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Challenges of Promoting the Rule of Law: Opening Remarks November 9, 2005

PARTICIPANTS: WILLIAM NEUKOM, STEVE ZACK, ASHRAF GHANI, AND
SALAHEDDIN AL-BASHIR.

WILLIAM NEUKOM: First of all, it seemed to us that a premise underlying our learning about the rule of law was that what we're seeking to achieve is the creation of communities of opportunity and merit. Communities of a scale as small as a neighborhood or as large as a nation-state. Places where individuals have a chance to achieve their potential and to contribute as useful citizens. So there is a sense in which, I think, we can think about the rule of law as a way of doing community building. Those kinds of communities that afford opportunities, that are inclusive, and that are tolerant. We learned a lot today and were reminded today of the barriers to building those kinds of communities and how difficult it is to build those communities of opportunity and merit where the folks living in those communities are confronted by terrorism and a lack of economic development, corruption, lack of an adequate public health system and the threat of pandemics. Tomorrow we will learn about poverty and what that does to make community-building more difficult, in some cases nigh onto impossible.

The thought occurred to us that an approach that we might all think more about in trying to deal with the challenge of creating these communities through the rule of law against those kinds of daunting barriers is to try to take a more interdisciplinary approach to recognize that none of us, in fact none of the sectors – whether it's public or private or nonprofit – has all of the insights and all the knowledge or, indeed, all the resources to achieve the desired results. And that we ought to be thinking more in terms of interdisciplinary multi-sector approaches to those thorny, but...terribly important, problems and opportunities.

Finally, it occurred to us that one of the ways in which we can improve our chances for making progress in this community-building exercise is to find ways to raise the awareness of more people about the fundamental importance of the rule of law by means of public education and by means of deepening our understanding of the importance of the rule of law and ways in which it can be implemented, that we can develop what you might think of as a culture of the

rule of law, which would be global in its extent and would be well-reasoned and thoughtful and, one hopes, would attract the sort of resources it will take to accomplish what we hope it might accomplish.

So we learned a lot today and were reminded of a lot today. We're only at the halfway point. There's a full program of presentations tomorrow, beginning with a breakfast at 8 a.m. and there will be more to be shared by way of observations at the end of the second day. But this evening, we are going to turn to two of our honored guests, and we're going to ask them to share some insights and observations with us from their perspectives about the rule of law. Here this evening we have the privilege of having Steve Zack to introduce our two speakers this evening. Steve is the chair of the House of Delegates of the American Bar Association. He is one of the country's preeminent trial lawyers. He's in the Miami office of Boies, Schiller & Flexner law firm. Steve has served as a past chair of our Latin America Initiative Counsel. And he has been very much a leader within the ABA and within his community for the rule of law. Steve, will you join us and introduce our guests, please?

[*Applause*]

STEVE ZACK: Thank you for those kind remarks, Bill. Before I do, however, introduce our speakers, I want to thank you for all you have done, both in your private practice and in your public life for the rule of law and the leadership that we know you'll continue to show as president of the American Bar Association for the goals of this symposium. I want to publicly recognize you for all those efforts. Thank you.

[*Applause*]

We knew we were going to have a very special evening tonight when we were told that Dr. Al-Bashir was going to address us. We didn't know how painful this moment in time would be for him and we recognize the pain that he and his country are going through and we greatly appreciate his desire to continue to address us this evening. What has happened in his country today really puts in context his life work. Dr. Al-Bashir is recognized as a committed and innovative leader of efforts to promote the rule of law in Jordan and throughout the Middle East. He has a diverse background which includes service in – it says here – several ministerial posts. I honestly believe it's every ministerial post in Jordan. He has been the Minister of Industry and Trade, the Minister of Justice, the Minister of State, the Minister of Government Performance. He clearly cannot keep a job. He has told me that people in his country say that there have been more Al-Bashir sightings than Elvis from all his great efforts in that country. He has taught law at the University of Jordan, where he has also worked in private practice. He holds degrees from the Jordan University, Harvard Law School, and has a Ph.D. in International Law from McGill University.

As the Minister of Justice, Dr. Al-Bashir spearheaded key judicial reforms. He was the author of Jordan's judicial upgrading strategy. He engaged the

judicial counsel in policy dialogues on critical justice issues such as judicial independence, judicial governance, and judicial accountability. Among the many things that you have heard about today and we'll hear more about tomorrow, he's developed a reform strategy for the Judicial Institute of Jordan and involved stakeholders in recommending changes to enhance the legal education in Jordan. While Minister of Trade, Dr. Al-Bashir was involved in formulating and advocating key reform initiatives – the creation of a special economic zone, privatization enterprise and regulatory reforms related to the information technology sector. On the regional level, Dr. Al-Bashir, of course, is a great leader. His efforts include serving as the committee chair for the Good Governance for Development in the Arab countries. This is an initiative to build consensus on legal regional reform priorities pertaining to judicial reform, public sector reform, management of public finance and the civil society empowerment.

He is also the lead advisor for the ABA-supported Arab Counsel for Legal and Judicial Studies Initiative. When I asked Dr. Al-Bashir yesterday – it was the first time I had the opportunity to meet him – and I said with everything you've done, what is your greatest achievement? With great humility, he said I just haven't achieved enough. I said this is more than three lifetime's work for most people. Tell me what you think you'll be remembered for. And he said that he has increased the public's perception of the bench and the good that the bench does and the ethical qualities of the bench in Jordan from 61% to 80% of the people of Jordan. You have many things to be proud of and we are most certainly delighted you could be here today. And we share in your sorrow, but we're glad that you're here to share your thoughts with us.

