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Photo by Major Paul Smith. ANA and ANP meet with local elders in the wake of Operation Mosharak.

INTRODUCTION

With one year remaining before American troops begin to draw down and four years before President Karzai’s ambitious target date for a final handover to Afghan security forces, pressure on the Afghan government and its international partners to stand up national security forces capable of protecting the population has reached an unprecedented level. Even if the Afghan National Security Forces (ANSF) progress quickly toward adequate numbers and exhibit the skills necessary to protect Afghan citizens, turning that protection into increased public support for the Afghan government will require strengthening the rule of law and improving access to justice.¹

Achieving sustainable security will rely on increasing the strength of Afghanistan’s legal framework and judicial structures with regard to government institutions and the traditional systems of dispute resolution that have served as the principal providers of justice within Afghan communities throughout the country’s history.² This edition of the *Security Sector Reform Monitor: Afghanistan* examines the nexus of security and justice in a context of acute instability, with an emphasis on the provision of justice in areas designated as “key terrain” by the Afghan government

¹ For a description of the challenges of improving ANSF competence while it undergoes rapid growth, see *Security Sector Reform Monitor: Afghanistan* Vol. 3.

² The term “traditional justice” is used throughout the paper in reference to established institutions of legal governance that reflect long-standing social structures, values and customs within a community. The term is used in contrast to the “formal justice sector,” which reflects the political priorities and social values of the central Afghan government.

ABOUT THE SSR MONITOR

The *Security Sector Reform Monitor (SSR Monitor)* is a quarterly publication that tracks developments and trends in the ongoing security sector reform (SSR) processes of five countries: Afghanistan, Burundi, Haiti, Southern Sudan and Timor-Leste. Every quarter, there will be separate editions for each case study country. Adopting a holistic definition of the security sector, the *SSR Monitor* will cover a wide range of actors, topics and themes, from reforms in the rule of law institutions and armed forces to demilitarization activities and the role of non-statutory security and justice actors.

Research for the *SSR Monitor* is field-based: a resident researcher in each case study country leads data collection and analysis, with support from desk-based analysts at The Centre for International Governance Innovation (CIGI). The same research guidelines are employed for each country. All editions of the *SSR Monitor* are subjected to an external peer review process in addition to our internal editorial review.

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and the International Security Assistance Force (ISAF).³ In particular, this *SSR Monitor* investigates the current status of efforts to enhance the rule of law by deploying judicial officials to contested areas and supporting them with a functioning set of legal frameworks and institutions. It argues that these efforts have been burdened by unrealistic expectations for the pace of institutional reform and public acceptance, questionable claims regarding the short-term efficacy of judicial reform as a stabilizing element in a counterinsurgency environment and reluctant or mismanaged engagement with traditional justice structures.

THE SECURITY ENVIRONMENT

In June, Afghanistan's security sector was rocked by the unexpected departures of top security officials from both the Afghan government and the international community. With the forced resignation of ISAF Commander General Stanley McChrystal, Afghan leaders lost a respected military and political partner (*Associated Press*, 2010). McChrystal's departure reignited a debate in the United States over fundamental counterinsurgency strategy in Afghanistan, leaving his successor, General David Petraeus, with a particularly incendiary political atmosphere to navigate as he takes command. Although Petraeus is a leading proponent of placing civilian protection at the heart of counterinsurgency strategy, he has indicated a willingness to re-examine McChrystal's insistence on prescribing rules of engagement to curb civilian casualties caused by allied operations. Karzai's continued readiness to publicly highlight these incidents despite drastic reductions of casualties caused by allied troops will lead military leaders to question whether the current tactical directives are helping build public support for the international presence (United States Assistance Mission in Afghanistan

³ Key terrain is defined by the US Department of Defense as "those districts where the bulk of the population is concentrated, and that contain centers of economic productivity, key infrastructure, and key commerce routes connecting such areas to each other and to the outside world" (US Department of Defense, 2010: 6).

[UNAMA], 2010: 13).⁴ In July, Petraeus initiated what has been portrayed in some media as a “reset” of McChrystal’s tactical directives designed to minimize civilian casualties, clarifying to lower-level officers that they retain both the freedom to fight aggressively and a robust right to self-defence (Barnes, 2010).

Two ministers at the heart of Afghanistan’s security sector resigned in the aftermath of the Consultative Peace Jirga held in June, a meeting that helped lay the groundwork for President Karzai’s reconciliation and reintegration initiative. Hanif Atmar, minister of the interior, and Amrullah Saleh, director of Afghanistan’s domestic intelligence service, the National Directorate of Security (NDS), were among the most important interlocutors to the international community. Minister Atmar had recently overseen the development of a new police strategy that had made strides in further separating the Afghan Uniformed Police (AUP) from combat-related activities, one of the key recommendations in the last *SSR Monitor: Afghanistan* (Afghan Ministry of Interior Affairs, 2010). The dual resignation is worrisome for Afghanistan’s security sector, and not only because each had a relatively good track record of reform in difficult posts. Although the circumstances of the resignations are still not fully clear, media reports indicate that Atmar and Saleh may have left their posts due to stark disagreements with Karzai regarding the reconciliation process, and also in reaction to a negative turn in Karzai’s perceptions of the international community’s role in Afghanistan, which has appeared at times to border on the conspiratorial (Filkins, 2010b).

In response to tension exacerbated most recently by American concerns about the Afghan government’s reconciliation initiative, the Obama administration has oscillated between forceful and placatory approaches to its relationship with Karzai, neither of which seems to

