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**Briefing on Human Rights in Afghanistan**

**Before the U.S. Helsinki Commission**

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Thank you, Mr. Chairman and Members of the Commission for the opportunity to present my views on the current situation of human rights in Afghanistan. Assessing the situation of human rights in Afghanistan is a challenge because of the extraordinary breadth and depth of issues that need improvement. There has been significant progress in several key areas of human rights since the adoption of the new Afghan Constitution in 2004, which guarantees Afghans the full range of human rights included in the relevant international treaties. Most notably, Afghans enjoy much greater access to education and healthcare, as well as the ability to participate in a more open political process.

That said, significant improvement must be made. I worked for the United Nations in Afghanistan in 2005 and 2006, where – like my work at USIP – I focused on rule of law development. Few factors are more important for improving the situation of human rights across the board in Afghanistan than establishing the rule of law, and few areas are in greater need of reform.

*My remarks therefore focus on four critical areas that must be improved to reverse the erosion of the rule of law in Afghanistan and improve the fundamental conditions for human rights:*

- 1. fighting pervasive impunity;*
- 2. ensuring free and fair elections;*
- 3. taking action to achieve transitional justice; and*
- 4. focusing more attention and resources on judicial reform.*

**I. The Need to Combat Impunity**

The greatest obstacle to establishing the rule of law in Afghanistan is impunity. Since the end of the Bonn process a consistent pattern of non-accountability for crime and abuse

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\* This statement presents the personal views of the author, not those of the United States Institute of Peace, which does not take positions on policy issues.

has been firmly established. Powerful individuals are increasingly able to flout the law because of their weapons, their family connections, or their money. It is safe to say that in all of the most important areas of law enforcement in Afghanistan – from corruption to narcotics trafficking, land grabbing, and a host of violent crimes – almost no powerful leader has ultimately been brought to justice. Those few that have been marginalized or demoted were as a result of political deals made behind closed doors – reinforcing the impression that individuals matter more than institutions in Afghanistan, and personal negotiations matter more than process.

Pervasive impunity and the unchecked corruption that facilitates it directly undermines the legitimacy of the government in the eyes of the Afghan people and cripples the credibility of the legal system. It is not surprising then, that the ABC News poll released last month showed less than a 50 percent approval rating nation wide for the Afghan government. A similar 2008 poll by The Asia Foundation found that half of Afghans thought the state justice system was ineffective, corrupt, and unfair. By failing to provide basic justice and accountability, the Afghan government invites support for the insurgency and further destabilizes the security situation.

Perhaps the most illustrative example of impunity is the case of Abdul Rashid Dostum. General Dostum has a long history of combat in Afghanistan. He gained notoriety as a brutal communist army commander whose alliances shifted during Afghanistan's long civil war. He then fought the Taliban as leader of the ethnically Uzbek faction of the Northern Alliance, and gained favor by serving as a proxy force for the 2001 U.S. campaign to oust the Taliban. In each conflict, he has been accused of war crimes and serious human rights abuse – most recently with credible allegations that his men were responsible for the death of thousands of captured combatants who were sealed into steel shipping containers and killed in 2001.

The new Afghan government had an opportunity to send a strong signal that human rights abuse would not be tolerated after the Bonn Agreement was signed, but instead it appointed Dostum to a series of prominent government positions. If this form of accommodation was supposed to have a moderating effect – keeping him “inside the tent” and not tearing it down – it has failed remarkably. In February of 2008, a kidnapped political rival was held hostage in his downtown Kabul home and severely beaten. After a public standoff with the Afghan National Police, the victim was released, Dostum was never arrested, and the Karzai administration said openly that he was too powerful to confront.

The failure to address even the most egregious violations not only enables continued human rights abuse. It also demoralizes those who are working for justice and erodes public trust in government. It is not just powerful warlords who represent the impunity problem, either. At the National, provincial, and local levels, weak courts and a lack of political will enable abuses large and small to go unpunished. Drug dealers are let out of jail after a few days detention. Rapists are pardoned after their convictions. At the same time, the criminal justice system is plagued by systemic problems of unlawful pretrial detention for “ordinary” cases that go unheard.

Some argue that fighting impunity must wait until “stability” is established – that warlords are too powerful to confront before democracy takes root. But the evidence of the last seven years in Afghanistan indicate the opposite: that as long as corruption, drug trafficking, land grabbing, and violent crimes are left unchecked, sympathy for the insurgency grows and violence and instability increase. In fact, the number of foreign or domestic troops brought in to fight the Taliban will matter little if the people do not see their government as a legitimate entity that can provide basic rule of law, thereby deserving their support.

