

## PANEL 1: ESTABLISHING THE RULE OF LAW<sup>†</sup>

Moderator: *Professor Daniel Bodansky\**

Panelists: *Scott Carlson\*\**

*Rosa Ehrenreich Brooks\*\*\**

*Mariam Nawabi\*\*\*\**

*Professor Bodansky:* Thank you very much. I want to add my welcome for what promises to be a really interesting day. This panel kicks off our proceedings, and quite appropriately so in my opinion.

The English historian, E.P. Thompson, once described the rule of law as an “unqualified human good.”<sup>1</sup> It helps curb arbitrary government; it provides a framework for predictability within which individuals can order their activities. Thus, establishing the rule of law represents one of the central challenges both in building the institutions of a democratic state and in developing a market democracy.

Despite a great deal of effort over the last decade, we still have much to learn about how to establish the rule of law. What are the key elements of the rule of law? What are the social, cultural, and political preconditions necessary for its establishment? How does one build the rule of law over time? What is the role of the international community in that process? How can it contribute most constructively? Finally, what are the particular challenges in establishing the rule of law in the aftermath of an armed conflict?

We have a very distinguished panel this morning to help us think through these issues. Our first speaker will be Scott Carlson. Mr. Carlson is currently a Supreme Court Fellow assigned to the U.S. Sentencing Commission. He received his undergraduate degree from the University of Alabama, his law

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<sup>1</sup> E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 266* (1975).

degree from the University of Georgia, and his LL.M. degree in international and comparative law from Georgetown University. He has worked extensively on rule of law and democratization efforts at the Organization for Security and Cooperation in Europe and at the American Bar Association, where he served as Director of Central and Eastern Europe Programs and Judicial Reform. He will speak generally about the rule of law, thereby providing a good introduction for the rest of the panel.

Our second speaker will be Professor Rosa Ehrenreich Brooks of the University of Virginia School of Law. Professor Brooks received her undergraduate degree from Harvard, her masters degree from Oxford, and her law degree from Yale. She served at the U.S. Department of State as a Senior Advisor to the Assistant Secretary of State for Democracy, Human Rights, and Labor. She also served as Acting Director of Yale's Orville H. Schell, Jr. Center for International Human Rights Law and was a Fellow at the Carr Center for Human Rights Policy at Harvard's Kennedy School of Government. Her current work focuses on human rights, post-conflict rule of law issues, and the law of armed conflict. She will focus her remarks on the issue of establishing the rule of law in Iraq.

Our final speaker is Mariam Nawabi, who serves as Commercial and Trade Counselor at the Embassy of Afghanistan in Washington, D.C. She received her undergraduate degree from George Mason University and her law degree from Georgetown. She has worked for more than ten years on humanitarian issues relating to Afghanistan and, in 2002, served on the UN Legal Affairs Working Group for Afghanistan. Her work has focused in particular on women's rights as well as commercial and legal reform issues. Her current portfolio at the Afghan embassy includes reconstruction efforts affecting trade and commerce in Afghanistan, private sector development, entrepreneurship development for Afghan women, and commercial law reform. She will focus her remarks on problems relating to Afghanistan in particular.

With that introduction, let me turn first to Scott Carlson.

*Scott Carlson:* Thank you. I would also like to thank the organizers for all the hard work that went into putting this together. It is also great to be back here at my alma mater. Athens has changed and it has stayed the same, but it is good to be back in any case.

I will cover some strategic considerations and approaches which I think are of a general nature. These considerations are ones that I have gleaned from my own experiences in Bosnia, Kosovo, and elsewhere. I do not offer these

considerations as an exclusive list, but rather one that should be provocative and illustrative.

The first thing I think everyone has to keep in mind is that when you come into a post-conflict situation there are some common conditions that you encounter. The first is physical damage; it can be very extensive. Public buildings may have been destroyed or looted. Legal records and materials could be damaged or missing. The population will be fragmented and embittered, typically. There may be entire segments that have been displaced. There may be a wide variety of unresolved property disputes. Significant unresolved human rights violations are very common. One or more factions or ethnic groups may have actually participated in the violence of the conflict and the local grievances may be very serious or even ongoing, or both.

**Limited administrative capacity:** Whatever the situation was before the conflict started, you can rest assured that after the conflict, the administrative capacity is going to be seriously compromised or potentially destroyed. Even if substantial human capacity still remains, it may be filled with people who, in some way, have been associated with the conflict before. It may also not be representative of the population. Disaffected groups may need to be integrated into the human administration. Rectifying all of these things will take time and training.

As recent news events have shown, civil unrest and disorder may be present. Residual fighting could go on long after the major part of the conflict has stopped and opportunistic criminal activities are very common. All of these things are made much more difficult to handle by the fact that, typically, you do not have established traditions of democracy and respect for human rights.

Against this backdrop, I like to do a self-check and a reminder—what I call “The Three Rs of Post Conflict.” In short, the three Rs are respect, redress, and realism.

**Respect:** In terms of respect, I think it is important when you arrive to realize that there was already some type of legal system in place. There is a tradition, a body of jurisprudence. It might be common law, it might be civil law, or it might be Islamic law. This tradition will shape local understanding. As you try to relate with local legal professionals, and have them relate amongst themselves, this has to be kept in mind.

**Redress:** There may be widespread human rights abuses. There may be systemic inequities that have been a part of the fabric of that country or zone. Reflexive resuscitation of any of the old institutions may be viewed as ignoring the need to address redress.

**Realism:** As anyone knows, when you start thinking about limited local capacity, physical damage, and things of that nature, you cannot expect for things to recover immediately. What I suggest is that it is important to think about these things in conceptual terms and not in terms of concrete timelines. What are the objectives that you want to come up with and succeed at? From that, come up with realistic expectations about timing.