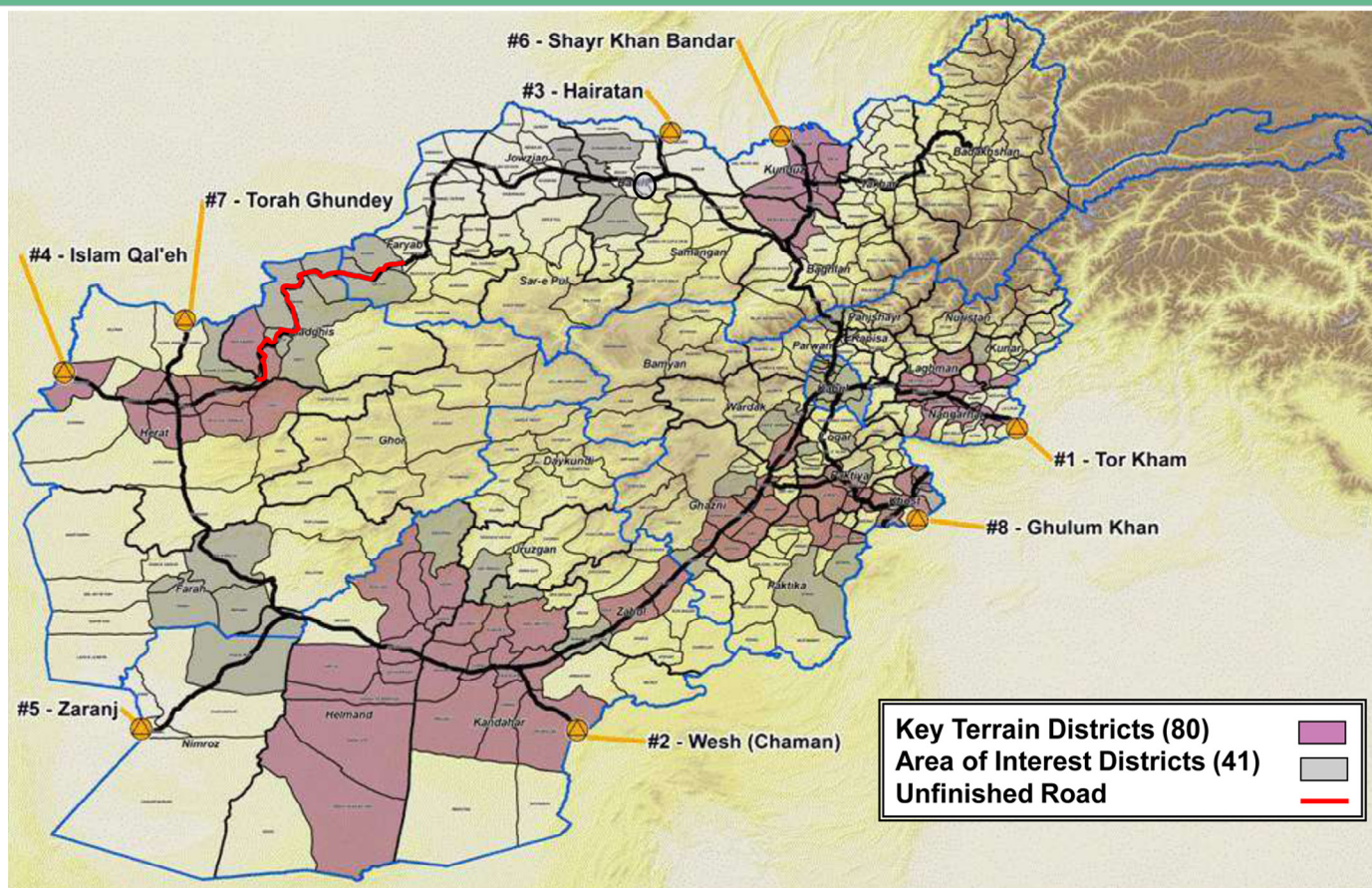
⁴ The overall number of civilian deaths increased drastically during this period due to a sharp rise in casualties caused by insurgents.

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have changed the tenor of US-Afghan relations. The extreme and erratic nature of Karzai’s outbursts toward the United States has led some analysts to suggest that the relationship is more fractured than it has publicly appeared, that Karzai’s rationality has suffered under the strain of

FIGURE 1: KEY TERRAIN AND AREA OF INTEREST DISTRICTS



Source: Cordesman (2010: 49).

governance responsibilities, or worse (Boone, 2010). Even before this series of high-profile resignations, the cautious optimism toward Afghanistan's security situation described in the last *SSR Monitor: Afghanistan* was tempered by a number of factors, including the difficulties of establishing governance in Marjah after the initial tactical success of Operation Moshtarak and an alarming spike of violence in Kandahar in advance of what was expected to be a major military operation.

Kandahar Province has long been recognized as a hotbed of insurgency. The unprecedented level of violence in recent months has been interpreted by many residents, and the Taliban itself, as a key indicator of insurgent success against the Afghan government and international actors (US Department of Defense, 2010: 21). Public fear has also risen in response to the announcement of plans for a major

military offensive in Kandahar Province, which in May compelled General McChrystal to slow the pace and lower the profile of military activity drastically, abandoning the "operation" moniker entirely (Nordland, 2010). Operation Hamkari,⁵ which had been billed as the most pivotal military offensive since the invasion of Afghanistan in 2001, has been recast as what one Western official in Kandahar would refer to only as an "intensification of current governance efforts."⁶

Aside from an influx of resources and international experts into the area to bolster development activities already underway, it is unclear how success will be defined. The role of military forces has been delineated only as it contrasts

⁵ Despite complaints by local leaders over the use of the Dari word "Moshtarak" to describe the operation ongoing in the Pashtun-dominated Helmand Province, ANSF and ISAF chose to repeat their use of Dari in coining Operation Hamkari, meaning "colleague."

⁶ Telephone interview with Western official, May 19, 2010, Kandahar, Afghanistan.

with the role of the Afghan National Police (ANP), whose ranks in Kandahar are being bolstered to secure urban centres, while military forces patrol rural areas (*National Public Radio*, 2010). In April, Karzai and McChrystal both emphasized the support of tribal elders as a precondition for any major military action, but more recently they exhibited an urgency to move forward, leveraging whatever support could be mustered (*BBC News*, 2010; Filkins, 2010c). General Petraeus is currently reviewing plans for Kandahar, adding to the uncertainty surrounding intentions for the province. The same Western official quoted above noted that “expectations in Kandahar have been shattered before,” and that the impetus is on the ISAF and the Afghan government to communicate intentions for Kandahar more effectively to both local leaders and international audiences.⁷

Prospects for bolstering the Afghan government’s competence and legitimacy in Kandahar are clouded by the troubles facing efforts already underway in Helmand Province, where the District Delivery Program (DDP), coordinated by the Independent Directorate of Local Governance (IDLG), is engaged in its first attempt to rapidly stand up governance institutions at the local level.⁸ Guaranteeing security for both Afghan officials and the public has proven far more difficult than imagined, because Taliban have either infiltrated previously cleared areas or simply laid their weapons aside for the time being, undercutting public support for governance initiatives and coercing the population with threats of violence after allied troops leave the area (Gall, 2010; Reichmann, 2010).