*Therefore, Afghanistan must take more effective steps to combat impunity of powerful leaders who flout the law in almost every area of justice. In doing so, Afghanistan’s leadership must demonstrate that democratic government is different from the warlord politics of the past. This can be done by publicly condemning the worst abuses and following up with action – either firing individuals who have abused their positions or prosecuting the most egregious violations of the law.*

## **II. Set the conditions for a legitimate and fair election.**

Ensuring a legitimate political process is also crucial for protecting human rights in Afghanistan. Both Presidential and Provincial Council elections will be held in August of this year, and each faces unique challenges to ensuring legitimate outcome. If the elections are not conducted in a way that preserves voters’ and candidates’ civil and political rights, then the entire democratic experiment in Afghanistan is in jeopardy.

For the **Presidential election**, the main risk – apart from the generally deteriorating security situation – is that government resources will be used inappropriately to support Presidential candidates’ campaigns. This applies mainly to President Karzai, but could be a significant issue for any others running who currently hold government posts.

Improper use of government resources could take several forms. State controlled media may produce biased reports in favor of or against particular candidates. Likewise, independent media may be pressured by government regulators not to report certain campaign-related stories. Government officials appointed by any of the Presidential candidates may use their official powers to support a particular campaign, or look the other way in the face of obvious violations at the District or Provincial level. And for all candidates, prohibited foreign financing may be used to evade caps on campaign spending limits to produce an uneven playing field.

*To protect against these violations of the democratic process, robust domestic and international monitoring of the election process is essential. Local observers in particular must be vigilant about limitations on the freedom of the media and the freedom of expression by candidate supporters – and they must be supported with sufficient resources from international partners to do so. A system for the public financing of equal media access by the candidates, which was one of the most effective programs of the*

*2005 Parliamentary elections, would also help to limit the impact of violations of campaign finance rules.*

The biggest threat to free and fair **Provincial Council elections** is the risk that candidates with weapons – and demonstrably poor human rights records – will seek to intimidate their way to victory at the polls. In recognition of the threat illegal militias pose to the democratic process, the Afghan Electoral Law explicitly prohibits candidates who belong to “Illegal Armed Groups” from running for office. Over the past year, the U.S. Institute of Peace has led a process to explore options on how best to implement the law.

In the 2005 Parliamentary and Provincial Council elections the vetting process largely failed. Hundreds of candidates with identified links to illegal militias ran for office but only 34 were disqualified. The results were predictable: By one estimate, 40 percent of the elected Parliament had strong ties to either current criminal activity or a history of serious human rights abuse. Fundamental reforms on the rule of law and human rights simply cannot be made if so many national decision makers are themselves benefiting from corruption, drugs, or human rights violations. The sizeable presence of warlords on the ballot also significantly reduced voter turnout, which itself undermined the legitimacy of elections.

Looking to the elections in August of this year (and further ahead to 2010), the same problem persists. Based on the success of illegally armed candidates gaining status and legitimacy in the 2005 elections, local commanders who thrive outside the rule of law are likely to run again. Vetting in the Provincial Council elections targets “lower profile” leaders who do not sustain a national power base, but engage in predatory behavior at the local level that violates a range of important human rights. Polls repeatedly show that Afghan citizens reject their legitimacy but lack the power to overcome their influence. If the ‘worst of the worst’ armed commanders run for Provincial offices in Afghanistan, they will intimidate voters, delegitimize the electoral process, and undermine the U.S. and Afghan interest in increasing local governance capacity and credibility.

*Minimum improvements must therefore be made over the unsuccessful vetting process in 2005 for Afghans with little experience of democracy to view elections as a vehicle for positive reforms rather than a mechanism for ratifying warlords’ power. Most urgently, the U.S., NATO, and Afghan government officials need to compile a credible national list of Illegal Armed Group affiliation that is free of ethnic or political biases. Second, the Independent Election Commission must publicly issue appropriate guidelines to ensure that the vetting process is transparent and fair.*

### **III. Focus greater attention on transitional justice.**

Afghanistan’s three decade long experience with war has left a legacy of abuse that impedes national reconciliation and, left unaddressed, will act as an anchor against democratic development. In recognition of this problem, the Afghan government approved the Action Plan for Peace Justice and Reconciliation in December 2006, which

was intended “to enhance peace and stability in Afghanistan through a process that will achieve reconciliation and justice.” The plan calls for five steps to move forward with transitional justice: 1) acknowledge people’s suffering; 2) purge human rights violators and criminals from the state institutions; 3) pursue truth-seeking and documentation; 4) promote national unity; and 5) establish reasonable accountability mechanisms.