None of these things is necessarily earthshaking or something that you would not think of from examining common post-conflict conditions. However, I think if you go into a post-conflict situation and you are working on this type of thing, it is easy to get lost in a post-conflict "fog." It is important from time to time to come back to the Three Rs and to reflect on the reconstruction process.

With that context in mind, I would like to explore what I think are some "lessons learned," or perhaps we should say "identified." A colleague at the National War College recently admonished me to stop using the term "lessons learned," because there is real doubt as to whether we are learning these lessons. So perhaps it is more appropriate to just say "identified." There are three basic categories I want to tackle: applicable law, judicial infrastructure, and accountability for human rights violations.

In terms of applicable law, what I am concerned with is the law that should apply in the post-conflict environment. Suppose you have an Australian soldier who is conducting a police operation in East Timor. What law should govern his actions? In terms of judicial infrastructure, ask what courts are needed and who should staff them. If a NATO soldier in Kosovo captures a thief, where should that trial be? Who should conduct that trial? Finally, consider accountability for human rights violations. The basic question you are looking to answer is: Who did what to whom? Once you are able to establish a record that begins to answer this fundamental question, then you have to determine what you will do with that information.

Taking a closer look at applicable law, I think three basic topics arise immediately: the local legal context, the international context, and the question of interim legislation.

With local legal context, if we are to respect it, we need to at least understand it. That means that there needs to be an intent to look into the local jurisprudence. However, if we are also going to take redress seriously, we have to realize that perhaps some of the existing laws, jurisprudence, and legal practices may have been used to oppress another group. If that is the case, respect for local tradition may have to give way to concerns about redress.

In the international context, if we have forces that show up, they will be trained, most likely, in the laws of war and international humanitarian law. But they may also have multiple codes of military conduct. This may create a complicated situation in certain border areas. Hopefully, the military and civilian contingents will have a decent understanding of basic international human rights law. In most cases you see the UN and others talking about the applicability of international human rights standards. At a minimum, I think this should be understood to implicate things like the International Covenant on Civil and Political Rights.

In addition, once the civil situation has stabilized to some degree, whatever interim authority you have will need to be able to begin issuing some sort of interim legislation. This legislation will be necessary to establish some sort of representative government, to put together a legal framework to correct past injustices and inequities, and to conduct the basic business of government.

With that substantial task, it is safe to assume that you are going to need some sort of legislative-administrative structure. The first task of this legislative-administrative structure should be to catalogue existing legislation. All of that law that I was just talking about needs to be brought into some sort of thorough and coherent framework so that it can be distributed and understood. Also, in the case of local law, there may be a need for reconciliation with international human rights standards. If we are to avoid falling into the trap of resuscitating some sort of institution or legal tradition that has oppressed one group, careful scrutiny is necessary. Local legal capacity to engage in this exercise could be very limited. It is very common to find a need for substantial international assistance in this reconciliation process.

As this is going on, there need to be mechanisms for representative public participation. You have a population that you hope to see proceed towards democracy and respect for human rights. The first thing you need to demonstrate to this population is that they have a stake in the legal system. I think one of the best ways to educate and to generate ownership in the rule of law is to encourage some form of public participation in the lawmaking process.

Once the necessary laws are collected and generated, you have to make sure your system is capable of getting them to all parts of the country or zone, and of making sure they are in the appropriate language. Frequently, you are in a multilingual environment where one part of the country speaks one language and another part speaks a totally different language.

Once you have the laws, you have to worry about applying them. That, of course, means building judicial infrastructure and providing personnel. If the

physical facilities are in good order, you may be able to move straight to human resource questions. However, it is very unlikely that you will find the physical facilities in good order. Even if the outside of a building appears to be in good order, that may not be the case for the inside. An assessment of the physical facilities should consider everything from electricity to security. Next, you need to examine the human resource components that were previously in place, so as to determine future needs. Frequently, prior staffing models will not have been based on rational job descriptions or tasks. Also, they may have had nepotistic components in terms of appointment and promotion.

There may also be lustration concerns. "Lustration" is a term from the Eastern European context; it generally refers to official, systematic attempts to remove previous perpetrators.<sup>2</sup> If a local judge has been viewed as an oppressor, there needs to be some mechanism whereby files are reviewed and the individual is made to account for past behaviors. If the physical situation and the human resource situation are fragmented, it may be impossible to easily generate local trust. This situation may call for a more extensive role for internationals. The internationals may have to act as judges and prosecutors.

All of these components imply some sort of administrative structure. When you begin to think about piecing together a staffing situation, it is important to start thinking about how you will proceed. For example, what will be the appointments process and the disciplinary process? As I mentioned, there may be distrust of people who have sat in the judiciary before. The local population needs to be reassured that this new system will address their concerns.

With respect to the new judges, there needs to be some demonstration that they are appointed based on merit and character, particularly if the population has serious concerns about the legitimacy of the new judiciary. Further, because there may be a number of changes in existing legislation as well as new legislation, there may be a need for substantial judicial training. The judicial training program should be developed simultaneously with the development of any new legislation so that as soon as the new legislation comes into force, the judiciary is trained to use that legislation.

**Budgeting:** Once you have the physical facilities issue taken care of, the staffing issue taken care of, and the training issue taken care of, you have to make sure you have a system whereby you can pay people. The quickest way

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<sup>2</sup> See generally KIERAN WILLIAMS ET AL., EXPLAINING LUSTRATION IN EASTERN EUROPE 3 (Sussex European Institute, Working Paper No. 62, 2003), <http://www.sussex.ac.uk/Units/SEI/pdfs/wp62.pdf>.

to undermine the credibility of the judiciary is to have payment problems. It increases the incentive for judges to take bribes and results in what we would all expect—erratic service delivery. If people are to have confidence in the rule of law, the system needs to be seen as consistent and reliable.