In Helmand, Kandahar and elsewhere, the international community has cited the provision of strong local governance as the principal determinate of success in the counterinsurgency mission. Unfortunately, the spring of 2010 has shown that while competent governance and security are closely linked, the development of strong governance structures is a process

⁷ Telephone interview with Western official, May 19, 2010, Kandahar, Afghanistan

⁸ For a detailed description of the District Delivery Program, see *SSR Monitor: Afghanistan*, Vol. 3.

SSR RESOURCE CENTRE

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On April 28th, CIGI launched an exciting new initiative, the **SSR Resource Centre**. The Resource Centre is a website intended to serve as a hub and meeting place for SSR practitioners, analysts, policy makers and interested observers from across the world. It features:

- A blog highlighting recent developments in the SSR field;
- A calendar listing SSR-related events across the world;
- Country profiles for countries/regions undergoing SSR;
- Multimedia content, including video and audio interviews of SSR experts; and
- Access to CIGI’s SSR research, including the quarterly *SSR Monitor*.

The site will be dynamic – updated daily – and interactive – with all blog pages comment-enabled and external contributions welcomed.

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too slow to provide a short-term remedy to insecurity. In particular, the establishment of a minimally effective judicial sector relies on an element of trust and legitimacy that will be achievable only through years or even decades of protracted work. It will certainly not be in place by July 2011, when American troops will begin drawing down, or 2014, when Karzai hopes to have transferred security responsibilities fully to the Afghan government.

EXTENDING THE FORMAL JUSTICE SYSTEM

Before the February offensive in Marjah, General McChrystal described the anticipated DDP program in the region as the provision of “government in a box” (Filkins, 2010a), standing by to fill the post-combat vacuum with competent institutions and officials drawn from the local community when possible or sent in from Kabul when necessary. This process has proven difficult in Marjah, and many practitioners with knowledge of the situation have expressed doubts about the prospect of installing effective governance in all 48 districts targeted for DDP operations this year. A US military officer with knowledge of DDP said of the “government in a box” phrase that ISAF is “trying to kill it,” having acknowledged that this terminology belies both the complexity of establishing governance and the extent to which programming will differ to reflect the diverse needs of key terrain areas across the country.⁹

A principal concern in Kabul is the lack of competent public servants to fill *tashkils*¹⁰ in DDP areas. Whenever possible, these positions will be filled from the local community to bolster government legitimacy and provide familiarity with local issues and power structures to development efforts. An official at UNAMA said that “filling these positions has been challenging,” but also noted that success in sourcing competent and knowledgeable local expertise in certain sectors, such as agriculture, has been “surprisingly easy.” The same official and many others cited positions in the justice sector as the hardest to fill.¹¹

The IDLG has set a goal to embed three judges and two prosecutors in each DDP-targeted district. There is no provision for compulsory assignments to dangerous areas,

nor are there plans to institute any such measures.¹² The Afghan government’s principal incentive for encouraging judicial officials to work in DDP areas is a salary top-up, the details of which have yet to be finalized. A UN official working on criminal justice reform noted that the intensification of assassination campaigns against public officials, tribal elders and other prominent locals has already compelled many officials to leave their provincial posts and seek refuge in Kabul. Convincing these officials to bring their valuable knowledge of local demographics and politics back to contested areas will be difficult.¹³

Protecting judicial officials more effectively was cited as a top priority by one Western official in Kandahar, where the *tashkil* is particularly large, calling for 90 judges. Twelve spots are currently filled, and the shortage is causing extreme delays in the processing of cases. He noted that while filling the *tashkil* in the near future is unrealistic, adding even a few judges will drastically reduce the workload of those already at post.¹⁴ Ensuring the security of judicial officials relies on both effective protection provided by security forces and improvements in the judicial infrastructure that can reduce exposure to threats.

In Helmand, the Afghan National Civil Order Police (ANCOP) continues to play a central role in the provision of security. In Kandahar, however, the AUP will bear primary responsibility for securing space for judicial and other officials to operate, thanks to a greater level of trust between the AUP and the population, and more advanced training in paramilitary tactics than is common for AUP units in most of the country.¹⁵ Additionally, Police Operational Mentor and Liaison Teams (POMLTs) deployed by the NATO Training Mission for Afghanistan (NTM-A) have been authorized to remain with their ANP units on a “semi-permanent” basis,

9 Interview with US military officer, May 14, 2010, Kabul, Afghanistan.

10 Tashkils are staffing lists designating the type and number of officials required to fulfill governance functions within a defined area.

11 Interviews with UNAMA official, May 13, 2010, and US military officer, May 14, 2010, Kabul, Afghanistan.

12 Interview with US military officer, May 14, 2010, Kabul, Afghanistan.

13 Interview with UN Office on Drugs and Crime (UNODC) official, May 13, 2010, Kabul, Afghanistan.

14 Telephone interview with Western official, May 19, 2010, Kandahar, Afghanistan.

15 For a detailed description of ANCOP and AUP divisions of labour, see *SSR Monitor: Afghanistan*, Vols. 2 and 3.

addressing the common complaint that quick POMLT turnover encourages lapses in trainee performance.¹⁶

The necessity of dangerous travel between home and work for judicial officials will be decreased by the construction in a number of districts of joint housing and office space for judges, prosecutors and defence attorneys, as well as greatly strengthened compound security. Officials hope this will help encourage officials to live in the districts they serve. A Western official in Kandahar was confident that new security measures would not present a barrier to public access to judicial institutions, but would not specify how the two will be reconciled.¹⁷ Some courts have been constructed in close proximity to Western military installations, simplifying security measures but blurring the distinction between the two and deterring community visitors, especially women.¹⁸

Regardless of measures taken to fill tashkils as quickly as possible, serious shortages of judicial personnel will persist in DDP areas. The Ministry of Justice is exploring a number of pilot programs designed to improve the reach of judicial officials in rural areas, in many cases initiating stopgap alternatives that challenge what one American official referred to as “Western constructions” that insist on the proverbial “judges with wigs.”¹⁹ These include the construction of “regional justice centres,” which combine a judge, prosecutor, defence attorney and police investigator under one roof in a district or provincial capital. The initiative is designed to remove the logistical barriers encountered by many rural Afghans in accessing government institutions of justice and leveraging the presence of a few officials to serve as large an area as possible. Regional justice centres will be operational in major capitals within six to nine months.²⁰

