

## "Reconstructing Afghanistan: Freedom In Crisis": Judge John R. Tunheim Testimony

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COMMISSIONER YOUNG: It's a great honor to introduce Judge Tunheim, who is District Court judge from Minnesota and has been such since 1995, after a very distinguished and successful legal career preceding that.

We asked Judge Tunheim, in particular, to come because he has extensive experience, of course, not only as an American judge, with all that that implies with respect to judicial independence and interpretation of constitutions, but for today's purposes, also, a very important background in terms of working with other countries as they have been developing their legal systems--in particular, Hungary, Kazakhstan, Macedonia and other places that he has visited and engaged in this work.

So we've invited him to come today and to share his insights with us, and we very much appreciate his taking time out of a very busy schedule to join us.

Judge Tunheim?

[Applause.]

JUDGE  
TUNHEIM: Thank you, Dean Young. It's great to be here at George

Washington University Law School, a wonderful school. I want to talk to you a little bit today, primarily about our work in Kosovo, which I think bears some similarities to the situation in Afghanistan. There surely are differences as well, but in recent times it probably comes as close as any experience can to what is going on in Afghanistan now, and maybe there are some lessons to be learned.

I want to emphasize first my firm belief that a primary component of the rule of law in any jurisdiction is an independent judiciary, a judiciary that's accountable to the constitution and to international agreements, which have the effect of a constitution.

Without an effective system of rule of law, crimes cannot be fairly prosecuted, human rights violations cannot be redressed, and property disputes simply can't be resolved - and that's the foundation of investment in a market economy.

I'm going to give you the one-minute recap on the situation in Kosovo to bring us up to date. Many of you recall Kosovo, the Serbian province, which the situation resulted in an urgent need to rebuild, almost from ground zero, the judiciary and the rule of law.

After Serb minorities complained of discrimination, Kosovo's Albanian and Muslim people lost their substantial autonomy in 1989, and they were dissolved. The Albanian Parliament was dissolved. Albanians were dismissed from all government jobs, including the firing of all ethnic Albanian judges, education, publications, cultural activities, and indeed use of the Albanian language was suppressed.

And the police and the Yugoslav Army were used to enforce the Serbian decrees, which of course engendered a response by the Albanians, who organized a sophisticated parallel government and organized military opposition to the Serb-run government.

Clashes grew worse as the decade drew on in the '90s, and by 1998 clashes between the Serb military and police units and the Kosovar Liberation Army were frequent, suppression became brutal and indiscriminate, massacres of Kosovar citizens were discovered and the increasing urgency led to a peace deal, which the Serbs refused to sign.

And then, amid increasing reports of the killings of Kosovars, NATO commenced an air campaign which brought the world into the situation. Nearly a million Kosovars fled the country and a half-million more were displaced within Kosovo.

Finally, in June of 1999, Yugoslav military forces were withdrawn, and the United Nations authorized the Secretary General to establish an international civilian administration in Kosovo, and NATO KFOR troops moved in to reestablish security, and therein lies the situation. What to do about a judicial system.

Refugees were streaming back into Kosovo, returning to a ravaged landscape. Sixty to seventy percent of the housing was badly damaged or destroyed, much of the infrastructure was badly damaged. Many of the ethnic Serbs had fled to Serbia. The ones who remained were engaged in ethnic clashes with the Albanians.

The United Nations first established an emergency judicial system, with appointments of some judges and prosecutors and some of the courts and the Organization for Security and Cooperation in Europe moved in to begin plans for training of judges and monitoring court proceedings.

But the problem was the system literally ground to a halt over a dispute over what the applicable law should be. The U.N.'s first decree was that the law in March of 1989 would remain in effect, and the Albanian leaders, including judges, refused to apply that law because it had been discriminatorily applied against them in the 1990s.

Therein, followed a relatively debilitating period of uncertainty and dissension, until December, when the U.N. agreed that the law would be as it was in March of 1989, when the Albanians were removed from the system, to be applied, of course, consistent now with international human rights standards.