**Judicial record-keeping:** The records may have been destroyed or damaged, or the types of records that may have been kept before may not be sufficient for a democratic system that respects human rights. Attention should be paid to the development of a centralized record-keeping system so that all courts can exchange files and use them in a coherent fashion.

If the decision has been made to include internationals in some capacity, whether as judges or prosecutors, there has to be clarity as to the jurisdictional lines. Blurred jurisdictional lines could be viewed as a device for manipulating the system for improper ends. If that happens, the notion of the rule of law, which you are there trying to promote, could be further undermined.

One of the hardest questions is how to address accountability for human rights violations. There are four major preliminary concerns that have to be thought about and addressed. The first is the protection and collection of information. As soon as it is realistic, there needs to be a serious, coherent effort to collect evidence and witness statements. Failure to protect this evidence early on can jeopardize the success of any subsequent prosecution or any other type of accountability mechanism. Once the information is collected, there needs to be a substantial amount of resources devoted to its analysis. Individual cases can be examined and anecdotal case files put together, but if the quantity and quality of the information is sufficiently large, an entire other possibility emerges.

I have a screen shot of the database that we used in a situation in Kosovo which actually resulted in expert witness testimony in the Milosevic trial. The idea was to take multiple witness statements, examine them statistically, and do what I like to call “conflict mapping” to see if there are larger trends that may be useful in proving or disproving aspects of a human rights case.

Once you have this information and you have analyzed it, you need to select what type of accountability mechanisms you want to use. We are all familiar with the Hague tribunal; judicial prosecution is certainly one very credible and increasingly utilized avenue. Truth commissions are equally valid, or you may use a combination of the two. Once you have these steps completed, you need to think about implementation. Coordination among the potential actors becomes very important.

The administrative structure and accountability is very different than the other two situations I described. Because you have multiple players, it is hard

to have any sort of centralized command structure. It is important to emphasize local ownership because the success or failure of any accountability mechanism will be dependent, in part, on local understanding and acceptance of the process. This probably presupposes some sort of public outreach process and, where realistic, public participation. It also means you are going to deal with the key players: the NGOs and civil society actors who have collected the information and done the reports, and the police in civil administration who are actually protecting the evidence and doing some of the follow-up investigation. When you talk to the victims, their friends, and their family, you have to realize that you are going to bring some of these painful situations back to the surface. You have to be prepared to deal with that by using counseling and other social services.

Although all of these actors have their own bosses and their own structures, it is important to try to do something in terms of coordination and implementation—some sort of regular meeting and exchange of information at the very least. As these different groups begin to complete their components of the accountability process, it is crucial that there be some sort of broad-based publication and public information campaign. For accountability mechanisms to be respected and thought of as successful and as encouraging reconciliation, people have to know the results they can bring.

Thank you. I know this was a lot of information, but I wanted to lay out the general considerations. I will close by reiterating that this was not meant to be an exhaustive list; it was meant to be an illustrative one. I am looking forward to hearing the comments of my colleagues and the discussion to follow.

*Professor Bodansky:* Thank you very much, Scott. Our next speaker is Professor Rosa Brooks.

*Rosa Ehrenreich Brooks:* Thank you very much. I am delighted to be here and I am grateful to the *Georgia Journal of International and Comparative Law* for inviting me. It is particularly nice to see several people I have worked with in the past, such as Scott Carlson. I had the pleasure of working with Scott on legal issues in Kosovo while I was at the State Department and Scott was at the American Bar Association's Central and East European Law Initiative. It is also a pleasure to see Captain Travis Hall, who will be today's lunchtime speaker, sitting in the audience. I last saw Captain Hall in a very hot courtroom in Baghdad last August.

In my remarks today, I am going to pick up where Scott left off. Scott laid out some of the basic practical issues that arise when it comes to rebuilding the



rule of law in any post-conflict society. I am going to speak today about some of the particular challenges associated with building the rule of law in Iraq.

Let me start with a couple of general observations. Scott pointed out how many complicated things there are to think about when you are talking about the rule of law,<sup>3</sup> which is a hard concept to get a handle on anyway. Most of us think that the rule of law is one of those “I know it when I see it” concepts, but we would be hard pressed to actually define “the rule of law.” Following on Scott’s comments, it may not surprise you if I suggest that when it comes to building the rule of law—whatever that is—in post-conflict settings, we are not all that good at it. When I say “we” here, you can take that to mean “we the international community,” to a significant extent, and even more, “we the United States,” since the United States has unfortunately been the sole architect of recent efforts to build the rule of law in Iraq.

As Scott said, maybe it is inadequate, or inaccurate, to offer “lessons learned”<sup>4</sup> from previous U.S. and international efforts to promote the rule of law, because although there are certainly plenty of lessons to be gleaned from past experiences and past failures, we have not done a particularly good job of truly learning any of those lessons, judging from our current practices. I want to suggest some of the reasons for that.

My first point: Building the rule of law is hard because it is hard. So it should come as no surprise that we are not very good at it. As Scott has suggested, there are a lot of interlocking pieces when we are talking about the rule of law. Rebuilding the rule of law requires making sure that police, judges, lawyers, and prison guards are all well-trained and adequately paid; making sure that the physical infrastructure of courthouses, prisons, and so on is adequate; rewriting legal codes; ensuring that the populace has accurate information about the changes; and so on, to name only a few of the components that go into creating that elusive state of affairs we call “the rule of law.” Trying to make all of these moving parts work together in the right way in the wake of a violent conflict is exceptionally difficult even in the best of circumstances. And in the real world, we are usually not operating in the best of circumstances. In the real world, there are too few resources, coordination is a problem, people make mistakes, and everything ends up taking longer and being more complicated than you expected. So if we have not been all that successful in building the rule of law in post-conflict settings, it is partly because such a complex enterprise is inherently difficult.

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<sup>3</sup> See *infra* pp. 120-26.

