

The new law gave great power to the Attorney General's office. Prosecutors vigorously pursued political crimes. Persons suspected of violations would often simply disappear.³¹

The highly centralized Attorneys General prosecuted selectively, leaving discipline in dispersed military units largely neglected. To fill voids left by Special Attorney General prosecutions, military units away from garrison began to conduct "field courts" for alleged offenses. Judgments and sentences from these field courts were final with no possibility of appeal. On the whole, judges and prosecutors were considered unprofessional and often did not understand or apply the law.³²

The next substantial military legal development occurred in 1987,³³ when Afghanistan adopted a new constitution under the leadership of Dr. Mohammad Najibullah Ahmadzai.³⁴ Dr. Najib, a medical doctor, had led the notorious KHAD (*Khidamat-e-Atla't Dualati*) state security service during the Soviet occupation.³⁵ Under Dr. Najib, the constitution reaffirmed the three basic branches of government, integrating the courts and the Attorney General's office.³⁶ All courts were organized under the Afghan Supreme Court. Despite encouraging structural developments and formalities, the new arrangements did little to reestablish the rule of law, and Dr. Najib was eventually overthrown by the *mujahideen*.³⁷

When the *mujahideen*³⁸ replaced the Najib regime with an Islamic government, some Soviet communist laws were repealed, but few new laws were passed. Judges and prosecutors enjoyed nearly unchecked power, with no agency capable of overseeing their activities.³⁹

As civil war ensued, the "rule of the gun" prevailed. When the Taliban eventually gained more complete control, they abolished all secular laws and exclusively applied Islamic law. The Taliban armed forces, for example, had only one military court, with one judge, who applied *sharia* law in closed session. This "system" persisted until the fall of the Taliban in November 2001.⁴⁰

Not surprisingly, as tenuously positioned regimes, both the Taliban-controlled and earlier Soviet-dominated governments of Afghanistan focused on protecting the State rather than the individual. The regimes' respective legal systems naturally reflected their biases toward self-preservation. Entrenched judges focused on perpetuating their positions and maintaining the status quo among elites. Information quickly became the currency of power and influence. Information flow across, and even within, ministries is poor to this day, as information is still perceived as key to maintaining power.⁴¹

The challenge of exercising effective national governance over Afghanistan persists today, in part, because highly centralized regimes never exercised strong control outside Kabul, remaining virtually ineffective in Afghanistan's thirty-four provinces. Years of ineffective national rule have produced an elaborate, independent, and unwritten system of law in the provinces and rural villages. To this day, for the sake of maintaining peace and stability, the central government often

³¹ Daud Interview, *supra* note 12.

³² *Id.*

³³ 1366 in the Afghan calendar. See Daud Interview, *supra* note 12.

³⁴ Often referred to as "Dr. Najib." See Afghanland.com, Dr. Najibullah Ahmadzai, <http://www.afghanland.com/history/najib.html> (last visited Mar. 21, 2006); see also EDWARD GIRARDET, AFGHANISTAN: THE SOVIET WAR 105 (1985).

³⁵ AMIN SAIKAL, MODERN AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL 163 (2004).

³⁶ The new constitution in fact promised a multiparty democracy, but failed to deliver under Najib's tight rule. EVANS, *supra* note 26, at 166.

³⁷ *Id.* The term "mujahideen" is frequently translated as "holy warriors." GIRARDET, *supra* note 34, at 1.

³⁸ While fighting Soviet invasion and occupation, the *mujahideen* were composed of independent and often competing groups. *Id.* at 55. In fact, two separate groups identified themselves as the "Islamic Unity of Afghan Mujahideen" *Id.* at 55-56. Following the Soviet withdrawal, civil war erupted between competing *mujahideen* with the fundamentalist Taliban emerging as the dominant faction.

³⁹ Daud Interview, *supra* note 12.