[Applause]

SALAHEDDIN AL-BASHIR: Thank you, Mr. Zack. You have made it very hard, actually, to say what I wanted to say. It has put me in probably a lower standing than actually what you try to achieve this evening. I am over-thankful for the sentiments that were expressed to my country and to my countrymen. I am sure that such events are not new and not just particular to Jordan. Many of the countries in the world have paid for this terrorism and I'm sure it will make all of us more resilient to hold life too precious. I'm sure it will make my country more resilient, to make it more secure and to continue with the path of reform.

Distinguished justices, President Greco, past-president Gray, Mr. Newcomb, Mr. Ide, my colleague, co-speaker tonight, Mr. Ashraf Ghani, it is my honor to address all of you tonight. Also I would like to express my thanks to the American Bar Association for allowing me this opportunity.

In the Middle East, as in many other regions, the countries are seizing the window of opportunity to engage in and achieve meaningful public policy reforms. Undoubtedly, such reforms are often driven by the need to affect a rapid economic growth and development in business in order to address the

pressing problems of poverty and unemployment. Typically, such initiatives involved general trade and economic liberalization recipes, private sector and market liberalization and development programs. However, the high hopes spent on such enterprises, it is fair to say, that the region is, today, increasingly facing another realization that all such attempts will not bear fruition and ultimately won't reach that end if they don't go hand-in-hand with a public sector reform and, more importantly, political reform.

This realization remains a conception in many parts of the region as political liberalization lags behind. Indeed, it is becoming a constraining factor for economic and social reform. This fact creates tension in the minds of people that talk about rule of law, since rule of law facilitates political reform and protects it. Can we divorce political reform from rule of law? And if so, how can we ensure that natural progression to support and expedite political reform? Finally, can we be optimistic then if political reform is lagging . . . ? Before addressing these questions, I would like to argue a position regarding them. Let me first acknowledge the following – the meaning of rule of law may vary across countries and cultures depending on their relative maturity of the political system – the democratic system and process – and also the internal coherence of the different institutions in any given country.

Indeed, I think it's worth initiating [a] symposium to talk about rule of law, its interpretation and similar concepts across time and space. Secondly, and before also arguing my thesis, which is the validity of a technical approach of what I would call rule-by-law rather than rule of law, I'd like to say that I am sure that we are all convinced, like you are, that the end game is clear for all of us. It is democratization. It is improving social inclusion. It is good governance. It is empowering civil society. It is ensuring respect of human rights, especially, freedom of speech. All these are necessary for a livable state that is worthy of humans. Definitely those are the characterizations of a country that belongs to this 21st century.

Accordingly, if you will accept with me the premise that rule of law is a concept that is affected by geography and historical progression, then one can meaningfully engage such a concept in countries where political reform and democratizations are lagging behind. I say so not apologetically. I say it with conviction. That dispensing justice by a technically efficient judiciary ensuring equality by law is the only way to sustain economic and social reform while allowing political reform, its natural historical friend, to catch up.

Let me pose the following question for all of us – does it really matter if countries fighting the uphill battle for economic, social, and political reforms, eliminating poverty, epidemics, focusing on employment, to adopt and embrace rule-by-law as opposed to rule of law? In the ideal world, the answer is clear and simple. However, where resources are finite and visionaries and institutions have to pick their fights intelligently, I maintain that a professional, efficient judiciary that delivers justice should be priority number one. And I further

maintain that rule-by-law is a necessary first step to rule of law.

This is more so since both the man in the street in the Arab countries, as well as political elite are in agreement to support building such professional judiciaries. Where they vary is the reason for such conviction. Suffice it to say, that recent years talk about justice, reform and rule of law has become center stage in many of the countries in the region regarding reform discourse, whether we're talking within the region or without. Reform means change and change makes people before governments nervous. Therefore, a trusted judiciary that delivers justice is a key prerequisite to ask the public to bite the bullet and endure the hardship and cost of reform and change.

The question now becomes how do we professionalize said justice sector? The answer will not vary or will not be different from other countries, including developed ones. We need to ensure the independence of the judiciary, fight corruption – which is extremely important – improve human resources, enhance infrastructure, leverage information technology, provide sufficient financing, training, and technical resources, improve case management and eliminate delays, and ensure faithful enforcement of court rulings.

Many Arab countries face significant challenges in professionalizing their justice sector. These include, in addition to the above challenges: limitations on resources; available reform tools needed for reform; actual shortages in domestic technical assistance; absence of data; absence also of benchmarking data; lack of generally accepted policies, practices, and principles of judicial independence; principles about the role of the public and the role of the media; and almost a total disconnect in dialogue of the relevant local and regional justice sector stakeholders; weak capacity of training; and, definitely not a very clear understanding of accountability of the justice institutions.

The approach to achieve a professional, sufficient, and efficient justice sector will add some meat here. And some words of caution, which I will probably use some of my very short experience in the post of Minister of Justice in Jordan and I will address them very quickly and thematically in the following few minutes.