For many years, the geographical barriers to accessing government justice institutions have been exacerbated by endemic corruption and a lack of training for local justice officials. A number of interviewees viewed corruption as a symptom of insufficient pay, lack of oversight and susceptibility to blackmail by insurgents or local strongmen, the risk of which increases with distance from district centres or provincial capitals.²¹ A law professor at Kabul University described recent instances in which young graduates had entered public service as honest and reform-oriented legal professionals, only to be corrupted by low pay and political influence in the provinces.²² In the relatively peaceful northern province of Balkh, a civil society representative noted that despite improvements over time in judicial infrastructure and the training of officials, the perception of corruption within local judicial institutions has prevented any noticeable increase in the use of the formal justice system by residents.²³

While most practitioners of judicial reform in Kabul insist that rural Afghans support the presence of government judicial institutions in principle,²⁴ the combination of corruption, geographical distance to courts or officials, the slow pace of the judicial process and a perception of generalized incompetence, make the formal justice system an unappealing or prohibitively expensive tool for many Afghans seeking justice. This has provided an opening for alternative systems to step in, one of which is offered by Taliban shadow governments. Of the services offered by the Taliban shadow governments prevalent in restive Afghan provinces (and many calmer ones), institutions of justice are some of the most competitive. The strengths of Taliban justice match up well with the weaknesses of the government system. Taliban justice is swift, enforceable consistently and immediately, largely unaffected by perceptions of corruption and adjustable as necessary to match the needs of diverse

16 For a detailed description of the POMLT program, see *SSR Monitor: Afghanistan*, Vol. 2.

17 Telephone interview with Western official, May 19, 2010, Kandahar, Afghanistan.

18 Interview with US Agency for International Development (USAID) contractor, May 17, 2010, Kabul, Afghanistan.

19 Interview with American official 1, May 19, 2010.

20 Interview with American official 2, May 19, 2010.

21 Interview with Afghan United Nations Development Programme (UNDP) official, May 17, 2010, and interview with Kabul University law professor, May 11, 2010, Kabul, Afghanistan.

22 Interview with Kabul University law professor, May 11, 2010, Kabul, Afghanistan.

23 Interview with AIHRC official, April 28, 2010, Mazar-e Sharif, Afghanistan.

24 Interview with international aid worker, May 11, 2010, and interview with USAID contractor, May 17, 2010, Kabul, Afghanistan.

TABLE 1: AFGHAN ATTITUDES TOWARD LOCAL JIRGA/SHURA

	Strongly Agree (%)	Agree Somewhat (%)	Disagree Somewhat (%)	Strongly Disagree (%)
Local <i>jirga/shura</i> are accessible to me.	35	44	13	5
Local <i>jirga/shura</i> are fair and trusted.	24	48	20	5
Local <i>jirga/shura</i> follow the local norms and values of our people.	25	45	21	5
Local <i>jirga/shura</i> are effective at delivering justice.	25	44	21	7
Local <i>jirga/shura</i> resolve cases timely and promptly.	24	40	23	9

Source: The Asia Foundation (2009).

communities (US Department of Defense, 2010: 24). Many communities have access to the Taliban's equivalent of an "ombudsman" who hears complaints about shadow government policies or officials and ensures that concerns are acted upon quickly or that unpopular officials are removed.²⁵

Despite its efficiencies in areas of government weakness, the severity of Taliban justice makes it an unpopular option for most Afghans. Another option for many Afghans are the traditional systems of justice that have been the country's principal architects and custodians of the rule of law throughout the country's history. These structures, which, until recently, had been largely discounted by international donors as anachronistic and anti-democratic, are now seen to represent an important pillar in efforts to provide access to justice in Afghanistan, particularly within the Pashtun areas that constitute most key terrain.

²⁵ Interview with UNODC official, May 13, 2010, Kabul, Afghanistan.

ENGAGING THE TRADITIONAL JUSTICE SYSTEM

The greatest strength of Afghanistan's traditional justice structures is their relative legitimacy with Afghan citizens. In 2009, 69 percent of Afghans indicated that *jirgas* convened by tribal elders "are effective at delivering justice," a number that is probably higher in areas away from major provincial capitals. Similar percentages indicated that local *shuras* or *jirgas*²⁶ were "accessible to me" and are "fair and trusted" (Asia Foundation, 2009).²⁷

Traditional justice mechanisms tend to match the strengths of Taliban justice. Geographical barriers to access are few,

²⁶ The terms *jirga* and *shura* are incorrectly treated as interchangeable in much of the literature. *Jirgas* are ad hoc gatherings of village elders convened to address an issue as necessary, whereas *shuras* are generally convened on a more regularized basis to discuss inter-community issues or bring together established community leaders on a topic of general concern. For a detailed description of traditional dispute resolution processes, see Deborah Smith's case studies on communities in Bamiyan and Nangarhar Provinces (Smith, 2009a; 2009b).

²⁷ Many in the international community distrust public opinion polling in Afghanistan, arguing that respondents will tailor their answers to what they believe the pollster, or their fellow community members, would want them to say.

as local community elders are the only, or at least the first, arbiters involved in a dispute. Justice is meted out quickly without the bureaucratic requirements of formal courts and, for the most part, without the bribery that often makes government justice expensive and untrustworthy. In addition, traditional dispute resolution practices tend to emphasize restorative justice and peacebuilding within communities, while government justice focuses more on individual rights.