⁴⁰ *Id.*

⁴¹ Defense Institute of International Legal Studies, Executive Summary Trip Report, Kabul, Afghanistan, 16-20 February 2004 (30 July 2004). This trip report reflects the initial DIILS mission to Afghanistan in February 2004, where CPT Martin participated in interviews with over thirty representatives of OMC-A, the Afghan government, the U.S. Embassy, and partner nations. The names of those interviewed are contained in the DIILS trip report.

chooses not to intervene in or countermand such proceedings.⁴² While administering provincial “civil” law, many military commanders favor soldiers from their own tribes or ethnicities, especially in remotely situated units.⁴³

Compounding the problem, *sharia* law, recognized by the new Afghan constitution,⁴⁴ is once again applicable to certain types of social crimes apart from secular law.⁴⁵ Its role in military justice and provincial legal systems, however, is inconsistent and ambiguous. Whether *sharia* offenses are to be complementary, concurrent, or exclusive in relation to military and civil offenses is now, and may remain, unsettled.

Lost in Translation

What may be considered basic rule of law standards to those involved in legal sector reform are often difficult to apply to such a complex legal tradition. Even international standards that may be *legally* recognized under the new Afghan constitution are frequently not yet *structurally* recognized. For example, civilian control of the military and police is not a familiar or even acceptable concept to some Afghans accustomed to the approaches of former regimes. In a society dominated by war and rule of the gun for over fifty years, the military has assumed a dominant and highly visible role. For example, today, within the Afghan MOD, nearly all officials have military rank associated with their positions, even those who perform traditional civilian roles or who are not technically members of the ANA or Air Corps. In accord with the Soviet model, military justice had until recently been applied to all “armed forces,” an expansive term including police and national security agencies. All employees, civilian and military, could be tried in military courts for offenses committed on duty, as could be ordinary civilians if the victim of the offense involved “armed forces” personnel or property.⁴⁶

As these examples make clear, international legal development efforts, both former coerced variants and latter invited efforts, introduced legal traditions new to Afghanistan. Afghan jurists have proved adept at incorporating foreign legal developments into their own system. It was not until we began to appreciate Afghan military legal history that we were able fully to appreciate the Afghans’ process of incorporation. Our eventual understanding of the Afghans’ history of centralized, and often arbitrarily executed, legal systems rendered invaluable context for the advice we would give.

As preceding citations indicate, no single source provided the complete historical picture for us to proceed as legal advisors. Comprehensive and unbiased legal histories were simply not available in Kabul. In fact, the most useful information and most revealing insights came from interviews with the Afghans themselves. Having labored under successive legal systems, the Afghan attorneys provided crucial background information and candid evaluations of preceding systems’ strengths and weaknesses. In addition to providing factual context, these interviews built rapport. After sensing our interest in learning Afghan history, our partners were more open to our own suggestions. Such historical sensing sessions, therefore, seem predicate and essential to future legal reform efforts.

The Current and Future Military Justice System

The framework for the new Afghan military justice system begins with the new Afghan Constitution, which supersedes the 1964 Constitution initially restored under the Bonn Agreement.⁴⁷ Adopted in 2004, the new Constitution removes military courts from the Afghan civil judicial system.⁴⁸ Although the Afghan Ministry of Justice was reluctant to relinquish

⁴² Daud Interview, *supra* note 12.

⁴³ *Id.*

⁴⁴ Chapter 1, Article 3 of the Afghan Constitution states, “No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan” AFG. CONST. ch. 1, art. 3. An English version of the Afghan Constitution is available at http://www.moj.gov.af/pdf/constitution_2004.htm. Note, however, that only Pashtu and Dari versions are considered official. Later articles of the Constitution explicitly refer to *hanafi* (ch. 7, art. 15) and *shia* jurisprudence (ch. 7, art. 16) in resolving certain types of legal disputes. *Id.* ch. 1, art. 3; ch. 7, art. 15.

⁴⁵ Daud Interview, *supra* note 12.

⁴⁶ *Id.*

⁴⁷ Bonn Agreement, *supra* note 3.