Key benchmarks of the Action Plan were then incorporated into the Afghanistan Compact and agreed to by the international donors to the country. Yet since then, very little has happened (apart from an attempt by members of Parliament to pass an amnesty law absolving themselves from responsibility for any past crimes). Admittedly, many transitional justice processes are difficult to initiate when conflict is ongoing, or in its immediate aftermath. But certainly seven years after the Bonn Agreement, more can and should be done to take initial steps are realizing the Action Plan’s goals.

Several common objections are heard to focusing on transitional justice now that deserve to be debunked. First, it is commonly heard in Washington that there is no national constituency for transitional justice – that everyone supports one bad patron or another and so a mutual consensus exists not to pursue truth or accountability.

Both polls and personal experience demonstrate, however, that the demand from citizens for transitional justice is actually quite high. A nation-wide survey by the Afghan Independent Human Rights Commission (AIHRC) in 2004 found that over 75 percent of Afghans thought that justice for past crimes was “very important” and nearly 70 percent wanted war criminals to be brought to justice “now” or “within two years.” In the 2005 elections, which I helped to administer, over 2000 complaints were received by the Election Complaints Commission from voters seeking accountability for candidates who had committed past crimes. Moreover, no family in Afghanistan is unaffected by the conflict, and the experience from several victims support networks that have sprung up in Kabul has shown that regardless of ethnic differences victims are unified in their desire to pursue common goals of recognition, reparations, and justice.

The other oft-stated concern about pursuing transitional justice is that it will in fact destabilize the fragile political situation by setting powerful perpetrators of past crimes against the State. The question then is what kind of state does Afghan government hope to create? In 2004, 76 percent of the AIHRC survey respondents said that judicial accountability for war criminals would “increase stability and bring security.” If that is less true now, it is because those who are most responsible for crimes have used the time during which no justice was being pursued to seize the reins of state power. As I stated above, you simply cannot form a legitimate democratic state if a significant percentage of its officials are well recognized for their criminal acts or human right abuse. And the longer a decision is put off on starting a process of accountability, the more impunity becomes entrenched.

A final objection to transitional justice in Afghanistan is that it looks to the past, and now should be a time to let bygones be bygones and look hopefully toward the future. The problem with this view is that the two are inextricably connected. The pattern of conflict

in Afghanistan over the past 30 years is one of history repeating itself. Episodes of massive human rights abuse and the discovery of mass graves have occurred in each era of conflict, often perpetrated by the same people. Again, General Dostum's case provides the most vivid example: just last summer, investigators discovered that unprotected mass graves linked to the massacre of Taliban prisoners in 2001 were dug up at Dasht-e-Leili in Northern Kabul, and evidence of war crimes was destroyed. Dostum's forces were strongly linked to the cover up, demonstrating that lenience may only give further license for abuse.

The most important argument in favor of pursuing transitional justice in Afghanistan, then, is pragmatic. You need to provide accountability for what happened in the past because unopposed the same people are continuing the same practices in the present and will almost certainly do so in the future.

What, therefore, can be done?

*First, in the absence of a well functioning legal system, the most important short term measure is to make good on the second pillar of the Action Plan and implement a vetting system that will “purg[e] human rights violators and criminals from the state institutions.”* The Afghan government has created a senior advisory panel on presidential appointments but has been hesitant to empower it with the resources or the mandate it needs to comprehensively review appointments for positions including Provincial governors, District governors, and police chiefs. Human rights criteria have also been incorporated into the vetting process for hiring by the Independent Directorate of Local Governance (IDLG), but it too has been slow to be implemented. In both cases, appropriate regulations are on the books. What is needed is a political commitment by the government to follow them and resources from donors to support a legitimate process when it begins.

*Second, the Afghan government and civil society groups should act to preserve information and evidence of past crimes both for historical purposes and for any future accountability or truth telling mechanisms.* Documentation and preservation is often one of the first and most important steps taken after a period of mass atrocities has ended. In the Balkans, Cambodia, and in Iraq, the U.S. in particular has strongly supported investigating atrocities and pursuing documentation of war crimes as a necessary condition for a sustainable peace. In Afghanistan, however, where warlords have historically been the bane of peace and stability, there is little funding or attention for this work.