That cleared the path for Albanian judges to go to work, but exactly what the law was in 1989 was not clear because there really were no code books that remained from that era. The security situation was problematic, confinement institutions and facilities had been destroyed, and the international military forces and the international police corps had different priorities and spoke different languages.

Large

numbers of judges were soon appointed, but there were no courthouses or code books, few arrests, and no one really knew what to do. There, I was asked, along with a group from the State Department and the Justice Department, to examine what was going on in Kosovo and to come up with an assessment of what was necessary to really jump-start the rule of law in this situation that I've just described for you. So we spent most of a month in early 2000 visiting every court and thoroughly assessing the situation.

There were a lot of immediate

problems, and some of these problems I think mirror problems in Afghanistan. First, the applicable law, which I mentioned. Uncertainty made it impossible to figure out what the substantive law was in the province of Kosovo. So how can a judge make a decision without knowing what the law was?

The 1989 law needed to be researched and

modified, upon comparison to comply with international human rights standards. Judges, frankly, needed copies of the laws, and jurisdictional disputes between the courts had to be resolved.

The

process was started to write modern criminal procedure laws and criminal codes, but that process takes some time, but it was a very slow and ineffective system for drafting laws, with the United Nations being in the middle of the approval process.

I have often

thought that, at that time, what Kosovo really needed was a prewritten criminal and civil code, fully consistent with recognized international standards, with trainers who were ready to teach the judges how to apply the codes. This would be an interim set of laws that would be consistent with the international agreements and to be put in place on a temporary basis until a Kosovar parliament could be elected and new laws developed for the province.

In the meantime, my advice

to the judges was to do your best, but do something. You simply can't sit and wait for the perfect code to be written. Criminals needed to be fairly prosecuted, instead of released, laws needed to be enforced. The paralysis was really crippling.

Training. Judges and

prosecutors had no training, not only on applicable law, but also no training on international human rights standards, which the U.N. pledged to apply. The new judges were woefully inept and either inexperienced or hopelessly out of date. Those who had experience had been judges only in the old Yugoslav system under the Communist dictatorship.

We did start a Judicial Training Institute that was designed to train judges on the substantive law, but also on international standards, on independence, on ethics, on practical judging skills and on case management. And despite a fine facility, not a lot of progress has been made yet in training judges in Kosovo, after three- and-a-half years.

Court facilities. All courthouses were significantly damaged or occupied by international administrators. So what we did was detail all of the work that needed to be done--literally, an engineer crawling in the basements of the courthouses.

You can't run a court system without supplies. In the end, we put together a Quick Start Program that was funded by the State Department, which brought everything that was necessary to run a courthouse. It really turned out to be an amazingly successful and well-organized, quickly organized program to enable the courts to start working--computers, metal detectors, typewriters, everything that you need, down to pens and paper.

Trial monitoring and assessment is another topic that's very important for accountability purposes and for due process purposes. And to make sure that human rights are being respected, there needs to be an effective system of trial monitoring and assessment.

The OSCE was, at first, very ineffective with this in Kosovo, but over time their work has improved. Monitors observe high-profile trials and statistics are published, and transparency is the key.

Court security. Security was a key issue in Kosovo, as it is in Afghanistan, as we have heard today.

Judicial independence is really impossible in a society that's permeated by ethnic, and political and even religious conflict. Both personal safety and the safety of sensitive evidence and files needed

to be assured. More guards were assigned, metal detectors were installed. The security is still a big concern in a society where organized crime is present.

Coordination with the police is also important. It is especially difficult in Kosovo because the police who are there were international police from countries all around the world. None of them spoke Albanian. Can you imagine the coordination problems with the judges and prosecutors when there was a language barrier and a different language every time a person was arrested.

The big success story in Kosovo is the development of the police academy, which the State Department has largely funded. It has trained hundreds upon hundreds of new police members for Kosovo, both Serb and Albanian alike, working together, and it's been a great success.