First, the independence of the judiciary. Independence of the judiciary in its Anglo-Saxon traditional sense as opposed to independence of judges is a thorny and complicated issue in the internal legal debate in the Middle East. More so with the opening up and inclusion into the internal debate of regional and international players and a donor community. The debate, in my view, focused more on institutional structure and traditional interpretation of separation of powers at the expense of more elaborate discussions of the true meaning of independence of the judiciary. How do we create a more trusted judiciary? Because of the poor capacity of the judicial corps, independence will be significantly enhanced in the region by emphasis on codes of conduct, training, speedy justice, adequate and effective protection of vulnerable groups more so than the preoccupation with the configurations of the judicial councils

and who runs the court staff.

The second theme is what I learned to call the common wisdom syndrome. One learns the hard way, and certainly I did, that much of most diagnostics by lawyers and judges alike are intuitive rather than scientific. In my opinion, one should resist the temptation to rely on such diagnosis even if they come from a long-serving judge or lawyer. I cannot emphasize enough how important it is to rely on solid, local data, which is usually lacking, especially in the initial diagnostic stages. Without having the basis for such data, future benchmarking is impossible and evaluating where we are heading will become counterproductive.

I remember in the very first days of taking my post, I asked how many cases do we have in this country? They figured it was from a quarter of a million to a million. Almost fourfold. How [long does an] average case stay in court? How many judges do we have per case? How many cases do we have per judge? Nothing of that was there. The more important thing is actually everybody had a theory of how to fix things. One important element in delays was actually the local post. Nobody figured that out. It took a month to get a court service from one court to another with twenty kilometers difference.

The third theme I would like to address is the public as a reform track. First, the public. The public knows. In the several polls that we have conducted to gauge people's reactions to the justice reform program, we surveyed courts, court users, the public at large, litigants, lawyers, and judges. What we found is that the public is fair and informed. Any attempt to exclude the public or the media from playing a central role in the justice reform is wrong. The public should be the informed driver of all of this. If the public is fully engaged, then everybody should rest assured that senior political leadership is engaged and definitely the ministers of finance are engaged, too.

The reality and perception when dealing with rule of law and the judiciary, reality and perception are one in the same thing. That's true in many sectors, but it's mostly true in the judiciary. Corruption and perception of corruption are equally detrimental. Real influence and the perception of influence are equally harmful. To achieve success, one should not address what is believed to be real problems, but also should address what are perceived problems. With brick and mortar, shortage of the financial and other resources, I see problems in the Middle East. Limitation of infrastructure, information technology and judicial pay are very serious. The problem is that also the donor community does not like to fund brick and mortar or current expenditure. I think a reconsideration of such policy is timely. An exception for supporting judiciaries will prove to be an excellent investment, which is a fact that I have learned also very fast. And what actually Mr. Zack has said, improving the clearance rate in Jordan from seventy percent to 150 percent over six months because of information technology utilization actually meant that we have created enough time for almost all of the judges of the Amman First Instance, which is the biggest trial

court in the country. We have allowed that judges would probably have two months in the year without work when the common wisdom was [that] we needed to add about another twenty-five percent to handle the caseload of that court.

Finally, I have to talk about homegrown reforms. Building a professional judiciary must be a homegrown effort in reality and in perception. This does not mean that others can't help. Others can and should help. What is needed here is a sense of ownership, not at the Chief Justice level or the Minister of Justice, but also to the different strata interested in the field. Even when we are dealing with the common international practice, that too has to have ownership within the country. I believe that it is important to start with a clear mandate – a public initiative by the Chief Justice, by the Minister of Justice that sets the stage besides the vision, invites buying-in by the judiciary, by the rest of the country, by the public, by civil society, the media, and definitely the donor community. And decides that this is for a delivery for the public, first and foremost. And also this is to achieve justice and rule of law at the end of the road.

It is important to talk about instilling accountability and to move a step at a time. Patience is a virtue. We need to give it time. Any new initiatives should build on old initiatives. It should not negate them. Justice and law are traditional institutions and they should stay as such. Therefore, there has to be a holistic approach that takes and learns from the past and builds on it. An expanded dialogue in the community that involves everybody, that addresses a quantitative, qualitative analysis of every step of the way, court's rulings, enforcement, university work, bar association work, the police, civil society, so on and so forth. A detailed diagnostic should be addressed. Reform initiatives should also talk about monitoring and accountability and how we move forward. One should not forget that at the heart of the judiciary, it's human resources which counts. Therefore law schools, bar associations, and judiciary institutes are the key players.

The key outcome of all of this is a consensus with any given country on the vision and the strategic plan, the deliverables and how to measure and attain. This will facilitate a healthy engagement of the public and the media. It will open doors for civil society and donors who wish to help and will start an irreversible path to entrenching the judiciary as the guardian of rule of law and protector of civil rights and political rights.

Ladies and Gentlemen, thank you very much for your patience and attentive listening. I'm looking forward to discussion afterwards by making sure that the rule by law is a functioning concept. I am sure that rule of law will be the next step. We're walking on that irreversible path to it. It is long, but it is surely attainable. Thank you very much.