Traditional justice has a particularly robust capacity to resolve both intra- and inter-community disputes related to land, property, family and marriage, many of which serve as catalysts for more serious crimes or are leveraged by insurgents to foment conflict and build local support. It also holds great potential as a facilitator of reconciliation with insurgents who wish to lay down weapons and rejoin communities. Instances have been chronicled of local elders playing transformative roles in reconciliation processes, first working to shape local perceptions of insurgents as traitors and then insisting that community members forgive the offenders and treat them with respect upon their return.²⁸

The use of the term “informal” to describe traditional justice structures has been largely dropped from the lexicon of governance reform in Afghanistan, reflecting the increased understanding that the traditional structures in many communities are complex, advanced and strictly formalized. This is particularly true in the Pashtun tribes of eastern Afghanistan, whose authority to provide justice within their communities was protected by Afghan kings throughout the twentieth century.²⁹ Traditional justice structures in the south have historically been challenged more regularly, both by the central government and by more intense violence, than those in the east. The extent to which traditional justice structures in some key terrain

areas have been destabilized by 30 years of conflict is only now coming under close investigation. Most involved expect to find many of these structures eviscerated.³⁰

Relationships between Taliban and traditional justice systems resist generalization, and they differ drastically across communities. In some cases, Taliban judges coexist with traditional structures, taking on difficult or sensitive cases that local elders are unable to accommodate or would prefer not to try. In other areas, the relationship is less symbiotic, with Taliban judges providing a de facto appellate function for citizens unhappy with the outcome of jirga deliberations. While this type of relationship involves an inherent level of tension, reports from some particularly conservative communities indicate that in their appellate function, Taliban courts affirm jirga decisions as often as they contest them.³¹ In most communities, however, where the Taliban maintains a shadow presence, Taliban justice exists in stark opposition to the power of local elders, as evinced by assassination campaigns that have claimed the lives of many such elders with increasing regularity.³²

Recent recognition of the powers of traditional justice in dispute resolution and low-level reconciliation has led to increased international focus on engaging these structures and helping to rebuild them where necessary. USAID has launched a one-year, US\$10 million project for “Rule of Law Stabilization,” which includes mapping traditional justice structures (beginning with those in DDP areas), supporting the efforts of shuras to resolve particularly destabilizing disputes and providing advice in the development of national policy toward traditional justice. Assessments and mapping are underway in four districts, and expansion will proceed if lessons learned from the first four implementations appear transferable to other districts.³³ The project has a number of detractors in Kabul, some of whom question the ability

28 Interview with international aid worker, May 11, 2010, Kabul, Afghanistan.

29 Interview with USAID contractor, May 17, 2010, Kabul, Afghanistan.

30 Interview with USAID contractor, May 17, 2010, Kabul, Afghanistan.

31 Interview with US military officer, May 14, 2010, Kabul, Afghanistan.

32 Interview with USAID contractor, May 17, 2010, Kabul, Afghanistan.

33 Interview with USAID contractor, May 17, 2010, Kabul, Afghanistan.

of the international community to positively influence the regeneration of traditional justice structures, and some of whom disapprove of this engagement in principle, based on human rights concerns.

Those who ask whether the international community can play a positive role in reconstructing traditional justice in the south express concerns that “putting too much money into the traditional system makes it no longer traditional.”³⁴ One interviewee involved with criminal justice reform noted that part of the strength of traditional justice is the public perception of its independence from government and international influence, and argued that building too close a relationship with or instituting a system of financial dependence on donors may erode public trust in the system. The same interviewee expressed confusion about what international funding would be used for, warning against “*jirgas* being given clubhouses” and the provision of “gold-plated armored cars” to *shura* members. Concerns also exist that funding traditional justice could produce financial incentives for *shura* participation that further erode public trust in traditional institutions.³⁵ A USAID contractor familiar with the Rule of Law Stabilization Program acknowledged these concerns, but insisted that the program’s remit is far broader than the simple provision of financial support and that the international community has an important role to play in mapping traditional structures, facilitating collaboration between the formal and traditional sectors and improving women’s access to existing justice mechanisms.³⁶

Afghanistan’s human rights community has worked hard to expose the abuses that sometimes accompany traditional justice. Of particular concern is the plight of women, who are broadly seen as lacking access to *jirgas* and are sometimes exchanged between parties as part of dispute settlements. These concerns have led the Afghan

Independent Human Rights Commission (AIHRC) to take an uncompromising stance, at least officially, on government and donor cooperation with traditional justice. An AIHRC official in Balkh Province “strongly objected” to Western attempts to engage the traditional justice sector, which he believes works directly against the broader project of encouraging democratic governance. He portrayed reliance on the traditional system as the last resort of a desperate public and described a “natural push” toward formal justice, caused by widespread human rights abuses and slowed only by the persistence of corruption in the formal sector.³⁷ Other prominent members of the human rights community have taken a less ideological approach, but they rarely articulate a willingness to engage traditional justice in public. “It depends who you talk to,” said one member of the international community, “and when you ask.”³⁸

While few in the Afghan government and international community contest the fact that traditional justice sometimes violates international human rights norms, many practitioners with concern for human rights reject the suggestion that traditional justice should be isolated or that reform should precede official engagement. An Afghan official at UNDP, which has made human rights a focus of its justice reform programming, argued that “encouraging the good aspects of traditional justice creates a space to discuss the bad.” He cited progress made by UNICEF against the practice of using young girls as compensation in dispute settlements as an example of the potential of slow, respectful engagement.³⁹

Other interviewees concurred, acknowledging concerns about women’s rights, but arguing that while women’s access to the *jirga* system is limited and constrained in most cases, this is a reflection of societal values rather than a peculiarity of the traditional justice system.⁴⁰ In fact, while

³⁴ Interview with UNODC official, May 13, 2010, Kabul, Afghanistan.

³⁵ Interview with UNODC official, May 13, 2010, Kabul, Afghanistan.

³⁶ Interview with USAID contractor, May 17, 2010, Kabul, Afghanistan.

³⁷ Interview with AIHRC official, April 28, 2010, Mazar-e Sharif, Afghanistan.

³⁸ Telephone interview with international rule of law expert, July 14, 2010, Kabul, Afghanistan.

³⁹ Interview with Afghan UNDP official, May 17, 2010, Kabul, Afghanistan.