⁴⁸ *See* AFG. CONST. art. 22.

its more expansive jurisdiction over members of the “armed forces,” the views of the MOD and its U.S. advisors ultimately prevailed.⁴⁹ Another key document is the Afghan National Army Law of Military Courts,⁵⁰ signed into law by Presidential Decree on 25 September 2005.⁵¹ The Law of Military Courts, citing the Afghan Constitution, creates primary military trial courts⁵² and a single Court of Military Appeals.⁵³ Like many military justice systems, the Law of Military Courts defers, however, to the civil Supreme Court as its highest appellate authority.⁵⁴ The Law of Military Courts also limits jurisdiction of the military courts system to members of the Afghan National Army or other persons under specific conditions.⁵⁵ Like the U.S. military justice system, ANA soldiers will be subject to military jurisdiction in all locations they find themselves, regardless of whether they are on or off duty. Additionally, military courts will have exclusive jurisdiction over purely military offenses and concurrent jurisdiction with Afghan civil courts over offenses that violate both military and Afghan civilian criminal law. The Law of Military Courts empowers the ANA Judge Advocate General⁵⁶ to organize primary military trial courts “in such numbers and locations as may be required to meet the needs of the service.”⁵⁷

Several articles of the Law of Military Courts illustrate why an effective military justice system must dovetail with the civilian justice system. Article 8(B) of this law, for example, authorizes the Minister of Defense to establish written procedures and rules for military courts “in accordance with the constitution and the laws of Afghanistan.”⁵⁸ The Military Criminal Procedure Code, the implementing legislation discussed in the next section of the article, goes on to state that, “the Civilian Criminal Procedure Code will be applied on issues for which there is not any provision listed in this code.”⁵⁹ Other provisions with necessary crossover between the civil and military systems include article 9, which provides for concurrent military and civil jurisdiction in certain cases;⁶⁰ and article 12, which states that the Court of Military Appeals shall apply “the same scope of review that the civilian criminal appeals courts would apply in a similar case.”⁶¹ Finally, article 15 addresses civilian court appellate procedures to the Supreme Court of Afghanistan.⁶²

⁴⁹ See *supra*, note 11; see also Defense Institute of International Legal Studies, Executive Summary Trip Report, Kabul, Afghanistan 13 June - 30 June 2005 (July 2005) (released on 16 Sept. 2005) (copy on file with authors).

⁵⁰ AFGHAN NATIONAL ARMY LAW OF MILITARY COURTS (2005) [hereinafter LAW OF MILITARY COURTS] (copy on file with authors). The Afghan Ministry of Justice publishes all national laws in its Official Gazette but has yet to publish or officially distribute the Law of Military Courts. A list of recently passed Afghan legislation and statutes, including the Law of Military Courts, is available at the Afghan Ministry of Justice website at http://www.moj.gov/af/pdf/list_recently_published/doc.pdf.

⁵¹ Presidential Decree on the Approval of the Military Court Laws, Decree No. 81 (Sept. 25, 2005) (copy on file with authors).

⁵² See LAW OF MILITARY COURTS, *supra* note 50, art. 11.

⁵³ *Id.* art. 12.

⁵⁴ *Id.* art. 15.

⁵⁵ *Id.* art. 2. In addition to ANA members, article 2(A)(4)(a) of the Law of Military Courts asserts jurisdiction over “a person who: in time of war, insurrection, or armed conflict, serves with or accompanies the Afghan National Army in the field, or serves with or accompanies an insurgent force, or an enemy armed force in the field; or submits voluntarily to military authority.” *Id.* art. 2(A)(4)(a). Article 2(A)(4)(b) further asserts jurisdiction over “a person over whom the authority for the exercise of jurisdiction by a military court is delegated by the Constitution and laws of Afghanistan, from a treaty or international law.” *Id.* art. 2(A)(4)(b).

⁵⁶ Referred to in the Law of Military Courts as the “Head of the Legal Department for the General Staff of the Afghan National Army.” Although the Afghans recognize the term in conversation, the phrase “Judge Advocate General” has no direct written translation. See, e.g., LAW OF MILITARY COURTS, *supra* note 50, art. 2.

⁵⁷ *Id.* art. 11(A).