[Applause]

STEVE ZACK: Doctor, thank you for those thoughtful remarks. We know that Jordan has a bright future under the rule of law and we know that you will

be at the center of that future. Thank you for being with us tonight. Our next speaker is our keynote speaker, who is also a great leader and advocate for the rule of law, not only in his country of Afghanistan, but throughout the region and throughout the world. To try and list Dr. Ghani's accomplishments would be foolish. He has so many and our time is short. I am going to limit my remarks to just a few, but I could spend the rest of our evening going through his many accomplishments.

Dr. Ghani earned a B.A. and Master's Degree at the American University in Beirut and has received numerous degrees, including a Ph.D. from Columbia University. He served on the faculty of Kabul University from '73 to '77. From 1982 to '83, he decided to come to Berkeley to serve on their faculty. He then proceeded in 1983 through 1991 to Johns Hopkins to serve on their faculty. In 1991 through 2002, he served at the World Bank. And from October of 2001 to February of 2002, at the United Nations. In February of 2002, after the overthrow of the Taliban, he joined the Afghan government as the chief advisor to President Karzai. From June 2002 to 2004, he was the Finance Minister of Afghanistan. During his tenure as Finance Minister, he implemented many wide-ranging monetary and fiscal reforms and prepared a comprehensive seven-year public investment plan called, of course, Afghan's future. In response to the plan, donors pledged \$8.2 billion for three years and agreed to consider an additional \$19.3 billion in three years. It's not very surprising that in 2003, Dr. Ghani earned the award of Asia's best finance minister. He has also received Afghanistan's highest civilian award.

Dr. Ghani has contributed to the *Financial Times*, *Los Angeles Times*, the *Wall Street Journal*, *New York Times*, and the *Washington Post*. He has appeared frequently on major radio and television programs and of great concern to Dr. Ghani is his abiding interest in Islam. He has published his first articles on Islamic law in 1997. He is currently writing on strategies for state-building. We are honored by your presence and we are pleased that you could be our keynote speaker this evening.

[Applause]

ASHRAF GHANI: Thank you very much for that generous introduction. In the middle of the Great Depression, John Dewey asked the question, what's a public? And he offered the remarkable answer. He said a public is constituted by debate. Discussion is disagreement, is prelude to agreements that result in enduring changes. Today, my remarks are a contribution to a concern that today challenges us at the global level.

After nearly 200 years of debate, OECD countries have achieved a rare consensus on capitalism as the organizational form of the economy, on democracy as the organizational form of polity, and on rule of law as the glue that binds everything together. But this consensus is limited to a billion people. Unless it truly encompasses the six billion people, it will remain fragile and threatened. So consequently, we have a challenge that requires the same level of

imagination that it took to defeat the great depression or the rise of fascism. Today, issues of exclusion, lack of access of the majority of the world's population, to rule of law and to economic opportunity is not a marginal concern, but a central challenge of our times. We must rise to this challenge or otherwise none of us will be secure.

Let me quickly highlight first six functions that, in my view, law has performed historically. First, law has tamed power. Power is unaccountable without law. It is law that has transformed power from a raw physical force to an instrument [for the] realization of public goals. It is giving the public value by defining the consensus in defining both the limitations and the users. It has both defined positive power and negative power. What should not be done with public power and what should public power be harnessed for?

Second, law has civilized the market. Without law, the market is unruly. And it is law that has turned the market into an instrument of the greatest prosperity that we have seen, because it has brought it under predictable regulation.

Three, law has been critical to allowing us to form voluntary organizations. That has truly given rise to what we are calling civil society. There's a lot of misunderstanding regarding civil society. But to me, civil society is inconceivable without volunteers for an organization. It is important to see these three components as all being rule-bound and balancing each other.

Fourthly, unless remarked upon, law has allowed us to turn collective fights into individual disputes. Without law, very small quarrels can become group conflicts. It is law that, through procedure, has turned these into instruments of predictable individualization.

Fifth, law has actually been critical to our categories of personhood. Most of our relationships, as parents, as friends, as colleagues, are legal relationships. The social realm has become legal. It has been law, of course, that has also been, in the past, the greatest instrument of separation.

Lastly, from the economic side, law has provided the ground for repeated play and thereby, that important and most missing commodity – trust. Because without repeated play, we do not have the incentive to trust. But to conclude regarding these functions, the rule of law is still an idea. There is nowhere where the rule of law is complete. Because the threat of abuse of power or crisis of the market or failure of the market or our failure to enter into volunteer organizations and its ever-present possibility. Because it's an ideal, it is always in the making. Let us not forget that England in the 19th century was the greatest source of corruption in the world. It was called the Great Corruption.

In U.S. cities in the 1920s, as you are reminded, were called the shame of the cities. There is no distinction here between the West and the rest of the world. It has been an historical process of consolidating the rule of law. Therefore, we must learn and act and not take an oppositional stance and say

that these things are bound in culture. Every great civilization has had respect for rules. And I have worked in half of the world – whether it has been China or India or Russia. The hungering of the ordinary woman and man for law is nowhere less than anywhere else. It's not the question of demand for law that's the problem. It's the question of the supply of law.

Therefore, our definition of institutions becomes very simple. They are the rules of the game, humanly-devised rules of the game, through which we agree to govern ourselves. But it's repetition and trust in these institutions that allows us to make the future predictable. It is routinization that becomes significant. In terms of basis of law, we either have moral commitment – law gets internalized as the moral system and finds a basis in our morality or our common social consent. All sanctioned by the power of the state. While moral consent is enormous power, it also must be recognized that then it becomes an obstacle to change. Even moral consent poses a problem of flexibility in adaptation. Therefore, mechanisms of change become extremely important.