⁴⁰ Interview with USAID contractor, May 17, 2010, Kabul, Afghanistan.

the Afghan constitution largely embraces international human rights norms, many now argue that a strong majority of human rights abuses in the justice sector originate in the formal system.⁴¹ The interviewee familiar with the Rule of Law Stabilization Program stressed that reform within the traditional justice sector is best pursued by inter-community dialogue, and that efforts to introduce greater respect for human rights need to be couched within the precepts of Islamic law. She argued that while community elders have expressed an interest in learning about formal Afghan law, training has thus far focused on the basics of dispute resolution, in which most community leaders are already skilled practitioners.⁴²

Although recent engagement with the traditional justice sector has sought to leverage its comparative advantage in dispute resolution, conventional wisdom still holds that criminal justice must fall solely within the purview of the formal system. This is largely a reaction to human rights abuses, the worst of which generally relate to criminal cases, and to the guarantees in the Afghan constitution for the provision of defence attorneys in such cases. The tension between desires to engage the traditional system fully and to respect the rights and processes guaranteed by the constitution, have led to a number of recent attempts to formalize, regulate and strengthen relationships between the traditional and formal justice sectors.⁴³

These initiatives seek to leverage relationships between traditional and formal justice that have developed naturally over the years. In many cases, for instance, elders have defended community members in formal courts when the shortage of defence attorneys would otherwise have delayed a trial indefinitely, leaving the defendant to languish in prison. In other cases, judges have consulted with *shuras*

to overcome ambiguities in Afghan law or simply to fill in gaps in their formal training. In response to these natural ties, the Ministry of Justice is considering proposals to certify some tribal elders as “arbiters” and to allow local officials to refer cases to *jirgas*, with elders then submitting a sort of *amicus curiae* brief back to the formal court for consideration. In addition to strengthening ties between formal and traditional structures of justice, these initiatives have the potential to alleviate the workload of government officials operating in under-staffed *taskhils*.⁴⁴

Traditional justice also stands to gain from these partnerships. Some elders in communities with weakened traditional justice structures, especially in the south, have asked for the opportunity to submit complex or sensitive cases to the local government for adjudication in order to maintain public perceptions of control and confidence and to avoid embroiling *jirga* participants in disputes relating to local strongmen. The USAID contractor quoted above argued that “one of the key ways to strengthen traditional justice is to strengthen the formal system.”⁴⁵

Although the Afghan government signalled its willingness to engage with traditional justice in the Afghanistan National Development Strategy of 2008, and again at the London Conference in early 2010, pressure from the human rights community and some members of Afghanistan’s legal establishment has slowed efforts to codify a clearly defined relationship between formal and traditional systems into Afghan law. A delicate consensus between the Afghan government, civil society and the international community emerged toward the end of 2009 under the guidance of a representative working group, but it was scuttled by new Minister of Justice Habibullah Ghalib in January of this year.

Ghalib initially threw out the working group’s draft statement delineating a number of areas in which traditional

41 Telephone interview with international rule of law expert, July 14, 2010, Kabul, Afghanistan.

42 Interview with USAID contractor, May 17, 2010, Kabul, Afghanistan.

43 For a description of earlier attempts to strengthen ties between the two systems, and for a detailed prescription for the delineation of state and tribal responsibilities, see the United States Institute of Peace’s study on dispute resolution in Afghanistan from 2006 (Barfield, Nojumi and Their, 2006).

44 Interview with US military officer, May 14, 2010, Kabul Afghanistan.

45 Interview with USAID contractor, May 17, 2010, Kabul, Afghanistan.

justice would play a central role. As an alternative, he presented his own document, which would have, in essence, relieved traditional mechanisms of any substantive role in the judicial process.⁴⁶ He has since indicated a willingness to compromise, and some in the international community view his decision to discard the group's document as a reflection of his desire to assert control at the outset of his tenure rather than as an indicator of a hardened ideological stance toward engagement with traditional justice. His stance at the beginning of his term may also have reflected the historical unwillingness on the part of high-level judicial officials to tolerate the inherent challenge to their political authority presented by traditional justice. Regardless of the reason for Ghalib's initial intransigence, he no longer appears intent on obstructing the attempts to integrate aspects of formal and traditional justice that have enjoyed support in principle from Karzai's office and the international community. The process has now resumed, and there is a cautious optimism that the earlier consensus, which included approval from the AIHRC, can be rebuilt and brought before President Karzai's cabinet sometime in early 2011.⁴⁷

ENCOURAGING INSTITUTIONAL REFORM

The first half of 2010 has seen a number of important initiatives for institutional reform in the justice sector as well as efforts to establish closer ties between Afghanistan's security and justice institutions. In general, approaches toward both sectors reflect an increased recognition of both the importance and the difficulties of encouraging better collaboration across institutions, and of the necessity of new approaches in addressing corruption.

46 Among other concerns, Ghalib's strategy would have instituted literacy and education requirements for *shura* members, disqualifying the vast majority of elders with experience in local dispute resolution.

47 Telephone interview with international rule of law expert, July 14, 2010, Kabul, Afghanistan.

BRIDGING THE GAP BETWEEN SECURITY AND JUSTICE INSTITUTIONS

Increased international recognition that security and justice go hand in hand is exemplified by current European Union Police Mission in Afghanistan (EUPOL) programming, which now includes strategic advice to Afghans and other international organizations on justice institutions as well as policing. EUPOL now provides training in basic prosecution skills at the Attorney General's Office and in provincial capitals runs workshops that bring together police and prosecutors.

Relations between the police and judicial system have been tense in the past, largely because of a criminal procedure code that divides responsibility more starkly than what is practical in most investigations. A EUPOL official noted that the "structure lends itself to a lack of cooperation" between all branches of the judicial system, and explained that fostering better relationships will rely on the slow process of bringing together small groups of police, prosecutors and judges for joint trainings. While some international advisers see this challenge as basically bureaucratic in nature, with "no instinct to collaborate" among representatives of different parts of the justice sector,⁴⁸ the EUPOL official viewed the lack of cooperation as both structural and cultural, with "quite a bit of distrust" between branches of the judicial sector inflamed by mutual perceptions of corruption and incompetence.⁴⁹

Although generally pleased with the results of current training mechanisms, the official expressed concern that the increasingly short time horizons for showing success are leading to "lots of competition for visibility and results" among international donors. An official at UNODC familiar with that organization's training programs expressed

48 Interview with American official 2, May 19, 2010, Kabul, Afghanistan.

49 Interview with EUPOL official, May 19, 2010, Kabul, Afghanistan.

similar concerns that “multilateralism and speed are diametrically opposed,” and that the broader atmosphere for cooperation among international donors has suffered since the US announcement that it would begin to withdraw military forces from Afghanistan in July 2011.⁵⁰ The success of training efforts is also largely dependent on the support of provincial government officials. Most provinces have shown sufficient willingness to provide this support, but that willingness decreases drastically in provinces where leaders see training programs for judicial officials as a threat to their control of local governance.⁵¹