⁵⁸ *Id.* An analogous provision, although it refers to the President, appears as Article 36 of our own UCMJ. See 10 U.S.C.S. § 836 (LEXIS 2005).

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . .

Id.

⁵⁹ MILITARY CRIMINAL PROCEDURE CODE art. 60 (2005) [hereinafter MCPC].

⁶⁰ LAW OF MILITARY COURTS, *supra* note 50.

⁶¹ *Id.* art. 12.

⁶² *Id.* art. 15.

Although the Law of Military Courts is now in force, Afghan judge advocates indicated that Afghan military leaders throughout the country would require considerable time to accept it fully. Many commanders outside Kabul are accustomed to administering their own justice under their own local terms.⁶³ Warlords and illegal militias still wield significant power in the provinces and remain a political, as well as security, challenge.⁶⁴ Legal reform to date has had little effect on the tribal systems of customary law in the provinces.⁶⁵ While the abolition of collateral courts is essential in the long term, it cannot be expected to happen immediately.

An example from the civil justice reform effort illustrating the difficulty of transitional change is the Interim Criminal Procedure Code (ICPC). The Afghan Interim Authority approved the ICPC in April 2004 for use in the civilian courts.⁶⁶ The Italian legal reform team developed the Code by streamlining the preexisting five-hundred article civil criminal procedure code to just ninety-eight articles. Unfortunately, many Afghan judges find the new code inadequate and simply resort to using the old, longer code. Accustomed to the civil law tradition, many Afghans jurists prefer a detailed code that spells out fine points of law.⁶⁷

The first tangible success in Afghanistan's military justice reform effort appeared in the form of a complete nonjudicial punishment regulation.⁶⁸ Thanks to the hard work of Afghan military jurists and OMC-A, the NJP regulation, including forms and a commander's guide, has been adopted, printed, and disseminated to ANA commanders. Anecdotal feedback from Afghan commanders indicates that it is well-received.⁶⁹ As with other legal developments, the challenge will be to move fully into implementation.

The Afghan Military Justice Code

In June 2005, due to developments involving the future repatriation of Afghan detainees from the U.S. detention facility at Guantanamo Bay, Cuba,⁷⁰ The American Embassy in Kabul directed OSC-A Legal to prioritize efforts at developing the procedural and substantive rules that would give life to the Law of Military Courts. The resulting two laws, enacted on December 17, 2005,⁷¹ include the Military Criminal Procedure Code (MCPC)⁷² and the untitled punitive articles.⁷³ The sixty-one articles of the MCPC⁷⁴ are akin to the procedural and due process articles of the UCMJ. In fact, early in its mission, OMC-A decided to use the UCMJ as the foundation for the MCPC.

The MCPC outlines a military case from start to finish, including pretrial investigation, referral to trial, execution of the sentence, and appeal. More than any other recent military legal development in Afghanistan, these provisions seek to

⁶³ See *supra* text accompanying notes 42 and 43.

⁶⁴ See, e.g., *Afghanistan Struggles to Keep Warlords off the Ballots*, CHRISTIAN SCI. MONITOR, Sept. 8, 2005, available at <http://www.csmonitor.com/2005/0908/p07s01-wosc.html>; Afghanistan's New Beginnings Programme, <http://www.undpanbp.org> (last visited Feb. 17, 2006) (providing demobilization statistics).

⁶⁵ See USIP Report, *supra* note 13.

⁶⁶ See Italian International Institute of Higher Studies in Criminal Sciences, *Criminal Justice and Human Rights Training Programs in Afghanistan: A Report on ISISC Project Activities from July 2003 through July 2004*, http://www.isisc.org/docs/July_2004_Report_ISISC_Programs_Afghanistan.htm (providing a summary of civil sector justice reform) (copy of the interim code on file with authors).

⁶⁷ Daud Interview, *supra* note 12.

⁶⁸ Officially, Regulation for the Resolution of Military Offenses Without Trial, and informally referred to as the "NJP regulation" (on file with authors).

⁶⁹ Daud Interview, *supra* note 12.

⁷⁰ Tony Capaccio, *U.S. to Move Afghan Detainees from Cuba to Jail Outside Kabul*, BLOOMBERG NEWS, Jan. 20, 2006.

