

Converging or Conflicting Approaches to Rule of Law: Civilian and Military Actors in Afghanistan

Jasteena Dhillon

Part I

Ladies and Gentlemen,

It is really an honour for me to be here and share some views from the perspective of an NGO on how civilian and military operations interact in conflict settings. I feel privileged, but more so, relieved that there is interest at this stage to bring the perspective of civilian non-governmental actors to the military policy-making level, regarding the issue of civil-military interaction.

As the focus of this paper, I will discuss some of the differences between the civil and the military approach to re-establishing the rule of law in Afghanistan and I will give my opinion on whether the differences can be bridged. The establishment of the rule of law and judicial institution building will be the example used in this paper to discuss how the co-ordination between the military and civilian organizations worked. Were we able to work together to help Afghans rebuild their faith in law and justice after over 50 years of conflict?

When I started my work in the international context, the realms of civilian non-governmental actors and political actors were only mildly connected. Our paths would cross at official events hosted by embassies or high commissions and in those infrequent encounters, there was some informal discussion among us about the importance of considering the opinions of NGOs in planning military humanitarian work in the field. At the time when I began to work in conflict countries, there was hardly any crossover between military and civilian activities. In peace-keeping operations we, i.e. the NGOs, only saw the military driving around in

tanks and trucks through villages and cities. We did not view the military as having a positive and empowering effect on the community.

However, when I went to Afghanistan, as a seasoned NGO person by then, I saw that the military conducted some activities that fit into my framework of understanding of appropriate humanitarian response. I saw that it was possible for them to have a role in international humanitarian work in conflict situations. What I saw in Afghanistan reminded me of my first experience with the military in Bosnia with the “CIMIC” teams, which led me to become more of a believer in the possibility of working together under limited circumstances.

In Bosnia, the CIMIC teams were composed of military officers whose orders were to act as community liaison officers. While I was not sure of their exact agenda at first, I saw that they had the potential to provide useful and needed services to the communities. For example, they had snowploughs and road graters that they offered to use to clear roads so that the people could access their destroyed or remote villages. They also offered assistance to NGOs with delivering food to communities.

One day, a CIMIC team from the Nordic Polish battalion approached me and asked if I could help them. They wanted to borrow my human rights lawyer. “Why?” I asked. They told me that, when they were out on patrol, people often asked them questions on legal and human rights issues and as they did not have any human rights background, they were not prepared to answer those questions. The CIMIC team wanted to find an efficient way to connect my human rights lawyer with the community. This suggestion to be linked in some way to the military was something I had not thought that it was feasible at all. Was it appropriate for my organization to be linked with the military? What about the diverging mandates and different agendas? On the one hand, NGOs viewed humanitarian assistance as being based on the principles of providing impartial and objective assistance. Was this also the way the military was motivated?

After many discussions among us on this proposed cooperation and my analysis of the advantages and disadvantages of working with the mili-

tary, I decided that there *was* a common ground for us. I agreed to ask my lawyer to receive clients, one day a week in the CIMIC office. The goal for both my NGO and the CIMIC team was to respond to the questions of the community. As this was a community that had been almost totally devastated during the war, it was in desperate need. The ultimate goal was to provide stability and security among the different ethnic groups and to encourage and empower community to build the foundations for the rule of law, justice and fairness. The military provided the first and the civilian organizations provided the latter.

The result was that our office became the “one stop shop” for all complaints that the local community wished to bring to the international community. The positive impact of this joint effort for this 90% war-destroyed community was immense and immeasurable. People who previously received no help nor answer to their questions, concerns and problems reported that, after the opening of the office, they felt that there was a place where they could go in order to report and get answers for their concerns or problems and other issues. The CIMIC teams were able to provide assistance on small reconstruction and repairs or via our presence refer people to NGOs who were able to provide such assistance. Our NGO was able to provide legal advice and representation for human rights, property and other legal disputes. Therefore, it worked and I continued to hear from persons who worked in Bosnia years later that the office was still functioning and was considered a crucial part of the positive reconstruction and humanitarian efforts in the community.

Part II

Afghanistan was my second experience working in a civil-military context. The operation of the provincial reconstruction teams (PRTs) and the willingness of some of those teams to be transparent and cooperative with the civilian sector created another opportunity for cooperation. Earlier today, you have heard from the Commander of the British PRT in Mazar-e Sharif that the British military in Afghanistan were committed to using the resources they had at their disposal to assist in reconstruc-

tion efforts. I was interested to see if they were able to work with NGOs to provide the assistance, Afghans needed to develop their communities? In Afghanistan, as I had seen in Bosnia, there was another opportunity for civil-military cooperation with regard to the rule of law and the judicial sector.