And it is here that the critical nature of rule of law must be linked to a mechanism of both interpretation and legislation. It is not sufficient to export various pieces of legislation. One has to think of the necessary checks and balances and the nested set of mechanisms that allow us to move forward. What is most important, of course, is participation. Law must become a category of daily interaction so people see it as engaging and involving their interests. Without that fundamental sense of the public being in the public domain and in public law, we are not going to have sustainability of rule of law.

From an historical perspective, 20th century expansion of law in OECD countries involves expansion of justice through citizenship rights in OECD countries. Let us not forget that it took civil rights to overcome the legacy of race in this country. Rule of law is not the same as justice. To have justice, there must be equality before the law. And on that standard, most of the world is still wanting. Enormous progress, but it is an objective of the future. Gender has still an enormous way to go. As for indigenous people in the Northern countries – whether it is Native Americans or Native Australians or Native New Zealanders. To claim that there is equality of law of all these citizens truly I think would be a mistake.

One must recognize the nature of the challenge that is ongoing. Law is both an instrument of freedom and wealth creation, as well as an instrument of oppression and an instrument where obstacles from a previous consensus prevent future flexibility. The social model in Europe today is at the center of a series of debates as to whether it's a constraint or an asset. It is totally legal, but is it advantageous? In non-OECD countries, the story is one of the crisis of the state. The market and civil society. Power has not been tamed. The market is not civilized, and association life is still highly problematic. One causal factor, of course, can be isolated. It was called the Cold War. The long years of Cold War were not years for the slogan of rule of law to find its focus. The politics of

Cold War revolved around who was with us or against us. And mostly, it involved support for dictators and authoritarian regimes around the world regardless of which bipolar.

Today, most of our crisis is the debris of the Cold War. The choices that were made then were both transforming and also destructive. Now in terms of the specifics of legal reform, basically there are three criteria – desirability, feasibility and credibility. I think the legal reform movement or the rule of law movement has done a remarkable job in creating the desirability of rule of law. When it comes to feasibility and credibility, we still have a very long way to go. Part of the reason is what Alfred Whitehead characterized as misplaced concreteness. Something that works in one context is taken uncritically and applied to another.

Rule of law is not a technology. It's a tissue of relationship that must, in terms of transplanting, find an organic home. And oftentimes, the reading of context has been lacking. Pieces do not make the whole. Oftentimes, in terms of interventions, the whole has been less than the sum of the parts. One has to be able to conceive of an architecture, if it is going to invoke a metaphor, as a whole process. That requires thinking through feasibility from the perspective of the citizen who is going to be the ultimate beneficiary and the steps. It requires what I call backward mapping from an objective to the inputs, not from an objective thinking the desirable outcomes are going to be realized.

But simultaneously, now that we have discussed and discovered institutions, we must disagree on one fundamental issue with institutional analysts, particularly from the economic side. It should not require 200 years to create credible institutions. None of us have that kind of patience. *[Laughter]* Even if the technology to give us long life – some of my colleagues are talking about 500 years, God forbid . . . So in the rest of my talk let me give some examples as to how one can address the question of institutional change to short, medium and long-term perspectives.

Let me disagree with one thing of Graham Allison this morning. He said rule of law was not necessary or sufficient to fighting terrorism. In the immediate short-term, we might make that claim. But I think in the medium to long-term, the most effective way of fighting terrorism is actually going to be our investment in rule of law. First, let me take an example from Russia, where I worked from '96 to 2001. In '96, when I arrived in Russia on a World Bank program, the Russian coal sector was receiving \$2 billion in subsidies but had 8 months of unpaid wages. It was essential to pay the workers because they had thrown two governments out. The issue here was how rules become constituted. What was the problem? The problem was that money was being put in a big pot without any control and any accountability. What we did was extremely simple. First we divided the pot into ten categories and put a rule that no money could be transferred from one category to another. We put checks and balances in. So the ministry of finance and the department of treasury had the right to veto any

request that did not correspond to those rules. Second, the most important issue which was salaries, we figured out how no one should touch the money because before that, cash was being handled at multiple levels of this complex system. The system that we put in place involved individual deposits of worker's salaries into their bank accounts. Of course, we had to persuade each piece of this. Within six months, everybody was receiving their wages on time. It did not involve more than four consultants. We worked with the Russians. Afterwards, because it had been a Russian-driven process, with us as catalysts of change, they generalized it themselves.

In China, when I worked there, it's extremely difficult to interact with Chinese through Western legal categories because the system is configured differently. We must recognize that institutions are not just configured in one way. Their strength, which needs to be appreciated, is in the notion of contract. They have an enormously sophisticated notion of contracts and contracts can be a binding instrument. It was one of the largest displacement projects in history that displaced about 400,000 people to stabilize the Yellow River. But everybody was compensated in time and in full because the local mechanisms were used to enforce contracts and elaborate measures were provided.