⁷¹ See "ANA Establishes Military Justice System," Defense and Security Highlights, Afghanistan, Jan. 4, 2006 [hereinafter DASH-A]. Defense and Security Highlights is a locally produced publication of OSC-A (copy on file with authors).

⁷² MCPC, *supra* note 59.

⁷³ PUNITIVE ARTICLES (copy on file with authors).

⁷⁴ The term "Afghan Code of Military Justice" was favored by the working group as a title for the complete military justice system, including the procedural rules, punitive articles, and rules of evidence, but was dropped from the final version passed into law.

reconcile the preexisting Afghan civil law tradition with the common law-based U.S. system selected as a model. During working group sessions with Afghan judge advocates, however, we quickly encountered a series of translational and conceptual impasses to superimposing the U.S. military justice system on the Afghans' existing experience base. In fact, we began seriously to question the wisdom and efficacy of the UCMJ as a template at all. Working group sessions quickly revealed that even determining which general subjects the legislation should address was very different in American and Afghan perceptions and experience.

Typically, common law systems, particularly that of the United States, draft broad statutes authorizing the executive branch by orders and through agencies to promulgate rules to implement and refine legislation into usable form. The UCMJ's supporting Rules for Courts-Martial (RCM) and Military Rules of Evidence (MRE) illustrate the common law approach. By comparison, the Afghans favor exhaustively specific and particularized legislation. The Afghan delegation quickly became concerned at the lack of detail in the UCMJ. An Afghan judge advocate explained that in the Afghan civil system, executive rules and agency regulations had not been regarded highly by military judges. Consistent with many civil law systems, the Afghan system prefers highly detailed statutes that operated without development by supporting regulations. Afghan judge advocates expressed a strong preference for including matters found in the U.S. RCM and MRE into the MCPC itself, rather than issuing subsequent executive branch rules.

Thus, the Working Group moved toward building a system that tried to offer the best of both worlds—maintaining recognizable civil law procedures as much as possible, while also building in essential guarantees and procedures to reflect the relative strengths of the common law system. The key procedural difference between the civil and common law systems identified in the Working Group sessions was the nature of the pretrial investigation and concomitant role of the prosecutor.

In the Afghan civilian sector, investigations are conducted jointly by the prosecution and defense. The prosecutor has two duties: to represent the law and order interests of society and to ensure justice for the accused. For instance, if a prosecutor finds evidence of innocence during an investigation, he has an independent obligation to stop the case.⁷⁵

The working group suggested applying this inquisitorial, civil law understanding of the role of the prosecutor to the military courts as well. In essence, independent military prosecutors replace convening authorities provided under the UCMJ.⁷⁶ In the U.S. military justice system, commanders have a role in every stage of the case, including the investigation (either by the command or professional investigators); preferral and referral of charges; trial; and approval of the findings and sentence.⁷⁷ Under the new Afghan system, however, the direct role of the commander ends upon his discovery of the crime and initial investigation.⁷⁸ The commander is then required to hand the case to the prosecutor for further investigation, the charging decision, and the conduct of the trial.⁷⁹ The prosecutor also recommends to the military judge whether pretrial detention is or is not warranted.⁸⁰

Perhaps the most unusual aspect of the MCPC, at least to the U.S. judge advocate, is its recognition that both the accused and the prosecutor can appeal verdicts of the primary military trial courts to the Court of Military Appeals.⁸¹ The prosecution, like the accused, also retains the right to appeal to the Afghan Supreme Court.⁸² Perhaps because of the novelty of government verdict appeals to common law-trained lawyers, several U.S. advisors encouraged the removal of the prosecution's right of appeal. What seemed uncomfortable to U.S. advisors, however, proved remarkable to the Afghan lawyers only by its absence. The Afghan working group members strongly insisted on maintaining the right of the prosecution to appeal. In the fall of 2005, this provision mysteriously disappeared from the draft version of the MCPC between working group sessions.

⁷⁵ See *supra* note 11.