<sup>4</sup> See *infra* p. 122.

Building the rule of law in post-conflict settings is also hard because you cannot rebuild the rule of law in a vacuum. You can have the world's most wonderful judicial system, but if most people do not have enough to eat it is not going to do them a lot of good and it is not going to do much to enhance public trust in government structures or the international community. You can have a fabulous set of legal codes, but if people are afraid to go out for fear of being kidnapped, attacked, or blown up by a car bomb, it is not going to do them a whole lot of good. I could go on, but I think that one of the biggest challenges is that the institutions of the rule of law have to be rebuilt at the very same time that security has to be reestablished. Reestablishing security in turn involves both protecting people from physical violence and also ensuring human security in the very broadest sense: ensuring that there is electricity, adequate and safe drinking water, and enough food, medicine, and shelter. This too is something that is exceptionally hard to do, even in the most favorable circumstances, with the best planning, and with maximum goodwill from the affected population.

It is particularly hard to build the rule of law in places like Iraq in the wake of military intervention. That is because of the complex paradoxes that are created by trying to rebuild the rule of law when you—"you" the United States; "you" the international community—are there by virtue of having relatively higher military capacities than anybody else, by virtue of having the biggest gun on the block.

To illustrate this point, let me offer a couple of contrasting anecdotes from my trip to Iraq last August. Almost a year has passed since then, and during that year some things have gotten better and some things have gotten much worse. Nonetheless, I think these short stories will give you some sense of how these difficulties and paradoxes actually play out on the ground.

I was in Iraq last August partly to do research for a book on post-conflict rule of law issues and partly as a consultant for a U.S.-based foundation that was considering making grants in Iraq to help fund various transitional justice and human rights-related mechanisms. Along with several colleagues, I visited various police stations, courts, NGOs, and government offices, and met with both Iraqi and Coalition officials to talk about the process of rebuilding the rule of law.

On our first day, we dropped in unannounced at an Iraqi police station in the middle of Baghdad. It was run like most of the other police stations in Baghdad at that point in time: by American military police, who were working to help train their Iraqi counterparts and rebuild the Iraqi police force. But in

the interim, American MPs were essentially exercising effective control over the operations of each police station.

Our first encounter with an American military policeman on the ground was not an inspiring one. When we dropped in on this first police station, the officer in charge was a young lieutenant from the Midwest. He could not quite figure out what we were doing there. This was Baghdad, right after travel restrictions for civilians were lifted, so at that time there were not a lot of non-military personnel wandering around. The temperature was also about a hundred and thirty degrees, not really conducive to touring the city. Having a bunch of American law professors suddenly show up unannounced at this police station was just mind-boggling for him. He kept saying, "What are you doing here? Why do you want to be here?"

We were having a little trouble answering those questions ourselves—it was our first day in Baghdad. The whole police station, of course, had no air conditioning or electricity because sabotage and looting meant that the electrical grid for Baghdad could not provide adequate electricity for most of the city. So the lieutenant, and all of the other American soldiers, mostly eighteen-, nineteen-, and twenty-year-olds, were just sitting there sweltering, as were all the Iraqi policemen. We were dripping with sweat ourselves and trying to formulate coherent sentences, which was not easy under the circumstances. We managed to get out something like, "Well, we're interested in the rule of law."

The young lieutenant's response to this was to look at us as though we were completely cracked. He said, "There's no rule of law here. There's no law here." Despite the presence of our Iraqi interpreter and various Iraqi police, he went on to say angrily, "These Iraqis are all corrupt. They don't know what they're doing. They just beat suspects to get confessions out of them. They take bribes. We have to tell them what to do. They don't understand anything about law. There's never going to be law here in a million years. These people just aren't ready for it. They don't understand it." Needless to say, this was not a great example of winning the hearts and minds of the local population and it was a troubling reminder that cultural sensitivity generally is not the U.S. military's strong point.

This encounter at the police station was in stark contrast to our next stop, another unannounced visit, this time to an Iraqi court. It was sweltering there too—same lack of electricity—but we were met by a middle-aged Iraqi judge who, despite the heat, was wearing a heavy, dark suit and a tie. He looked very uncomfortable, but it was clear that maintaining professional standards was important to him. Once again, we explained that we were researching efforts

to build the rule of law in post-conflict societies. He responded by saying, "Well, the first thing you need to understand, and that most Americans don't understand, is that Iraq has a very ancient legal tradition."

We nodded, and he said, "Are you familiar with the Code of Hammurabi?" We replied that we knew of the Code of Hammurabi, and he said, "Well, most Americans have never even heard of it. Iraq has an ancient legal culture. We don't need you to come here and tell us about what law is. We invented law. This is the cradle of Western civilization. We are the people who figured law out, thousands of years ago. But now your soldiers are coming in and telling us what to do, and you're not respecting our legal traditions or legal process. The first thing the Americans did after the war was to announce that they were immune from Iraqi legal process. So, if an American commits a crime, they're completely immune, there's nothing that we can do about it. The Americans are unaccountable. How can this be the rule of law?"

The Iraqi judge had a long litany of complaints about American-led rule of law programs. He said—and of course I am paraphrasing here—"We have all sorts of day-to-day problems in the administration of justice. You say that you want to respect our indigenous system. We are trying to get crime under control. But suspects will be brought in by the Iraqi police, and we will order that they be detained so that they can be tried and, half the time, some American will come in and order that they be released again. And the other half of the time, suspects are hauled in by somebody, including, maybe, the Americans, and we have a preliminary hearing, and decide that they ought to be released because there's not enough evidence against them. But then some American comes in and says 'No, no, no. We're going to detain them.' And off they go, taken to some military detention facility and we never see them again. What kind of rule of law is this? This is not the rule of law. You say you want the rule of law, but you seem to be setting an example of total arbitrariness and inability to respect our local processes."