EUPOL’s insistence that civilian policing relies on a strong relationship with formal justice institutions in order to be “effective, accessible and trustworthy” has been incorporated into the organization’s new mandate, which, if approved, will allow international trainers to train both police and judicial officials at the district level for the first time. EUPOL officials have sensed that their holistic approach to security and justice sector reform has played well with the international donor community. This has led to the development of a unique training style that has helped carve a clearer niche for EUPOL in a crowded field of international training missions. In addition, the emphasis on rule of law reform as a vital part of police development plays to the priorities of the European publics for engagement in Afghanistan and sets a good precedent for future donor support in the area.⁵²

In addition to marring relations among Afghanistan’s rule of law institutions, perceptions of corruption and susceptibility to political influence within the judicial sector have influenced the willingness of prosecutors to bring charges against offenders, often encouraging an artificial approach to selection. An American official noted that when confronted with a group of suspects in a single case, Afghan investigative prosecutors often choose to bring

charges against all or none, ignoring relevant evidence that might otherwise implicate only some of the suspects. By grouping prosecutions together, the vulnerability of prosecutors to accusations of bribery by particular accused individuals or bias toward particular political allies can be lessened;⁵³ however, the practice undermines the credibility and effectiveness of the judicial process.

COMBATTING CORRUPTION QUICKLY WHILE ENSURING SUSTAINABILITY

In addition to strengthening collaboration between the security and justice sectors, the international community has funnelled substantial resources into combatting corruption on as large a scale as possible. Afghanistan’s Anti-Corruption Tribunal (ACT) heard its first case in January 2010, following American calls to establish it quickly in September 2009. The ACT has the authority to hear cases from around Afghanistan and generally sets its docket based on recommendations from the Attorney General’s Office. The thresholds for prosecution in the ACT, if they exist, have not been made public, and this lack of transparency has been a subject of intense debate in Kabul.

An international official working on reform in the criminal justice system claimed that in their rush to create a functioning court, US embassy personnel encouraged Afghan officials to forego the process of setting clear thresholds for what cases will be brought before the court. He described a meeting in which US officials stated that “we’re not concerned with sustainable development now,” and that “once we start getting results, then we can worry about the legal framework.” He argued that the US insistence on speed allowed Karzai to set a private docket for the court based on political considerations, and “if you waited a couple more months, you could have had a sustainable court.”⁵⁴

⁵⁰ Interview with UNODC official, May 13, 2010, Kabul, Afghanistan.

⁵¹ Interview with EUPOL official, May 19, 2010, Kabul, Afghanistan.

⁵² Interview with EUPOL official, May 19, 2010, Kabul, Afghanistan.

⁵³ Interview with American official 2, May 19, 2010, Kabul, Afghanistan.

⁵⁴ Interview with UNODC official, May 13, 2010, Kabul, Afghanistan.

An American official dismissed these concerns, arguing that the impetus for speed had come from the Afghan Ministry of Justice, not US officials, and that the caseload demanded that the court move forward before the legal structure was finalized. The official noted that deliberations to set terms of reference are currently underway and will be implemented as soon as a decision is reached.⁵⁵ While a different US official agreed that the ACT appeared to be operating transparently, he noted that a number of very old cases had been placed on the docket, and that these could be designed to direct the court away from current cases with significant political implications. The same official expressed concern that the creation of separate tribunals hurts efforts to strengthen the court system as a whole, and that the Afghan justice sector would be better served by cultivating the capacity to try major cases within existing structures.⁵⁶

BETTER INTEGRATING CORRECTIONS INTO SECURITY AND JUSTICE REFORM EFFORTS

The nexus of security and justice in Afghanistan is perhaps most clearly displayed in the problems facing the country's corrections system. The dearth of judges, prosecutors and defence attorneys around the country has meant that prisoners are often held far beyond the constitutional limit of 72 hours before being charged and far longer before being brought to trial. Even when officials are available to present charges or at least monitor detainees, insecurity in the south often precludes regular travel to prisons and increases isolation between prisoners and the justice system. The Afghan government is sending small teams of judges and prosecutors around the country to bolster capacity to monitor prisoners in key areas, but a US official indicated that these visits are on an ad hoc basis, and that there is "no strategic plan" to formalize the program.⁵⁷ In

⁵⁵ Interview with American official 1, May 19, 2010, Kabul, Afghanistan.

⁵⁶ Interview with American official 2, May 19, 2010, Kabul, Afghanistan.

⁵⁷ Interview with American official 2, May 19, 2010, Kabul, Afghanistan.

addition, police facilitation of official visits to prisons has been poor because of interagency tensions and competing priorities for the ANP in insecure areas.⁵⁸

Despite the critical importance of corrections reform to the broader SSR process, particularly with the influx of detainees from counterinsurgency operations, the corrections system has received far less attention from the Afghan government and international community than the ANA and ANP, causing it to lag behind those institutions. Working conditions at prisons have improved somewhat, according to a Western official in Kandahar, who cited better oversight, training and mentoring by international staff as key in the drop of prisoner abuse cases at Sarpoza Prison.⁵⁹ Although a different Western official of the same country was pleased with countrywide progress on corrections reform, she noted that restructuring the pay scale for corrections officers will be necessary to ensure sustainability. Pay raises to match the salaries of ANP officers are currently under consideration, but debate continues over whether the risks faced by corrections officers are severe enough to warrant equivalent salaries. The decision is expected to be a key determinant of future attrition rates of corrections officers, which have been historically problematic.⁶⁰

CONCLUSION

Justice reform in Afghanistan is progressing at an accelerated rate due to creative new thinking on engagement with the traditional justice sector, a new sense of urgency in building institutions to combat corruption and the centrality of ensuring access to justice in areas newly cleared of insurgents. There is an increasing sense in Kabul that viable strategies to strengthen Afghanistan's justice sector have been identified, and that programming is being put in place that, if supported over the long term, could

⁵⁸ Interview with EUPOL official, May 19, 2010, Kabul, Afghanistan.

⁵⁹ Telephone interview with Western official, May 19, 2010, Kandahar, Afghanistan.

⁶⁰ Interview with Western official, May 19, 2010, Kabul, Afghanistan.

have a significant impact on the rule of law in Afghanistan.