⁷⁶ Although this option did not immediately occur to the U.S. delegation and required an adjustment, upon reflection during a session break, the authors agreed that the U.S. system was likely quite exceptional and not representative of the international direction of military justice. Lieutenant Colonel Richard Batty, the British officer on the delegation, was able to effectively relate his armed forces' experience with the *Findlay* decision and the resulting divestment of command involvement in courts-martial and military justice generally. See *Findlay v. The United Kingdom* (22107/93) [1997] ECHR 8 (25 Feb. 1997).

⁷⁷ See generally MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. chs. 3, 4, and 11 (2005).

⁷⁸ See MCPC, *supra* note 59, arts. 16 and 17(d).

⁷⁹ *Id.* arts. 21, 24, and 39.

⁸⁰ *Id.* art. 21.

⁸¹ *Id.* art. 47.

⁸² *Id.* art. 55.

When the DIILS team returned to discuss the provision's absence with the nineteen newly-appointed military judges in November 2005, there was unanimous uproar and an immediate call to reinsert the provision. The judges' arguments were based, no less, on the interim civil procedure code, which also affords prosecutors the right to appeal.⁸³ The provision was restored and passed as part of the final law. While allowing prosecutorial appeals could arguably slow down the military justice process, the authors came to believe that U.S. efforts to remove this provision were based more on knee-jerk reactions than an inherent misunderstanding of the civil law process.⁸⁴

In another significant departure from U.S. practice, Afghan commanders have no binding input on judgments and sentencing. Afghan lawyers in the military justice working group were very uncomfortable with the idea of a commander (i.e., convening authority) being able to approve or disapprove a sentence. Afghan judge advocates explained that ANA line officers currently do not have the legal understanding or independence to make these decisions in courts-martial. Further, commanders are perceived to be partial toward soldiers from their own provinces. The Afghans thus repeatedly expressed the need for powerful and independent military judges and prosecutors.⁸⁵

When we turned to the separate Punitive Articles Working Group, we found ourselves working with what turned out to be a direct translation of the UCMJ.⁸⁶ Despite efforts to streamline and simplify the offenses listed in the UCMJ, it quickly became apparent that the UCMJ and its procedures were simply too foreign to be of any use to the working group members. In the late summer of 2005, with the assistance of the DIILS team, the working group discarded its UCMJ draft altogether and revised a former Soviet-era military justice code.⁸⁷ This Soviet code reflected many of the common military offenses of the UCMJ, such as disobeying a superior and absence without leave, but was written in a language and format much more familiar to the Afghans. As a result, the working group quickly revised the forty-eight punitive articles that were passed into law in December 2005.⁸⁸

Getting Out and About

Our admittedly brief experience with the Afghan team revealed another important lesson. In any operational environment, but especially one in which combat operations are ongoing, there are typically too few personnel, too many missions, and too few hours to complete every task. Operation Enduring Freedom, particularly with respect to the legal staffs at CFC-A and OSC-A, is no exception.

While the legal staff at CFC-A may appear robust with an O-6 (colonel) staff judge advocate and between three and five subordinate legal personnel, all of these personnel are fully engaged at all times with the operational focus. The OSC-A Strategic Reform Team faces similar if not more profound personnel challenges, operating with two full-time attorneys: an O-5 (lieutenant colonel) judge advocate on a six-month rotation and a civilian contract attorney. At present, even augmented by DIILS staff and adjuncts, the OSC-A Legal section is not staffed for its mission. Considering that OSC-A typically works with an Afghan legal staff of eighty or more lawyers who service a force of more than 25,000 soldiers (with a goal of 70,000), the challenges are obvious. Rank disparities between the working group delegations further complicate a difficult situation. A larger, and perhaps more senior, American legal contingent to OSC-A would provide greater value.

The OSC-A's command structure poses a further challenge. While OSC-A is led by a major general, this officer is not in a command billet and therefore lacks the attributes of command to influence outcomes. This, along with the organization's

⁸³ See *supra* note 63.