Based on my experience in working on rebuilding the judicial system and the rule of law sector, I am going to share with you my thoughts about how civil and military interaction led to a productive partnership in Afghanistan. An important point to mention is that the basis for a good relationship between PRTs and NGOs mainly depended on what the nationality of the PRT was and whether they kept a distant or close relationship with the community and whether they had consultation and co-ordination as their main operating principles.

It is agreed on by most of those who worked in Afghanistan in the post conflict period that re-establishing the rule of law is a pre-requisite for peace and stability in Afghanistan. The process of encouraging the rule of law is to use the existing legal understanding in the country, to inject some basic underlying foundation of international human rights standards, international humanitarian law and other international instruments into the legal developments in Afghanistan.

In Afghanistan, on the road to rebuilding the judicial system, you find many actors whom you may not have expected to find. For one, there are the ISAF forces, which are working on rebuilding courthouses and police stations and provide some training and information sharing. Among the civilian actors, there is the United Nations, Office of the High Representative and NGOs. The question to ask is whether all actors working together, using their different resources will be able to rebuild the Afghan judicial sector that has been shattered by 23 years of armed conflict.

Within the mandates of ISAF – the military arm – and UNAMA – the civilian arm – there is the commitment to build stability and foster confidence in the justice system, as part of their work. Therefore, it would appear that there is room for crossover in the mandates. In the judicial

sector, one example of the differences is that they direct their resources to different aspects of the judicial system. ISAF – via their PRT (Provincial Reconstruction Teams) – is engaged in activities, such as building courthouses and police stations as well as in police training and military advisory functions.

The UN and NGOs are engaged in working with the courts and other judicial institutions to assist them in functioning better. They also provide training and capacity building for judges and lawyers and other functionaries within the legal institutions, review and change laws and policies concerning all aspects of rebuilding the country, and look into the interrelation of traditional law and formal law in the context of Afghanistan's history and development.

In all activities mentioned above there are also many points where the civilian and military approaches converge. In addition, these aspects have been the focus of my thoughts on this issue.

Part III

The fact that there is a lack of effective governmental control outside Kabul means that governmental institutions, like courts and the police, function less well in smaller urban areas and, of course, inadequately in rural areas. In practical terms, that means that the government gives priority to the development in urban areas where it can further solidify its political influence, rather than giving priority to poor and rural areas. The vacuum of authority in these regions is then filled by commanders and armed groups who use intimidation and fear as tools. This rule of the strongest creates a lack of public confidence in the ability of democratic processes to change the lives of the people and, by extension, a lack of confidence in the judicial system.

The actual picture of the judicial system in these places ranges from the lack of basic commodities, such as furniture, to the lack of adequately trained judicial officers and of proper libraries of legal texts. People see

these problems and that further erodes their confidence in the system and leads them to rely more on the informal justice system. This in turn is based on traditional beliefs prevalent in particular regions which can therefore lead to more influence of commanders and armed groups and at the same time, increase violence and instability.

Another problem that plagues the Afghan legal system in both urban and rural areas is, for example, that there is so much pressure in form of threats and intimidation on the courts, judicial officers, witnesses and victims, which cripples the ability of the judiciary to assert its independence. The lack of adequate judicial guarantees to those accused, the denial of access to fair trials and arbitrary detention are further gaps in the judicial system that need to be addressed. Related to that is the issue of discrimination against women as a relevant concern in Afghanistan, since women are often denied access to justice in both the formal and informal justice systems.

All of these problems inherent in the judicial system, combined with the climate of violence and conflict in many areas of Afghanistan, mean that the justice system has to be developed simultaneously with creating stability. Therefore, having the two actors, the military and the civilian, both working on issues related to the justice system, can provide a more comprehensive approach. However, it can also cause confusion within the Afghan society, as to what the international community's engagement in stabilizing and rebuilding Afghanistan is about.

In December 2001, the two major initiatives from the International Community were taken in order to try to bring peace and stability to Afghanistan. First, the Bonn Agreement (Agreement on Provisional Arrangements in Afghanistan Pending Re-Establishment of Permanent Government Institutions), and second, the UN Security Council authorizing the deployment of ISAF led by NATO. In my opinion, these agreements created two parallel but different approaches to establishing the rule of law in Afghanistan. One is focused more on stabilization, while the other one is focused more on rebuilding. The questions I want to put forward in this paper are whether these approaches work well to-

gether in Afghanistan and whether other examples of good cooperation can be used as a guide.