Unfortunately, many of the long-term goals for justice sector reform are being co-opted by counterinsurgency strategies that require immediate results to retain support from Western publics. Every interviewee with knowledge of DDP was confident that the strategy for installing governance in key terrain areas is theoretically sound, but they also warned that none of the program's goals will be achieved within a timeframe that will show short-term success in abating the insurgency's momentum.

The rush for results risks the creation of shaky institutions incapable of bolstering the legitimacy of the Afghan government in the eyes of the people. While the establishment of the Anti-Corruption Tribunal within a matter of months is an astonishing feat in the Afghan context, ensuring transparency in the courts' terms of reference is vital to ensure public support. And while a new sense of urgency is welcome for a sector that has made remarkably slow progress since 2001, policy makers need to ensure that speed does not come at the cost of multilateral donor engagement, which is key for long-term sustainability.

One positive to emerge from the new emphasis on access to justice as a part of the counterinsurgency approach has been a reconsideration of international engagement with traditional justice structures. The engagement of these structures can make a major contribution to conflict resolution and reconciliation over the long term and play a key role in plans to reintegrate insurgents into society. Although Afghanistan's human rights community has done important work in exposing the abuses that sometimes accompany traditional justice, it needs to play a constructive role in the state's efforts to engage these bodies. The AIHRC's approval of a government policy concerning traditional justice in late 2009 was a significant step in the right direction, but the inconsistent articulation of its

stance toward the issue has been problematic and needs to be addressed. Additionally, the human rights community needs to acknowledge the emerging consensus that the treatment of women in formal justice structures is as bad if not worse than in the traditional system, and should refocus its advocacy toward reforming both structures rather than condemning traditional justice outright.

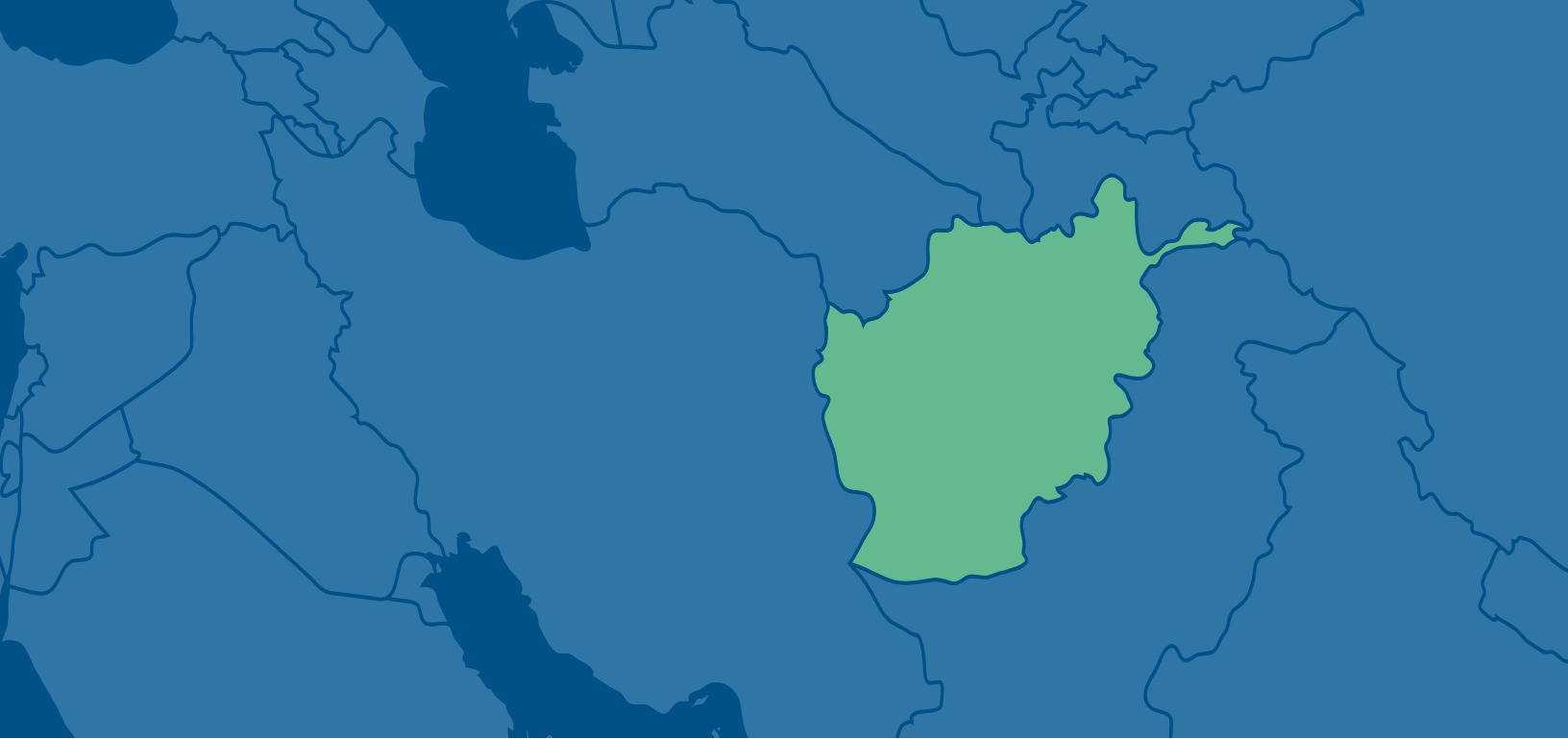
The task now confronting Western policy makers concerned with the rule of law in Afghanistan is to reconcile the short-term goals of counterinsurgency with the long-term requirements of justice sector reform. These goals are not mutually exclusive, but donors must bear in mind that the capacity of current justice initiatives to undermine support for the insurgency in the short term is questionable, despite the wishful thinking and false advertising that has accompanied this notion. Rule of law reform can have a major impact on peace and security over the medium and long term, but not as a short-term instrument of counterinsurgency. While current trends in justice reform are promising in some areas, the impact and sustainability of the process will depend on the donor community's willingness to commit to the process beyond the withdrawal of troops over the next three to four years. Whether donor nations can afford to provide this support to Afghanistan's judicial sector outside a counterinsurgency context should be the subject of renewed public debate.

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