⁸⁴ The notes from these revision sessions are on file with the authors. See also Defense Institute of International Legal Studies, Executive Summary Trip Report, Kabul, Afghanistan, 16–25 Nov. 2005 (Nov. 2005) (mission completed by CPT Martin) (copy on file with authors).

⁸⁵ See *supra* note 11.

⁸⁶ See Defense Institute of International Legal Studies, Executive Summary Trip Report, Kabul, Afghanistan, 23 July – 10 Aug. 2005, Kabul, Afghanistan (Nov. 2005) (mission completed by CPT Martin and released on Nov. 18, 2005) (copy on file with authors).

⁸⁷ *Id.* The working group worked with two versions of the Soviet code—one from the 1970s and one that was revised and used by the Ministry of Justice (but not Ministry of Defense) in 2001. To emphasize the lack of interagency cooperation inherent in the Afghan government, the MOD lawyers were not even aware of the MOJ revision, even though both ministries purported to exercise jurisdiction over the “armed forces.” Copies of both Soviet codes are on file with the authors.

⁸⁸ DASH-A, *supra* note 71.

location apart from its MOD counterparts, poses special challenges. While CFC-A lawyers are well-situated to support their client—the lieutenant general CFC-A commanding general—the OSC-A legal section is practically a world apart from the Afghan lawyers whom they are charged to mentor. The very secure Afghan MOD, where the ANA Staff Judge Advocate and MOD General Counsel both hold offices in a single building, is a five-minute drive from Camp Eggers, the location of CFC-A and OSC-A. The mission would be best served by establishing offices at the MOD. Co-located with their advisees, OSC-A legal officers could both better respond to requests for assistance and impart a stronger sense of trust and cooperation with the ANA and MOD legal sections. This problem is not unique to the legal mission—no OSC-A section, as far as we could observe, maintains offices at the MOD.

We also observed that vigorous coordination, both horizontally and vertically, is absolutely essential to making effective progress in something as multi-faceted as military justice reform. Military justice reform cannot happen in a passive environment, and changes made by U.S. mentors will never take root unless they are closely coordinated with the Afghans and other parties involved. We observed that critical coordination was needed at several levels: with the Afghans themselves, within the U.S. military effort, and with the international community. Without such coordination, military justice reform may repeat many of the mistakes made in the parallel civil justice reform effort.

The Afghan bureaucracy and generally disoriented state of the government are often a hindrance to prompt action. One of the greatest challenges is identifying a single source of information, legal or otherwise. In a world driven by the Information Age, very few Afghan laws are available on the Internet or even in the public domain. Operating within a highly bureaucratic system, Afghan government ministries still rarely exchange information voluntarily. We found it extremely difficult to locate old Afghan military laws and regulations, even those purportedly still in effect. Written copies of any law are precious few. Some military laws, due to the previously hazy military-civilian overlap, are held by the Ministry of Justice and Ministry of Interior. Unaccustomed to interagency cooperation, many Afghan organizations have difficulty sharing information. The OSC-A should actively foster information cross-leveling as the Afghan system matures and traditional practices erode. Inter-agency drafting exercises and working groups provide an excellent forum to acclimate Afghan lawyers to information sharing.

A further opportunity for coordination exists at monthly Justice Sector Reform meetings, which we were invited to observe. Attendees include the CFC-A commanding general; the Italian ambassador overseeing civilian justice sector reform; U.S. Embassy representatives, including a resident Department of Justice lawyer; representatives of the U.S. Agency for International Development (USAID); civil affairs representatives; and other relevant military staff. The meeting is designed to update and coordinate justice reform efforts, including civilian legal reform, judges' training, and construction of courthouses and even prisons. The Office of Security Cooperation-Afghanistan should remain a regular participant in these proceedings both to inform others of its progress as well as to coordinate future developments.

The United States Agency for International Development, which occupies a compound within the walls of Camp Eggers, has been involved in legal training and legal reform programs in Afghanistan.⁸⁹ Unfortunately, OSC-A lawyers have no regular coordination with the USAID efforts, as we learned from their inquiries while trying to form a full picture of the varied assistance projects. The problem continues at the international level. Contact, both formal and informal, between OSC-A and the Italian lawyers in Kabul charged with civil sector legal reform does not exist. After days of effort to effect such coordination, we were only able to secure the name and number of an Italian lawyer who left Kabul more than six months ago.