In Afghanistan, I want to give several examples to be able to bring this. In September of 2001, of course nobody expected radical change in Afghanistan on the ninth of September. On the 11th, the world changed. So things had to be devised, very rapidly. That's when I joined the U.N. The key to us, in order to face our critical challenge, which was a lack of a legitimate center, was to devise a process of rules, a set of rules, through which a legitimate center could be established. How did we do this? Administrator Natsios spoke of this. It was to harness an institution called the *loya jirga*, the grand council, and reshape it radically. We reshaped it by making people elected to it. Then those people became the electors of the presidency. Second, the same mechanism became the constitutional convention. What was extremely important in terms of short-term gains was to mark the time for participation over a two-year process where the rhythm of change was so well marked that people's energies could be geared. This resulted in a remarkable document, which is the constitution of Afghanistan. Twenty-five percent of the seats in Afghanistan are reserved for women and they've all been elected. But not only that, it is a constitution that both recognizes the centrality of Islam as our political culture, but also in the first ten articles, recognizes the Universal Declaration of Human Rights.

Because it was negotiated and every comma literally was fought over, it has the chance of becoming the rules of the game. This is a very different document than something that is dictated by a gun. Because of that, the elections that took place for the presidency, again, are very important because we are enormously proud of the fact that our president was only elected with 54.5 percent of the vote. Not 99.9. [Laughter] I think legitimacy requires contestation. Roughly sixty percent of the vote, I think, would be enormous

guilt.

That's at the grand level of the nation. But what did we do with the village? The untold story of Afghanistan is at the village. We have 20,000 villages. 10,000 of these villages have elected their village leaders by a secret ballot-based election, both involving election of men and women. And this in a country where gender apartheid from '96 to 2001 was the rule. They decide on block grants of \$20,000 to \$60,000. In turn, there is a very simple set of rules – democracy, namely election, accountability, namely that minimally sixty percent of the village has to be present for the decisions to be made on their priorities, and transparency, posting every cent that comes. Administrator Natsios is not here, so I tease him. But USAID managed to build eight schools in Afghanistan when it promised 500. These villages built 600 schools, not promising one.

A contractor to build a school through a USAID contract costs \$250,000 without village contribution. When these villages build it, it costs a maximum of \$50,000 and they contribute at least \$10,000 of their own money. And they will be sustaining. So rule of law has got many instruments. I think it is important to think of this nested hierarchy.

The other example is communication. In 2002, Afghanistan had 100 mobile phones. Every ambassador was coming to me, asking me to intervene to give them one of them. Today we have over a million and a half mobile phones. All thanks to one decision on the part of the president, then selecting a minister of communication who conducted a transparent bidding process for the private sector to participate. All the money has come from the private sector. Last year, the largest two taxpayers were the two mobile telephone companies that were awarded the contract.

It is important to think of rule of law as a resource. The way rules are framed, you could have awarded the same thing under the table, but awarding it transparently and with due diligence, not a single member of that one cabinet or any member of the government was involved in the technical evaluation. We all showed up when the final decisions were being announced and by the technical experts.

If you are seeing the positive, there's also the negative. The negative is that the worst corporations in the world harness legal power to literally rob the developing countries blind. We had one contract where they had written – we were able to defeat it – but they had managed to get some of our ministers to agree to a contract that would have resulted in loss of at least a billion dollars over fifty years. I described it as Leopold getting the Congo. The point here is a very simple one. Some of the corporations harness legal resources not to promote, but to undermine transparency and rule of law. And it is extremely important that the balance shifts. As a country that had gone through twenty-four years of conflict, we did not have the legal power to be able to review such contracts. And it is extremely important that priority in legal assistance be focused on those domains that subsequently create a nightmare instead of an

asset.

Last two points in terms of example – one was customs. When I became the minister of finance, I looked at the tariffs. I did one week of work. For an Afghan citizen to pay two dollar in taxes required paying eight dollars in bribes in one week of their lives. Nobody could understand the law. There were 120 categories on the tariff. There were five or six different tariffs in every customhouse. What became extremely critical to us was simplification. We mapped every part of the process. It required twenty-four pages of documentation. It required twenty signatures to get a piece of goods out.

The burden of rules that exist – you know, we have usually a positive image of rules – but rules, as I have seen, again, in Russia, in Vietnam and other places or in India – can be an enormous burden. Simplification of rules is absolutely essential to investing the system with transparency.

At the end, we reduced the tariff to six categories and reduced the number of signatures to four and the document to one page. As a result, revenue increased quite substantially. But that, again, shows that corruption is not just a moral problem, it is also a problem of rules and the way we need to approach the rules to simplifying it. By the time I left, we were working on the tax accord. We had 110 taxes on the book. And nobody had an understanding of what our tax system was. Sometimes we are spending \$1,000 to collect \$1 in taxes.

Here, again, is that legacy issue. It is important to clear the legacy. But legacy cannot be cleared without understanding the fundamental social categories through which law and justice are experienced. When I reformed the justice, there was a province in Southwestern Afghanistan called Herat. And the governor was extremely powerful because he was a military figure and the coalition and allies had backed him. When I wanted to make my case, I needed cash and I needed to pay the army. So the arena where I took my case were the mosques. I went to seven mosques in this province, including the Friday mosque. And put my case to the people. My case was very simple. Islamic theory of governance requires that the public purse be accountable to the public. And that it be unified. And as Minister of Finance, I argued that that was my job.