This Iraqi judge was just as skeptical about the idea of the rule of law in Iraq as the young and undiplomatic American military police lieutenant, although he came at the issues from the opposite perspective. Although he was extraordinarily polite to us, given the circumstances, his attitude was clear: How can the U.S.-led coalition in Iraq claim to care about the rule of law when it maintains control—tenuous control—only through overwhelming force and when its actions strike many Iraqis as inconsistent and arbitrary? To put it a little differently, how can you pull the rule of law from the barrel of a gun?

The rule of law is an elusive state of affairs, although most people who design and implement rule of law programs might be reluctant to acknowledge

this. As I said a few minutes ago, the rule of law is one of those “I know it when I see it” concepts. Few of us could define it, but most of us are pretty sure we know what it is. Of course, if you are not satisfied with relying on sheer instinct, you can read dozens of highly theoretical law journal articles arguing over just what the rule of law is or is not. But whether we rely on intuition or on carefully reasoned theory, most of us would probably agree that the rule of law has both a procedural dimension and a substantive dimension, and that the two are interconnected. That is, the rule of law has something to do with procedural fairness, with neutral mechanisms for decision-making, and with lack of governmental arbitrariness. Under the rule of law, laws are fairly and democratically enacted, they are known in advance, and they apply equally to everyone—not only to those with less power. The rule of law also has something to do with the conviction that processes based on rules and reason have to trump force; that rights are more important than sheer might. Saying this, of course, implies the existence of some shared substantive conception of rights.

This suggests an even deeper reason for why it is tough to create the rule of law. You can do as much as you like to set up judicial institutions and revise statutes, but the bottom line is that if one wants to achieve that magical thing—the rule of law—one not only has to create fair, appropriate, and reasonable laws and institutions, one also has to create a widely shared societal commitment to using those laws and institutions. To put it a little differently, the rule of law only works if people believe in it. People have to believe that rule of law mechanisms—the courts and all the other institutions of governance—are there for them, will work for them, and will be a viable alternative to other means of resolving disputes and getting things done. People have to have enough faith in legal institutions to make them willing to eschew violence, to eschew self-help, and to refrain from turning to the local warlord, militia leader, or extremist religious organization to solve their problems.

Conversely, if most people do not believe in the efficacy and worth of legal institutions, it will not do much good to create them, no matter how good they look on paper. It is not like the movie *Field of Dreams*,<sup>5</sup> where the refrain was, “If you build it, they will come.” When we are talking about legal institutions, no one will necessarily come unless they are convinced that it makes some sense for them to do so. To use a wildly overused phrase, creating the rule of

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<sup>5</sup> FIELD OF DREAMS (Universal 1989). The actual quote is “If you build it, he will come.”

law is a matter of winning hearts and minds as much as a matter of creating institutions.

In Iraq today, American-led efforts to create the rule of law keep bumping up against a fundamental paradox. We govern Iraq—to the extent that we govern Iraq—because we had the military muscle to invade it and defeat Saddam's armies, even when many of our allies did not want us to invade Iraq. As the world's sole superpower, we were able to do what we wanted and no other nation could hope to stop us. We encountered a great deal of diplomatic opposition, but we invaded Iraq anyway. Maybe that was the right thing to do or maybe it was the wrong thing to do. Maybe it was a little bit right and a little bit wrong, or right in principle but done at the wrong time or in the wrong way. We could debate this eternally, but the bottom line here is that the United States was powerful enough to go its own way—right or wrong—and we did go our own way.

So our current adventures in Iraq began with a military invasion that was perceived by many around the world—including most ordinary Iraqis—as illegitimate, enabled by our superior military might rather than by international law. Not an auspicious start to the project of convincing a defeated post-conflict population to believe in law and in reason, rather than the efficacy of coercion. It is hard to proclaim the virtues of rights over might when you have just offered the world an object lesson in might makes right.

Since the end of the war in Iraq, the misunderstandings born of this paradox have only proliferated. Iraqis—like the judge I mentioned earlier—often see the actions of the Americans in the judicial arena as rather arbitrary and this spells danger for the project of creating the rule of law in Iraq. Under Saddam Hussein, Iraq's legal and judicial institutions were badly discredited because they were naked instruments of his political power. But if U.S. efforts to reform the Iraqi legal system appear arbitrary, many Iraqis may find it hard to tell the difference between Saddam's rule of law and American rule of law.

Of course, we all think, "Well, there's a huge difference," because after all, we are the good guys and we genuinely want fairness and reform, whereas Saddam ruled for his own benefit, not for the benefit of the Iraqi people. And of course I believe that there is a real and profound difference. But from the perspective of a young Iraqi who is plucked off the street by American soldiers and tossed into detention, maybe because he is hanging out with some bad guys or maybe because he is just in the wrong place at the wrong time, it may not seem that different on the ground.

It is tempting to conclude from what I have said that the problem is that the Coalition is being a little too heavy handed with the Iraqis and that if we want

to create the rule of law, we should first take a big step back. I do not think that is the solution either. When you ask Coalition officials, "Why do you sometimes release Iraqis who the Iraqi judges think should be detained, and detain those who Iraqi judges order released?" you actually get a fairly persuasive answer. Coalition officials will give a somewhat more diplomatic version of the comments the young American lieutenant offered, saying something like, "Because we've looked at the evidence and sometimes people are being released or detained by the Iraqi judges on purely nepotistic grounds, or as a result of bribes or intimidation, or because the evidence against them was clearly trumped up, or they were beaten to get a confession. The Iraqi judges may claim to be fair, but they are not. We may appear to be arbitrary to onlookers who see only that we sometimes countermand what the Iraqi judges say, but in fact, we are applying genuine rule of law standards, insisting on due process and true fairness."

