

55<sup>TH</sup> ANNUAL DPI/NGO CONFERENCE  
(9 September 2002)

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**RE-ESTABLISHING THE RULE OF LAW  
AND  
ENCOURAGING GOOD GOVERNANCE**

I am expected to speak from the perspective of the Department of Political Affairs on issues which deal with re-establishing of the rule of law and encouraging of good governance. As a former law professor, working in the Department of Political Affairs and dealing with issues of post-conflict peace-building on a daily basis, I continue to be fairly perplexed. When various practical and specific questions are discussed, I see how political considerations and legal principles mix. Sometimes this mixture is described as a happy one, very often, it is less so. Practical needs do not always favour legal clarity and coherence. The Department of Political Affairs is involved in issues which are of interest to the discussion with this panel in several ways. Let me mention 3 most typical types of activity:

The first one is involvement in negotiations of a peace agreement. Of course, issues such as amnesty and other related issues for post-conflict justice systems arise and have to be negotiated in this context.

Second, the department leads some offices which have a peace-building mandate: peace-building offices in Tajikistan, in Liberia, Guinea-Bissau, in the Central African Republic and in Guatemala. In some of these places, justice issues are important and in all of them governance issues are essential. Furthermore, Afghanistan is one of the cases

wherein our department is particularly involved in peace-building since recently. (I will have a few words to say about that shortly).

The third typical activity which the Department of Political Affairs performs relates to electoral assistance. Elections are almost always a critical aspect of governance and one where the Department of Political Affairs offers technical assistance.

Let me now mention three types of questions which arise and where issues of law and policy, politics and principle mix. These are, first, conceptual issues, secondly, there are practical issues, and there are political issues.

First, on conceptual issues: Most often, some of the most difficult conceptual questions are dealt with in a practical political context. And, sometimes they are ignored as a result of political convenience. Mr. Gahima mentioned the genocide convention (Convention on Prevention and Punishment of the Crime of Genocide). Article 10 of that convention provides for the right of any state party to raise the question of an imminent genocide before the Security Council and initiate effective action. This, in practice, does not happen. There is a legal instrument which would allow things to be done preventively, but this does not happen in practice.

We have heard from speakers of this panel and elsewhere about the two ad hoc tribunals which were established: one for former Yugoslavia and the other for Rwanda. For legal commentators these are important judicial institutions which are capable and will bring justice to the places for which they have jurisdiction – but, for political analysts, they might look as a substitute for an effective early action which was both necessary and possible and which could halt preventable atrocities. It was the absence of that action and the ensuing genocide which created conditions necessary for the establishment of these tribunals.

We have to be aware of these imperfections, of the fact that sometimes justice comes simply too late and comes in a form which cannot produce an optimal result.

Of course, it would be better if states found a political will and were able to prevent genocide in Rwanda or in Bosnia and Herzegovina. Lack of timely action led to a situation which was so unbearable that judicial institutions were created at international level and produced the dynamic which has led to further advances of the concept of justice in international affairs and in areas ravaged by conflict. This is a fundamental paradox which arises at the conceptual level.

Let me now turn to post-conflict situations. In these situations, very often, we are faced with the dilemma whether the process should lead to what some people would call retributive justice: mainly based on a victim-oriented approach and criminal law and criminal prosecution, or a restorative type of justice: an approach which would place emphasis on truth and reconciliation and conciliatory measures that would bring harmony into the society.

In my opinion, this dilemma is very often false because it doesn't take much thinking to discover that criminal prosecution is most often the best instrument of truth. Without truth, not much justice will happen. So, criminal prosecution is a necessity – whenever it is possible; whether it is possible early enough – that's another question. But let us not forget that war crimes and crimes against humanity are crimes to which the statute of limitations does not apply and therefore, if justice cannot be done immediately, there is still a reason to seek truth and justice over a longer period of time. Restorative justice should not rule out but only delay the exercise of retributive justice which might not be possible immediately.

Another conceptual problem arises in the form of the dilemma between peace-building and nation-building. Very often, the UN or other international organizations come into a place where the lack of national institutions is such that the temptation to take over a disproportionate amount of responsibility is overwhelming. In such situations, the responsibilities taken by the international community have to be very carefully assessed. It is important to ensure throughout the process of peace-building that national or local ownership is given a chance or that institutions are created

which would allow, over time, local capacity to emerge. This is, of course, easier said than done, but it is a fundamental necessity which we face in all situations. In Afghanistan, for example, the United Nations has taken a deliberate approach of what was called “small footprint” presence. In other words, a deliberate effort not to allow the international presence to be too large or to be, in itself, unmanageable and take responsibilities which will be impossible or legitimately belong to the Afghans themselves.