Lack of coordination and information sharing directly limited the efficiency of our work. The military and international organizations regularly involved in legal reform in Afghanistan surely suffer from the same challenges. For military justice in particular, stronger top-down oversight, plus a greater dedication of manpower and resources, are needed to truly create lasting reform in Afghanistan. Military justice reform is not incident just to the U.S. mission in Afghanistan; it is an obligation to the international community under the division of responsibilities for rebuilding the country.⁹⁰ More importantly, it is an obligation to the Afghans themselves.

Ownership

Do not try to do too much with your own hands. Better the Arabs do it tolerably than that you do it

⁸⁹ See, e.g., United States Agency for Int'l Development, Rebuilding Afghanistan: Weekly Activity Update for April 9 – April 15, Issue #83, http://www.usaid.gov/locations/asia_near_east/afghanistan/weeklyreports/041505_report.pdf.

⁹⁰ See Bonn Agreement, *supra* note 3.

perfectly. It is their war, and you are to help them, not to win it for them.⁹¹

Lawrence of Arabia's words of wisdom, popular among U.S. military commanders,⁹² could just as easily apply to development efforts in Afghanistan, or anywhere else in the world. After discovering just how foreign a transplanted common law system could be to experienced Afghan lawyers, we quickly realized that any new legal system would have to be recognizable to Afghan practitioners if it were to have any lasting value. This illustrates the final and most important lesson learned: ownership ultimately has to be in the hands of the reformed, not the reformers. This observation, while perhaps obvious, is nonetheless easy to overlook.

There is perhaps a cliché among the international community in Afghanistan, prevalent in the legal as well as other reform sectors, that because Afghanistan suffered under a succession of oppressive, destructive regimes, good law, governmental organizations, or even societal norms simply do not or cannot exist. The logic continues that even if these resources do exist, they must be categorically "bad," since they emerged from "bad" regimes. At least with respect to military justice, this could not be further from the truth. We discovered that Afghanistan enjoys a great wealth of knowledge, experience, and even written laws to govern military justice. It is an equally great challenge to pull together this knowledge from its scatterings over decades of war, but the results will be rewarding. Given that it targets a finite group of individuals, reflecting a population that tends to be more educated than the average for Afghan society, with highly trained judges, defense counsel, and prosecutors, the Afghan military justice system stands to be a huge success story in the modern reform taking place in Afghanistan.

Conclusion

Military justice reform in Afghanistan is well under way. Currently, the U.S. units charged with this mission enjoy a number of conditions conducive to success, including prepared partners, talented support staff, and relatively good security conditions. Above all, owing to their unfortunate political history, the Afghan military legal community possesses a wealth of experience at learning from other legal systems. Leveraging these advantages, while mindful of shortcomings associated with past legal reforms and even the present effort, will ensure a lasting and successful transition. Readers with previous international justice reform experience have likely found similarities between their own experience and that related in this article. To be sure, the lessons identified in this article—appreciation of history, the value of embedding oneself in advisee operations, and fostering a sense of ownership in reform—apply to nation-building efforts elsewhere.

⁹¹ JEREMY WILSON, LAWRENCE OF ARABIA: THE AUTHORIZED BIOGRAPHY OF T.E. LAWRENCE 962 (1989). This excerpt comes from T.E. Lawrence's famous *Twenty Seven Articles*, published in the *Arab Bulletin* on 20 August 1917 to offer tips on relating to Arabs. See *27 Articles of T.E. Lawrence*, <http://www.lib.byu.edu/~rdh/wwi/1917/27arts.html> (last visited Marc. 23, 2006).

⁹² See *Pentagon Promotes Words of Wisdom by Lawrence of Arabia*, TELEGRAPH ONLINE (U.K.), June 7, 2005, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=news/2005/07/06/wlawr06.xml&sSheet=news/2005/07/06/ixworld.html>.