Much of the time, this is undoubtedly the case. It would be silly to deny that there are deep problems with the Iraqi judicial system. Although Iraq has many dedicated and honest police and judges, the political system under Saddam Hussein also left a legacy of corruption and abusiveness. The American willingness to settle disagreements by falling back on our superior force undermines our claim to stand for the rule of law in many respects. But the alternative would also undermine the rule of law. If we simply stood by, wringing our hands in the face of evident abuses, we would not be doing anybody a favor either.

This is the inherent paradox faced by those who wish to promote the rule of law but are in a position to do so only by virtue of their possession of superior force. Hobbes would have seen no contradiction here, but we Americans owe more of our assumptions to Locke and his "kinder, gentler" vision of the relationship between law, power, and legitimacy than to Hobbes' grim realism.

Is there any way around the difficulties and paradoxes I have outlined so far? I have said that building the rule of law in post-conflict societies is difficult in general because there are so many moving parts. It is an unbelievable coordination challenge, much harder than getting those rovers up to Mars, because you are dealing with human beings and not machines. It is particularly hard, as I have said, in the context of places like Iraq or Afghanistan, when the international community is present by virtue mainly of superior force, which is inherently somewhat contradictory to the idea of building the rule of law. I do not think there is any simple solution. Nevertheless, I think that there are lessons that could be learned, although, like Scott, I am skeptical about our

collective capacity to learn them. Let me quickly suggest a few of these lessons.

The first lesson is, or ought to be, obvious: Plan in advance for these kinds of problems. For example, in the Iraqi context, lack of advance planning hampered U.S. efforts from the beginning. As a result, we missed a window of opportunity very early on after the war ended. By failing to anticipate looting, sabotage, crime, and the exceptionally high level of human need we faced in post-war Iraq, we missed our chance to create security, including human security in the broadest sense, and as a result we sacrificed a critical chance to win the trust of ordinary Iraqis.

A second lesson: Know the culture and the language well. During our visit to Iraq, my colleagues and I were tremendously impressed when we ran into Captain Hall and found him chatting away in Arabic to an Iraqi judge. It was great to see an American JAG officer speaking fluent Arabic and working with Iraqis as colleagues. Even our Iraqi interpreter was impressed. But when we told Coalition authorities how impressed we had been by Captain Hall and asked how many other JAG officers spoke Arabic, we were told sheepishly that Captain Hall was pretty much the only one. This is a real tragedy. If we hope to build trust and to work to promote the rule of law in post-conflict societies, we desperately need more people like Captain Hall, people who are capable of engaging in a respectful and appropriate way with local people, and engaging with them on their terms, not just on our terms.

Third, if we want to create the rule of law, we need to lead by example. That means that not only must we—our troops, our officials, and our civilians—abide by the highest human rights standards, but we need to do so visibly, in a way that is plain to all Iraqis and all the world. When there are abuses committed by American officials or soldiers, we need to make sure that the resulting investigations or disciplinary procedures are as public as possible. If we want to maintain credibility, it is critical that we avoid even the appearance of double standards. We need to show that despite our possession of superior firepower, we are willing to comply ourselves by the very same set of rules we want others to comply with.

Fourth, if we care about the rule of law, the United States needs to take a more multilateral approach. This paradox that I have talked about—how to bring the rule of law from the barrel of a gun—partly stems from the fact that in Iraq, the face of the guy with the gun and the face of the guy urging the rule of law are one and the same. With almost all the troops and civilians on the ground operating under the auspices of the American military, most Iraqis unsurprisingly find it difficult to distinguish between our claims about



legitimate authority and rights and our sheer power. Making sure that both soldiers and civilians come from nations all over the world would not entirely solve this problem, but it would certainly help give rule of law efforts a bit more credibility.

Finally, the last point: We need to be more open about acknowledging these paradoxes, both to ourselves and to the affected populations in societies such as Iraq. In effect, we need to be honest enough to say to the Iraqis, "Look, we know it's hard to sell you on the value of the rule of law when we're the ones with the guns, and the tanks, and the helicopters. We're going to tell you to do some things that you may not want to do, and the bottom line is that you won't have much choice about some of these things, because we won and you lost. But we promise this won't be forever, and in a few years it's going to be entirely up to you again."

Broadcasting this message would make a lot of people angry but I suspect such an honest message might make people somewhat less angry than the current state of affairs. Right now, Iraqis rightly decry what they perceive as deep American hypocrisy: we have one group of soldiers out shooting at people to make them behave the way we want and another group of soldiers simultaneously standing around in Iraqi courts saying, "Come on, folks. Let's all join hands and believe in reason, rights, and the rule of law."

We are trying to have it both ways and we cannot, so we might as well admit the problem. There is no simple solution, but being straightforward about the nature of the problem is the beginning of the way forward. Thank you.

*Mariam Nawabi:* Other panelists have identified a lot of lessons learned. I will cover the post-conflict situation and major differences in the Afghan multilateral effort. In Afghanistan, you have not only the United States involved, but a lot of European countries, Japan, Australia, and others. Afghanistan does have its own sovereign government that is working in conjunction with the international community. Also, the Afghan people, the majority, welcomed the international involvement in the country because of the past twenty-three years of conflict, because the people wanted to build peace and to reconstruct the country, and because they know it cannot be done alone. The Afghan government, right now, does not have the resources and capacity to take on this huge task on its own.

One of my favorite quotes is, "The pen is mightier than the sword." Moving Afghanistan away from the rule of the gun to the rule of law is crucial to the development of the whole country. The Afghan government is

committed to establishing the rule of law and in the past couple of years, since the fall of the Taliban, has made significant progress in that area. But given the devastation in Afghanistan over this twenty-three year period of conflict, the legal system has just been devastated, both in terms of infrastructure and human capital. There is the lack of resources to train the judicial personnel that Scott was referring to.<sup>6</sup> There is a greater need for donor support and coordination in the area of judicial reform because you do have more than one country involved in the reconstruction efforts. Lastly, the lack of international support to expand the International Security Assistance Force (ISAF), outside of Kabul during this whole two-year period after the fall of the Taliban, has made it a tremendous challenge to implement the rule of law outside of Kabul.