Part IV

To get started on the rule of law and building the justice sector in Afghanistan, it was not easy to convince all of the actors that this was a priority. Although from the perspective of the actors of the judicial sector, there is no hope for a long-lasting rebuilding of the country without the rule of law. Until November 2001, i.e. until the US-led military intervention in Afghanistan, the country was ruled by the Taliban from their capital in Kandahar. The approach to justice during the time of the Taliban was a mixture of two categories: one was the fundamentalist Islamic law, as interpreted by the *mullahs* and elders of the communities and the second one was that of traditional tribal laws, specific to each region. In most rural places, there was a combination of both Islamic and traditional laws. In cities, there were additionally some formal legal structures – i.e. courts that used civil and common laws.

Therefore, when the Bonn Agreement was drafted to rebuild an “interim administration” with the aim of setting first steps to develop a broadly based, gender-sensitive, multi-ethnic and fully representative government, required to respect international human rights law, there were high hopes for the development of Afghanistan under the Afghan Transitional Authority (ATA). Nevertheless, it was not clear how this was going to happen without a specific pillar of justice in the agreements. At the same time, the military was not interested in rule of law guarantees while it was fighting insurgency and terrorism. Its main objective was to stabilize the volatile and insecure environment. The development of the justice sector was left to the UN and NGOs.

UNAMA was created and mandated to assist the ATA with implementing the Bonn Agreement. There were two pillars: pillar one for political affairs and pillar two, tasked with co-ordinating humanitarian relief and reconstruction. In the initial report of the Secretary General to the Secu-

rity Council, explaining the mission of UNAMA there was, within the pillar one structure, a reference to promoting human rights and there were senior officers of the rule of law based in Kabul.

As part of the Bonn Agreement, there were three commissions set up:

- the Judicial Reform Commission, mandated to rebuild the justice system in accordance with Islamic principles, international standards, rule of law and Afghan legal traditions;
- the Constitutional Commission which was supposed to ensure that there was a Constitution drafted that was representative and, at the same time, ensured the solidification of democratic principles in Afghan governing structures; and finally,
- the Afghan Independent Human Rights Commission.

All of these commissions were directed at rebuilding an aspect of the rule of law. All parts were vitally important to ensure that rule of law would become standard in Afghanistan.

The Constitutional Commission was not able to live up to the expectations of what it should accomplish and was not able to use a transparent and inclusive manner, i.e. public consultation was not adequate. The Afghan Independent Human Rights Commission set up in June 2002, with a mandate to investigate and monitor human rights violations and to establish a program of human rights education. The AIHRC takes complaints, investigates allegations of human rights abuses in all areas, including women's rights, the rights of children and transitional justice and monitors the prison system from a human rights perspective. However, it lacks the capacity to run a full judicial monitoring system, including court observation. Both of these commissions were set up by the civilian arm of assistance in Afghanistan.

It is the third commission, where there is some overlap between the military and civilian actors in Afghanistan and where they were able to work together. The Judicial Reform Commission was established in November 2002. The commission has 12 Afghan legal experts as members. The mandate of the commission is to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions. However, the mode in which the JRC is

mandated to operate is to propose reform strategies and to seek international donor assistance. Their main role is to establish the formal legal institutions: Supreme Court, Attorney General's Office and Ministry of Justice to implement the suggested reforms. Some of the areas the JRC has been successful with were to facilitate the compilation of applicable laws, setting up working groups for redrafting legislation, establish a legal education centre that has made a survey of the judicial system.

Part V

For the remainder of the discussion I propose to talk about some problem areas in the development of the judicial system and how civilian and military sectors, working together, can overcome some of them. The main area in which there have been inputs from both the civilian and the military arms are the judicial reform and reconstruction efforts. In this area, a few main issues have prevented an effective implementation of reform and reconstruction in Afghanistan. The problems in implementing this reform and reconstruction of the judicial sector are:

1. lack of a coherent strategy of judicial reform;
2. lack of co-ordination among donors, judicial institutions/ministries;
3. delays in getting international assistance and funds distributed;
4. lack of programs in the early phase, that could have quick and effective impacts on the judicial system;
5. coercive influence by family members on judicial officers, so as to spare men who raped or assaulted women embarrassment and to prevent women from reporting a case, while using crimes, such as sex before marriage or adultery, as a way of keeping women from feeling free to act as witnesses;
6. political influence and bias when it comes to judicial appointments, which leads to appointing unqualified judges and results in a lack of public confidence in the judicial system;
7. interference of public officers in the judicial process, using their clout to influence decisions;

8. security threats to judicial officials by armed groups, especially in the south and the east. These threats include threats to judges and prosecutors and there is a lack of proper security for other judicial personnel, victims and witnesses;
9. corruption – this problem seems to be everywhere in Afghanistan. Bribery is used to either drop a case or move it forward. The low salaries or non-payment of salaries, due to an inadequate salary distribution system, exacerbates the problem. In 2004, there was a review and increase in the salaries of judges, but still the level is so inadequate that corruption breeds quite easily;
10. lack of resources – run down/destroyed buildings in which Afghan justice is meted out, lack of basic facilities and supplies for the courts and the attorney general's office as well as the police and lack of legal texts and books in the buildings;
11. violations of human rights of women and children that are institutionalized in the justice system;
12. prominence of the informal justice system;
13. lack of strategy of how to integrate the formal, informal, *sharia* and international law principles into a coherent strategy.