These are some of the conceptual issues which arise in daily practice. Much of our daily work relates to resolution of practical issues and sometimes those practical issues have a fundamental importance for the larger questions of justice. Let me mention some examples. First, the question of massacres that have happened in Afghanistan in the recent past. We can discuss the problem of those massacres in terms of the need to establish a stable and permanent base of justice and long-term stability in the country. But how can that be done with responsibility, if, at the same time, a minimum degree of security is not ensured for investigators who would perform the investigations and for witnesses who would remain in their places after the investigators are gone? How do we credibly and responsibly deal with such an issue in a situation where there is no established justice system, where there are no prisons and where there is lack of other infrastructure? I’m putting this before you as a problem of a practical nature, not a conceptual one, because the solutions to a larger conceptual dilemma here are totally dependent on practical arrangements. Will there be enough military presence which would ensure the minimum degree of security, or not? This will decide the larger conceptual issue and this is where the discussions are at present.

The second type of practical need relates to the political process itself. We have discovered in our practice that in order to achieve the goal of good governance, it is extremely important to generate the right kind of political dialogue within societies which have been ravaged by war. In Tajikistan, for example, the UN, which has been present in the form of a peacekeeping operation during the conflict, and has now a small peace-building political office, we have discovered that some of the achievements will not last

if the UN does not stimulate a new form of political dialogue and political culture in the country. We discovered the fact that the former elements of the United Tajik Opposition, are represented in the Parliament, does not, in itself guarantee a mature political process in the country. Therefore, the United Nations office has initiated a number of “political dialogue clubs” throughout the country, which allow, on an ad hoc basis, discussion of public policy issues and through that, improve the culture of dialogue in the society. This, in turn, is important as an underpinning for the parliamentary process.

This is an example of a problem for which we would not find a ready made solution in textbooks or otherwise, but has to be dealt with as a practical matter and with a good understanding of the local circumstances.

A third example relates to the inter-ethnic issues. Very often, ethnic balance is a major source of possible instability for the future of countries emerging from an armed conflict and it is important that laws, which are negotiated, are negotiated in a manner which allows for ethnic balance to emerge in the institutions to be elected. Kosovo is an example where an electoral system had to be developed in a manner which allows non-Albanian parts of the population to be adequately represented with a view to establishing a balance. Here again, there is no prescription, there is no clear principle involved except the one of the need for an ethnic balance. Everything else needs to be negotiated. Everything else depends on the quality of the process leading to that objective. Of course, that includes also the United Nations which often has to take a lead role in the effort to facilitate a balanced outcome.

These are some practical examples of the issues which one has to keep in mind when talking about governance in the post-conflict context. Obviously, many of these issues go beyond the questions of justice per se.

Let me conclude with a few remarks about one of fundamental political problems which characterize many of these situations. One of the basic political needs of all post-conflict situations is to ensure that the post-conflict management leads towards

legitimate structures of authority. The Universal Declaration of Human Rights states that consent of the governed is the basis of legitimate authority. This principle has to be applied in difficult post-conflict circumstances. Very often this requires serious and difficult work in the electoral domain. I would like to emphasize the fundamental importance of that word. In Afghanistan, for example, the United Nations is now starting an electoral assessment of the situation in a country which is not only large, but which has been ravaged by a war of more than 2 decades and which never had elections held in accordance with the international standards in the entire territory of the country. The question of establishing of a voter register, the question of electoral legislation, the establishment of electoral institutions such as the electoral commission – all these are extremely difficult questions in such circumstances. However, they will have to be resolved in 2 years in accordance with the Bonn Agreement which has called for the establishment of an assembly 2 years after the conclusion of the Loya Jirga.

I am mentioning this as an example of a task which is fundamental, without which it is quite impossible to envisage a true and legitimate authority in the country, but where international assistance is of vital importance. That assistance should not be anything else but assistance. The real art in these kinds of circumstances is to stimulate local initiative, to stimulate local capacity and to ensure that gradually, that capacity becomes a legitimate authority. This is a fairly general conclusion which I would like to make and I think it is not entirely inappropriate given that this panel is expected to deal with issues of governance more broadly. I have, in a very sketchy form, addressed some of the practical aspects of the problematique of justice and peace and I hope that in the discussion, if there are questions, I will be able to offer specific answers.