Democracy is not a new concept for Afghans. Actually, it is embedded in the culture. There are *jirgas*; there is also the *loya jirga*, which is a gathering, a convening, of people from around the country, similar to what we would think of as a referendum process in the United States. Afghans have been using the *jirga* process to resolve certain issues of national importance. There are also *shuras*.<sup>7</sup> At the local level these councils decide issues by consensus. The cornerstone and foundation of democracy is there, but in order to develop a democratic and moderate Islamic state in Afghanistan, it is going to take a long-term commitment. Short-term plans will not work because of the devastation that the country has experienced from the Soviet invasion, the civil war, and then the Taliban.

Although there are still areas of conflict in the south, I define post-conflict Afghanistan as post-Taliban Afghanistan. In order to understand post-conflict Afghanistan, it is important to understand, as Scott said,<sup>8</sup> what the legal system was like before the Taliban. Afghanistan is unique in the region in that it developed an indigenous legal system. It was never colonized by the British. Thus, it borrowed from different countries based on its needs at the time. It is largely a civil code country that developed its codes from the Ottoman Code. It borrowed from the French, the Egyptians, as well as Afghan legal institutions. The main codes that existed were a civil code, a commercial code, a penal code, and a criminal procedure code.

In addition, even though it was a constitutional monarchy for most of the last century, it did have a parliament that passed stand-alone legislation, so there were statutes that existed. There was an independent judiciary, although

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<sup>6</sup> See *infra* pp. 123-24.

<sup>7</sup> *Id.*

<sup>8</sup> See *infra* p. 121.

the king exerted a lot of power and had veto power. Nonetheless, the judiciary heard cases and interpreted legislation. There is also a history of constitutionalism in Afghanistan, although unfortunately the country has seen too many constitutions because of all the political changes that took place.

Afghanistan has seen, in the last century, an absolute monarchy, a constitutional monarchy, a republic, communism, an Islamic republic during the civil war, and a theocracy under the Taliban. The new challenge will be to move Afghanistan into a democratic and moderate Islamic state. It is a tremendous challenge. The Afghan people have experienced these different systems within their lifetimes. Talking to some of the people in Afghanistan during my trips there, they have learned a lot of lessons and I think the international community needs to pay attention to that when they are working on rule of law programs in Afghanistan.

Another important thing to know about the Afghan legal system is that there is an informal as well as a formal legal system. In the United States, when we think of a legal system, we automatically think of courts and established legal procedure. However, in many areas of the world, the rural areas do not have the capacity to extend that type of system; there is no physical infrastructure there. To fill that void, people have developed institutions such as *shuras*. Arbitration, as well as other alternative ways to resolve disputes, has been used in Afghanistan for hundreds of years. They have worked quickly and effectively for the rural communities for many years. When constructing a rule of law program or thinking about rule of law issues, it is important to realize that that is the way the legal system exists. In large part, the majority of Afghans have more experience with the informal legal system than they do with the formal system. Thus when international organizations are trying to create programs, they impose a formal legal system in an area where it does not fit and where there is no capacity to develop it. Going back to what the other panelists said, it is important to understand the situation that you are working with and to ask the people what they need.<sup>9</sup> I have seen so many programs that are designed based on other people's ideas. It is all done with good intentions, but they never ask the people in that area what would work for them. I think that is one of the biggest mistakes that can be made.

Going back to the post-conflict period in Afghanistan after the fall of the Taliban, there was an agreement in Bonn, Germany.<sup>10</sup> Afghan stakeholders got

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<sup>9</sup> See *infra* pp. 122, 129-35.

<sup>10</sup> Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment

together at this conference and really set out a framework for how the legal, political, and constitutional development would take place from 2002 to 2004.<sup>11</sup> The Bonn Agreement is a simple document—only four pages—but it created some new institutions that have been used the past two years. There have been some successes and some failures. As it was a short document, there were a lot of ambiguities. As lawyers, we know that once a document is in place, it is sometimes hard to figure out the intent or whether a certain issue was ever thought through to begin with. I think that one of the most important things that has come out of the Bonn Agreement is that it has set the legal precedent that is the beginning of establishing the rule of law. One thing that I have seen that has been a good development is that every time there is a question of how something should go forward, everyone refers back to the Bonn Agreement. They do not try to create a new document or new rule. If it is not in the Bonn Agreement, they look to Afghan law and international law to resolve the issue.

The Bonn Agreement created several institutions: the judicial reform commission,<sup>12</sup> a human rights commission,<sup>13</sup> a constitutional commission,<sup>14</sup> and an independent election commission.<sup>15</sup> These institutions have been used in Afghanistan since 2001, although they developed differently based on the support they got from donors, which is one of the things I will talk about in terms of the judicial reform commission. They developed at least some sense of a plan for going forward for these areas.

The Bonn Agreement also authorized the creation of the international assistance force, ISAF,<sup>16</sup> a four thousand to five thousand-member, multinational force inside Kabul that has been very successful the past two years. Unfortunately, this has never expanded, and although there was one deployment sent to a city in the north that did not need it so much, there has not been a plan that has affected the whole country in terms of providing security. That has been one of the most important impediments to providing security and establishing the rule of law in Afghanistan.

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of Permanent Government Institutions, Dec. 5, 2001, [http://www.usip.org/library/pa/Afghanistan/pa\\_afghan\\_12052001.html](http://www.usip.org/library/pa/Afghanistan/pa_afghan_12052001.html).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* pt. II(2).

<sup>13</sup> *Id.* pt. III(c)(6).