At the end of seven days, I just sat with the governor for half an hour and took \$20 million in cash from him. Because by then he knew he had lost the moral argument. The notion that I was invoking is called the cycle of justice. It's over 2,000 years old. And this notion says a state needs a public purse because a state cannot defend itself without an army. But an army cannot be sustained without a public contribution. But the public will not contribute unless they realize that there is justice.

Justice becomes foundational. It is extremely important to understand this legacy. Because of this, one of the neglected issues is legal composition. The greatest difficulty that we have had with technical assistance has been off-the-shelf legislation. My colleagues in the Ministry of Justice are extremely proud

carriers of a tradition of rule of law. But they wanted to make sense of the legislation that they were going to approve. The two lawyers that gained their greatest respect were people who could compose with them. Not people who handed them something in translation. And you do realize, at times, things have come across my desk – not once, but many times – where people have even not bothered to change the name of a country.

One auditing code in one very major important country is a code where every single paragraph is taken from a different country. That does not create the confidence that is required to underwrite this. In here, it is very important to look at co-production of rules and to look into this as a ten to twenty year program. Not 200, but not one year or six months again. The right time horizon must be there for the type of partnership to transform. Spain, Portugal, and Greece are examples of this. Who would have thought in the 1950s that Southern Europe was capable of democracy? Or that Central Europe today would be embracing wholesale Europe?

In conclusion, to return, consensus on democracy, the market and rule of law should require us to think on the global scale. This is not a case of charity. It's a case of investment – investment in our collective security, ourselves, but particularly of our children and of our grandchildren.

Rule of law is critical to get states that function in economies that are predictable. The key to stability is to create trust between the citizens and the state and open up paths of opportunity. Mr. Newcomb was referring to where individuals can see a better future. It was the creation of the middle class in the OECD countries that solidified the rule of law and put an end to the great tensions and then the civil rights movement that allowed the problem of race to end. This requires thinking carefully about investing in human capital. It cannot be done just through transfers constantly. The catalytic mechanisms are to invest in the institutions of learning and the critical facilities. This is a partnership because it brings about a culture of tolerance, a culture of acceptance, but more importantly than anything else, a common culture of globalization where we see globalization as a common asset – global public asset – to be left for the benefit of all of us.

In this regard, ABA has been a tremendous partner to us in Afghanistan and, I think, globally. And I would like to thank all of you for giving me this opportunity to address you.

[*Applause*]

WILLIAM NEUKOM: I think we have a few minutes for questions, if you'd like to ask them, of Dr. Al-Bashir or Dr. Ghani, or indeed Dr. Zack.

DOROTHY BEASLEY: I think it was Monday in the *New York Times* – if you don't mind my referring to that article on the front page – very critical about some of the aid to Afghanistan, what has happened to it and what has been accomplished. I was reminded of it when you talked about the local

governments not promising and building schools and the[n] promising not delivering. Could you comment on that and the report that was given?

ASHRAF GHANI: On aid, I have the following observation – aid is not a right of the recipient or the duty of the provider. We should enter into compacts of mutual responsibility. My colleague, Claire Lockhart, and I have coined the term – it's called a double compact. Aid is a broken system today. It was designed in a different era in 1945 for different purposes. USAID is over-burdened by a series of regulations that would make [the] life of anybody a nightmare. [laughter] They have so many requirements, so what happens? A series of beltway bandits get all the contracts and then it becomes a check. Out of one dollar, spent by the American public for the benefit of Afghanistan, at best twenty cents comes to Afghanistan. Eighty cents goes back around the beltway. This is a problem. What is really required in terms of efficiency is to be able to use the government processes that government designs.

When I went back, in four months, we put a developmental strategy. In two years, we had a seven-year plan. USAID is burdened by a lot of constraints. For instance, the number of people it can have. No USAID official can serve more than a year in a country like Afghanistan. Their spouses are not permitted. So in four years, they were not capable of putting together a strategy. But they also militate against using our strategy as their common framework. Some fundamental thinking is required. The argument here, to tie it back to rule of law, is that rule of law is actually being fragmented to a variety of donor regulation complexities.

Take purchase of goods and services. I needed to master at least twenty different sets of rules for purchases. We need simplification. We need harmonization to be able to truly harness the aid that the public in these countries so generously gives to [*Unintelligible*]. But, the other side is our obligation. For instance, the compact that I put in Berlin involved raising of domestic revenue significantly every year. We have to focus on both sides.

SALAHEDDIN AL-BASHIR: I have to say that the USAID have been involved in much in the reform programs of Jordan for the last six years. If I may say also, I believe they have been a very efficient contributor to our reform program and very responsive. I remember that I managed to get the buy-in for the judicial upgrading strategy. About fifteen, twenty days later on, mobilization happened on the ground and ABA was the first to arrive. But I would like to talk about donor help from another point of view, whether it is USAID or anybody else. I have only good things to say about donor communities' work in Jordan in governance and elsewhere.

It does provide continuity. That could not be judged by terms of time or probably some efficiencies or some politically or secured form of where the contractors go – whether they come back home or they benefit peoples contracting from that side. The continuity element, especially in politically volatile situations – they help being spotted in more places than Elvis than

actually if there is somebody who is an institution of stature and caliber where also his accountability helps to become a partner. Indeed, I'm very happy that at least part of our judicial work, USAID, ABA, and other contractors are on the ground to also keep the agreed term of reference to see that it is there. Sometimes there is some pushing. Sometimes there is some compromise. But indeed, it keeps the boat going and delivery will happen, if not this year, within two years. And that's much better than not happening at all.