I looked at all of the problems that plague the Afghan justice system and looked at how the military and the civilian sectors can work together on issues or divide issues amongst themselves to work on them in an equitable way. If you look at the list of urgent issues that I laid out above, one can see that in a number of them, there are ways to co-ordinate assistance between the two groups – the civilian and the military arm – and on which they can work or are working together or separately at the same time.

Part VI

How can the civilian and military sectors converge and work together on developing the justice and rule of law sector in Afghanistan? There are a couple of areas in which an active partnership between the civilian and the military sector yields positive results. The concept behind the part-

nership is to find out what actor will have more influence in a particular issue.

For example, if one deals with a member of an armed group, who is party to a legal dispute, maybe the military is better equipped to confront the person. If I as a civilian actor was taking part in mediating a dispute, such as on land or family matters, I always made sure that there was a PRT team in the vicinity that would be able to react, if the situation escalated. Another example was that when quick infusion of money was needed to renovate a court building, sometimes the PRT were better placed to access the needed resources.

Finally, the training of police and military actors in Afghanistan was much better done by those who have had experience in the sector. In Afghanistan, as of March 2004, there was a very small national civilian police force with inadequate training and equipment, so that they might easily become more allied to local warlords than to the central government. Therefore, having the military conduct the training and dissemination of standards and guidelines can be extremely effective both in terms of how the information is framed by the military trainers and received by the military and in terms of police forces.

What can the PRTs do better?

1. quick implementation of programs, in order to have quick and effective impacts on the judicial institutions. PRTs can make fast repairs and restore archive buildings, courthouses, police stations, so that they can begin to operate in some kind of a normal way. This gives the society a sense of security and stability;
2. providing protection against security threats of armed groups against judicial officials. Threats against judicial officials are still very much prevalent in the south and east of the country but also still happen in the central, northern and western regions. The threats range from threats to judges and prosecutors and include the lack of proper security for other judicial personnel, victims and witnesses. This insecurity also concerns individuals who are in opposition to commanders and are often held in prison extrajudicially, while the prison authorities are actually not aware of

- why those persons are held. Through their presence, the PRTs can provide a sense of strength and stability;
3. donating needed resources to fill gaps – providing building materials for run down/destroyed buildings in which Afghan justice is meted out. There is a lack of basic facilities and supplies for courts, the attorney general's office and the police and a lack of legal texts and books in the buildings. These things give a community the feeling of importance and foster their commitment to stability.

What can NGOs do better?

1. develop rules, laws and policies for judicial institutions. Non-governmental organizations have the professional capacity to develop rules, laws and policies based on equity and fairness as the foundation for stability for judicial institutions;
2. implement programs of training and capacity-building for judges, police and government officials. NGOs offer many programs that provide training and build capacities for judicial officials. In conflict societies, there is a loss of trained and motivated professionals, so that it ensures continuity and stability;
3. map the best locations and timeframes for reconstruction and rehabilitation efforts. NGOs, since they have very close ties with the communities, know best where to implement what programs and how fast to implement them for the reconstruction and rehabilitation of the judicial sector.

Combined efforts of the PRTs and NGOs serve to provide sturdy structures and reliable infrastructure and at the same time increase confidence and competence in judicial institution-building by using the special knowledge that each of them bring to work in conflict and post-conflict settings.

What is the impact of civil-military interaction? The impact of civil-military interaction is yet to be seen in full. Most communities and institutions welcome the inputs from both of the sectors. In the North, where ISAF is more active, the military is looked at with less scepticism than in

the south and east, where the Coalition is still actively involved in fighting the insurgents who are continuing to install fear in the communities.

It was my experience that in the northern provinces of Balkh, Sar-e Pol, Jawzjan and Maymaney, the civilian and the military sector were able to combine resources and efforts to build the rule of law and justice sector in Afghanistan. We worked together on the reconstruction of courthouses and police stations, on training personnel and stocking libraries with legal texts.

The model provided hope for stabilization and growth in Afghanistan. It led to a faster transition from international to national control of institutions. It was a success story with regard to giving the communities a sense of security and faith in the judicial system.