<sup>14</sup> *Id.* pt. I(6).

<sup>15</sup> *Id.* pt. IV.

<sup>16</sup> *Id.* Annex I.

To give you an example, in Bosnia, there was approximately one peace-keeper for every sixty-five people.<sup>17</sup> In Afghanistan, that number is about one to 5300.<sup>18</sup> That shows you the disparity; without proper security in areas outside of Kabul, it has been and continues to be a challenge to establish any type of rule of law program.

Early in 2002 there was a donor conference in Tokyo.<sup>19</sup> The UN decided to do things a little differently in Afghanistan than in previous post-conflict situations where the UN had taken the responsibility of managing the whole country. When things did not go right, the donor countries blamed the UN. What they did differently was they asked donor countries to become the lead donor on a certain issue. For example, in Afghanistan, the United States took the lead on training the new Afghan military; the Germans took the lead on training the police force; the U.K. took the counter-narcotics area; Italy took judicial reform; and Japan took demobilization of former militia. This approach has been interesting and in some areas it has been effective. For example, Germany has a pretty effective training program for police officers. They have refurbished and reestablished Kabul's police academy. They have been working on police training and providing equipment and vehicles. The United States has also been doing that for already-commissioned officers. Unfortunately, in other areas, such as judicial reform, certain countries, like Italy, subcontracted their work out to an international organization and were not very active in terms of providing leadership. As a result, the judicial reform commission that they were supposed to assist has not been receiving the support it needs to come up with any type of strategy or plan. Up until last year, they did not have one advisor to help on budgeting and technical issues.

On the other hand, the constitutional commission received a lot of international attention and support. Within a year-and-a-half period, that process was pretty successful. But throughout that whole process, I kept thinking, "What's going to happen after a year and a half when you have this constitution and you don't have any institutions to implement it?" That is the point where Afghanistan is now. This judicial reform that should have been a priority from the beginning was not. Thus, in Afghanistan, you have a

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<sup>17</sup> Press Release, CARE, CARE Says Ideal Time to Expand ISAF Mandate in Afghanistan (Aug. 11, 2003), at [http://www.careusa.org/newsroom/pressreleases/2003/aug/08112003\\_afghanistan.asp/](http://www.careusa.org/newsroom/pressreleases/2003/aug/08112003_afghanistan.asp/).

<sup>18</sup> See *id.*

<sup>19</sup> International Conference on Reconstruction Assistance to Afghanistan, Tokyo, Japan (Jan. 21-22, 2002), at [http://www.mofa.go.jp/region/middle\\_e/afghanistan/min0201/index.html](http://www.mofa.go.jp/region/middle_e/afghanistan/min0201/index.html).

multilateral approach, which is good. The downside is that it can lead to lack of coordination and uneven development.

In terms of security, the Afghan national army and police are being trained. But the pace has not been going fast enough to really provide security and that is why the Afghan people have been asking for the security forces to extend their presence beyond Kabul.

Opium production is still a problem in terms of establishing the rule of law. We all know what type of activities a drug trade can cause in a country. It leads to the financing of terrorist activities and to corruption in the whole judicial system, so there has to be a good enforcement program. It can only be done with the help of the international community providing the incentives and enforcement needed to curb the drug trade. Unfortunately, from 2002 to 2003, the drug trade doubled in size to half the size of the legal economy.<sup>20</sup> That is another one of the major issues affecting rule of law in Afghanistan.

In terms of the status of the Afghan legal system right now, it is important to understand the baseline. When you think of a courthouse, something maybe as beautiful as this, you do not see that in Afghanistan at all. A court could be a room in some rundown building. Outside of Kabul, there is not much. There has been some physical reconstruction of the facilities, but it is still not what we are used to here in the United States in terms of physical infrastructure. Capacity is another major issue. During the Soviet invasion, a lot of qualified people left or were executed. So, in that twenty-three year period, people who had the expertise to serve as judges and lawyers died. At the same time, there was no training of new people. So, there is a thin layer of capacity in Afghanistan. You do have some people who have the capacity, but then they do not receive the necessary support. There has to be a lot of support for building up a new generation of Afghan lawyers who can serve. They are the ones who are going to help implement this constitution and defend the people's rights in the country.

Some law reform programs have been successful. I do not want to seem too negative and just point out the challenges. A new banking law passed last year resulted in three new commercial banks in Kabul. A new press law was passed and 250 independent publications were created. A political party law was passed as well as a very liberal investment law. In these areas there have been a lot of successes. But there has been a great divide between these areas of

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<sup>20</sup> OFFICE ON DRUGS AND CRIME, UNITED NATIONS, AFGHANISTAN OPIUM SURVEY 2003 52 (2003), [http://www.unodc.org/pdf/afg/afghanistan\\_opium\\_survey\\_2003.pdf](http://www.unodc.org/pdf/afg/afghanistan_opium_survey_2003.pdf).

commercial law and the kind of law that affects people day to day, for example, criminal law and family law.

In Afghanistan, it is not just the lack of capacity, but also a lack of access to the law during periods of conflict. When you have different regimes enacting different laws, it is difficult to know what law applies. The cataloguing has taken place that Scott was talking about,<sup>21</sup> but no one has gone through the process to determine which laws should apply. That will likely be one of the huge tasks for this new parliament that will be elected.

You cannot build the rule of law until you know what it is. Unfortunately, because of this conflict, many of the laws were lost and destroyed. On top of that, there were several different regimes who came in with different laws. These are just some of the challenges and they are illustrative of what is happening in Afghanistan. I think it is important to work, as Professor Brooks said, with the people in the country, to follow their plan, and to assist them, rather than coming in with your own predetermined plan and vision of what you think is good for the country.<sup>22</sup> Thank you.

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<sup>21</sup> See *infra* p. 123.

<sup>22</sup> See *infra* pp. 129-30, 135.