JIM MICHAEL: Thank you. My name is Jim Michael. I work with DPK Consulting we've had the privilege of working with Dr. Al-Bashir and his efforts in Jordan. I had a question for him. First, sir, I want to express solidarity with the Jordanian people at this time of tragedy. Sir, can you tell me what your expectations are with respect to the National Agenda of reform that has been awaited? And whether you see perhaps new incentives for reform at this time in Jordan with respect to both the political agenda and the rule of law agenda? Thank you.

SALAHEDDIN AL-BASHIR: The National Agenda is an exercise, actually, that started from the Jordanian government where there has been an attempt to have an agreement across society for the priorities of Jordan for the coming ten years. Part of it is a private dream that if we could build a consensus, then popular support for some of the reform programs could be forthcoming. It has eleven pillars. To address the most important one of which is the political reform program. Election laws, party laws, media, freedom of speech, civil society, and so on and so forth. But it has economic, judicial, health, education, and so on and so forth. We started this program about a year ago and almost before the end of the year, breaking down between the government and parliament happens and some ministers had to go. However, I am happy to say that the work has finished and there is a document, which is a beautiful document, that has been accepted across the whole sector of society and political life from the far right to the far left, and in each group, the business community and NGOs. It will come out soon. I believe it will really invigorate the vision of the country and it will buy us small mileage into the coming years.

The difference in this document from any previous work that we've done in a country is that it has milestones and it has deliverables and standards to deliver. Therefore, we will be able to gauge what we are doing year in and year out. I think it will create a lot of momentum for the future.

STEVE ZACK: I was taken when I looked at both your resumes at how similar the resumes were on a lot of different levels. I was very curious; do you have opportunities to share your experiences in your respective countries in other forums? And how transferable is the knowledge you have from one country to the experiences in the other, particularly since you're in the same region? *[Laughter]*

ASHRAF GHANI: I think what is really important is to think through a range of options for reform. What is very important is to be able to formulate

scenarios. Scenarios are very useful devices, I have found, because you can depersonalize it. Four months ago, for instance, I went for ten days to Sudan and had a meeting with the late John Garang. We were supposed to meet for one hour. We ended up meeting for five hours in Cairo because I told him there were three scenarios. I knew Sudan could be accountable, a stalemated country, or reversion back to violence. In all of that I could draw on the drivers of change as to what were institutional drivers of change. This is where understanding a comparative range becomes very important to be able to see. Second, our common traditions. For instance, Jordan has made enormous advances in legal interpretation of Islam – are very dynamic. That's the tradition we have in common though our's was interrupted. Last year, when President Karzai and King Abdullah met together, we agreed that we will share experience in that regard. It's also, for instance, in terms of the regional donors, the Arab Fund or the Saudi Fund or others; Jordan has acquired an immense reputation for predictability, for being a very good client. That provides the type of examples as to what should be done. I think what is also really important today, now, in terms of legal education, for instance, is to think wider in terms of sub-collaboration. For instance, what has happened with legal education in India and some of the most dynamic states like Andhra Pradesh or Karnataka, where Bangalore is the capital, is remarkable. The people who are graduating from a five-year program in Bangalore are getting the same wages as M.B.A.s. And they've managed to think through some really fundamental issues. My last example would be Dubai – the investment zone in Dubai, for instance. They have invested \$100 million in simplification of investment legislation. This is now a patrimony, a common legacy that is made available to other countries because Dubai's growth provides an enormous possibility. Just on transparency and accountability, to get their other story. If you look into 1992, the number of countries that rank six, nine being highest. In 1992, no Middle Eastern country was on that list. No country from Central Europe was on that list. United States and Japan and France have stayed at six. New Zealand is at nine. Now, Bahrain Dubai, Qatar have all made it to ranking of six. As have Latvia and Lithuania. It is very encouraging to see that kind of change and then identify those drivers and build on it.

AL-BASHIR: It is disturbing for the intelligentsia within that region – the Arab-Islamic region – to work with the processes that connote somewhere else. So there is something called the Barcelona process for those who understand the lingo of the European-Mediterranean partnership. There is something called the Sea Island or the Common Future which was started actually in the Sea Island and the thinking before that. All of these wanted to work with some kind of reform programs, necessarily from outside the region to address it from Morocco to Afghanistan and even beyond. That cleared some need to actually what Mr. Ryan said to actually have sub-sub. For two reasons. One of them is probably, it won't work unless it becomes from within. I'd like to stress the

homegrown element of it. And there have been several initiatives. One of them also referred to which is the Good Governance for Development within that region, which is an initiative that was able to get forty-five prime ministers and ministers to commit on the 16th for good governance there. But all this goes well until you touch political reform. So if we're talking the economy, if we're talking simplification of investment, if we're talking about an efficient judiciary, some parts of public sector reform that deals with processes, then that's all fine. The moment you touch political reform, gerrymandering or one of the hot issues, then probably even that appears to me whether we are from the same alma matter or not.

WILLIAM NEUKOM: Very well. Three good questions and superb answers. Will you join me in thanking, please, Dr. Ghani and Dr. al-Bashir and Steve Zack?

[Applause]