Case management was another area we addressed with new computer systems to replace the old files that were stolen or destroyed. Confinement systems are very important. The large penitentiary in Kosovo had been destroyed by the bombing, and therefore jails needed to be rebuilt and staffed. It was especially critical to develop separate jail facilities and detention facilities for the women inmates and for juvenile detainees.

Defense lawyers. Kosovo suffered from a huge shortage of defense lawyers who were qualified. Back in early 2000, there were as few as about a dozen private lawyers practicing in Kosovo. So the establishment of a bar examination, defense lawyer training and legal training was especially important, as was the development of a tradition of aggressive defense of accused criminals. Attitudes needed to be changed.

Kosovo provided many special human rights concerns. In particular, ethnic bias was, and is, open and quite prevalent. The military forces there dealt with the issue by segregation, which was not really the right solution, but it was quick, and easy, and convenient at the time.

The ideal in Kosovo is a society where all of the ethnic groups--Albanian, Serbs, Turks, Roma, and everyone--can live together peacefully, and obviously a lot of time will be necessary to heal those wounds, and our goal was to make sure that there was a foundation in place for all sectors touching the judiciary for a multi-ethnic society.

#### Appointment of Serb

judges and prosecutors was key. Quite a number were appointed, but nearly all refused to serve because of the security concerns. The pressure remains for Serb appointments and some progress has been made.

#### It's

still very difficult for Serb defendants to get fair trials and sometimes difficult to even prosecute notorious Albanian defendants. Some war crimes have yet to be prosecuted, especially against Albanian defendants. Organized crime and corruption provides significant prosecution problems and judges' salaries are far too low.

#### At

first, a War and Ethnic Crimes Court was proposed in a secure facility. The U.S. opposed that. It was abandoned, and the replacement was international judges--local judges from other participating countries who would come in to take the difficult cases. This is not a great solution, but it has resulted in fair trials for ethnic minorities, and it's a system that should be phased out soon.

#### There's a lot

of other checklist areas that one needs to look at in developing the judiciary, but in closing I want to just give you a fairly critical observation about the development of the rule of law anywhere, and that is the key to have an independent judiciary.

#### A judiciary

that's not independent or free from political or personal influence is not going to be the foundation for a free, and open, and prosperous society. That means structural independence. Are judges appointed on the basis of skills and experience? Are they paid well enough to resist bribes and resist influence? Are their terms of office long enough so that they need not fear the result of an unpopular decision? Can they be removed for political reasons? These are important questions to answer if the rule of law is to take root.

#### It also means a

different kind of independence, and this is based more on my experience throughout the Eastern Europe and Central Asia. Many of those countries have very structurally strong systems. They have constitutions that are strong. Judges can't be unfairly removed.

#### But judges in many

of those countries do not have the training, the experience, the

knowledge and the understanding to be independent judges. It takes maturity, it takes courage, it takes willpower and the easy decision is not always the best decision. So please bear that in mind as well. An independent judiciary is really a key.

There's many pieces to the puzzle that is the rule of law and the development of the rule of law. We still have problems here in the United States, and we've been working at it for more than 200 years. But remember that when there is a void in the development of the rule of law, where there's a fundamental dispute that lingers for a long period of time without resolution, where there are holes in the system, bad things happen, and it's inevitable.

When the criminal justice system cannot effectively prosecute crimes, organized crime and corruption will step right into place. When there's no agreement on what the law is, then a politician or even a judge can impose his own views; and when judges are not trained in international human rights standards, human rights abuses can flourish; and when there's no effective defense counsel, then the rights of everyone can easily be abused by the police.

The foundation to the rule of law has many, many blocks, and all of them need to be addressed. I've touched on just some of them from my experience in Kosovo and elsewhere. I'm going to conclude my remarks so that we can hopefully get us back on time schedule.

Is there time for questions now or should that be later? Later. Okay. Fine.

Thank you.