*Third, the Afghan government should commit to a series of national consultations to determine the most appropriate form of memorialization for victims of human rights abuse that will promote national unity.* It should then initiate the creation of memorials at the national and local level on an expedited basis. More than 85 mass grave sites have been identified from the various eras of conflict and they might be an appropriate location to focus on for creating a program of national recognition and remembrance.

#### **IV. Prioritize reform of the legal system.**

Finally, the justice system must be reformed so that it has the capacity and legitimacy to systematically address pressing issues of impunity, corruption, narcotics trafficking, and human rights abuse. This involves supporting and training local police, hiring and training competent judges and prosecutors, and engaging in a robust program of legal education and empowerment so that people are aware of their rights under the new Constitution and can exercise them – either through a lawyer or, until enough lawyers can be trained, through paralegals or legal liaison officials from the Ministry of Justice.

These priorities are and have been relatively clear from the beginning of Afghanistan's reconstruction. But the effort to execute a strategy of rule of law reform that looks at the overall system of police, prosecution, courts, corrections, and legal education has fallen well short due to a lack of resources and lack of donor and Afghan coordination. Afghanistan has spent years working with its international partners to develop a comprehensive national justice sector strategy that calls for a holistic set of reforms. Yet so far, aid that has gone into the justice sector has focused overwhelmingly on police – who are being trained more to fight insurgents than to effectively police their communities – and to special projects that cater more to the national interests of the donor country (such as counter-corruption or counter-narcotics task forces).

Enabling the Afghan justice system to meet most international standards is a generational project. A new generation of lawyers, judges, and prosecutors must be trained and gain practical experience. Court infrastructure must be built out into the Districts. Case management systems must reduce the time it takes to reach a judgment and eliminate prolonged pre-trial detention. All of these projects would benefit from greater donor resources and better coordination with and among the relevant Afghan government agencies. But they are long term solutions.

*In the short term, several practical steps can be taken to improve the strength of the justice sector institutions that will be responsible over the long term for protecting human rights and promoting the rule of law. First, President Karzai and other senior government officials should begin making public statements that support judges and the judicial process over the preferences of narrow political interests. Second, the government must take action to curb rampant corruption in the police and courts by enabling firings and prosecutions of corrupt individuals identified by independent anti-corruption monitoring mechanisms. Third, donors should invest far more resources into the Ministry of Interior, Ministry of Justice, and Judiciary to ensure that they are able to hire, train, and retain competent staff at least in each Provincial capital. Finally, judicial training programs and justice sector strategies should borrow what works from the informal justice system that operates more effectively than the courts in most of the country rather than trying to create a model in which the perfect system becomes the enemy of one that is merely good.*

## V. Conclusion

The Bonn peace process of 2001 and the adoption of the 2004 Afghan Constitution made enormous strides in improving Afghans' human rights. Since then, however, progress has slowed, and in several key areas has moved backward – particularly with respect to instituting the rule of law. Corruption and impunity have increased, and this has caused the Afghan government to lose legitimacy in the eyes of the people and, consequently, to lose popular support. Empowering warlords who have shown greater talents for fighting than governance has exacerbated the root causes of the conflict: warlords, weapons, lawlessness and the lack of functioning government institutions. This, in turn, has significantly undermined the rule of law and the government's ability to carry out its duty to protect and promote human rights.

Now the Afghan government, supported by the international community should take several specific steps to regain momentum against impunity and promote the rule of law.

1. First, it should engage in a strategic public campaign to condemn impunity and corruption, which is backed by action to fire officials who have abused their power and prosecute the most egregious criminal acts that currently go unpunished.
2. Second, the Afghan government should work to ensure the upcoming Presidential and Provincial Council elections are conducted freely and fairly by enabling independent monitoring of the campaign and voting process and ensuring that illegally armed candidates who seek to intimidate their way into office are disqualified from election.
3. Third, the Afghan government should take positive steps toward implementing the transitional justice Action Plan by vetting candidates for Executive branch appointments based on their human rights records, by encouraging a national dialogue on memorialization of the conflict, and by protecting and preserving evidence of past crimes, including mass graves.
4. Finally, the Afghan government and the international community should fully fund the national justice sector strategy in a way that prioritizes integrated institutional development of the police, prosecution, prisons, and public education about the legal process.