
The Flawed U.S. Approach to Rule of Law Development

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Abstract

The key flaw to the United States' approach to rule of law development is routinely including the "standard menu" of rule of law development assistance as a part of the overall development effort without regard to whether the recipient country is at a developmental stage where it is able to absorb some or all of this type of aid. This article uses Afghanistan as a case study. Despite a decade of assistance, Afghanistan remains a fragile and conflict-affected country, thus raising concerns about the value of the aid given and whether rule of law development aid should continue to be a part of the standard aid package in similarly situated countries. This article also reports the results of a small-scale survey of rule of law development workers in Afghanistan who were universally critical of rule of law development efforts in Afghanistan.

This article concludes that the experience in Afghanistan demonstrates the need to change how the United States approaches rule of law development assistance. The United States should no longer routinely include rule of law development assistance in developmental aid packages. Instead, the United States should analyze the current conditions in a particular country and determine whether that country is

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ready for rule of law development assistance. This analysis should consider economic, political, and social development, and whether the country is currently in armed conflict. Depending on the level of development, it might make better sense for limited rule of law assistance. In some countries, it might be better to provide no rule of law assistance and instead to focus on other development goals and advocate for rule of law development at a political level.

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I. INTRODUCTION

Think about life in the average underdeveloped country. In that country, most people barely subsist by farming or day labor. The average life is cut short by diseases that are easily treated in more developed parts of the world. Babies die before they grow up. Women die in childbirth. If that underdeveloped country is in the midst of armed conflict, young men die fighting. In such conflict-affected countries, people regularly fear being in the wrong place at the wrong time and being killed. The roads are poor or nonexistent. The lack of roads makes it hard for most people to go to the next town or city to visit their family or to find better jobs. Most people are illiterate. They get their news from the radio, or not at all. They live without electricity or easy access to clean drinking water. Daily life is difficult for the average citizen of the average struggling third world country.

The first world, including the United States, has aid programs that are intended to improve the quality of life for people living in these conditions. In the middle of the last century, these aid programs focused on building roads, building bridges, digging wells, providing basic healthcare (such as vaccinations), and improving basic education.¹ Slowly, these aid programs moved away from the basics, in part because of the concern that providing these basics was not enough.² Put simply, the idea started to develop that, to have a better economy, there needed to

1. See, e.g., ROGER C. RIDDELL, DOES FOREIGN AID REALLY WORK? 21-33 (2007); CAROL LANCASTER, TRANSFORMING FOREIGN AID: UNITED STATES ASSISTANCE IN THE 21ST CENTURY 19-25 (2000).

2. For a discussion of the variety of goals and purposes of U.S. foreign aid, and changing goals, see LANCASTER, *supra* note 1, at 9-28.

be better laws and better lawyers.³ And that simple idea grew. By the end of the twentieth century, aid no longer focused exclusively on the basics for human existence but grew to include much more complex forms of assistance, including rule of law development aid.⁴ This type of aid brought foreign lawyers and law professors to nations around the world to help rewrite constitutions, draft new laws, train lawyers, train judges, and build new courthouses and infrastructure for the legal systems of developing countries.⁵ But should rule of law development assistance be part of the overall aid package given to every country? Is it as basic a type of assistance as vaccination programs or road building projects? Alternatively, should this type of aid wait until the country is at a certain level of development?

The United States is one of the major donors and direct assistance providers for rule of law development and has spent billions of dollars and deployed thousands of lawyers to help build rule of law in countries around the world.⁶ The U.S. approach to rule of law development is not unique and is shared by European countries and intergovernmental organizations, including the European Union, the United Nations (U.N.), and the World Bank.⁷ However, this article will focus on the United States because it is uniquely positioned, as a world power, to change the approach to rule of law development around the world.⁸ This type of aid increased dramatically in the 1990s when the Soviet Union and Yugoslavia dissolved.⁹ This article will critically examine how the

3. See, e.g., David M. Trubeck & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 1* (David M. Trubek & Alvaro Santos eds., 2006) (describing the development of law and development theories, including current approaches).

4. See generally *What We Do*, USAID, <http://www.usaid.gov/what-we-do> (last visited Feb. 9, 2013) (listing eight broad categories of aid through USAID: agriculture, democracy & governance, economic growth, the environment, education, health, global partnerships, and humanitarian assistance).

5. See discussion *infra* Part II. For a discussion of the specific rule of law development work in Afghanistan, see *infra* Part III.A.

6. See, e.g., RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM 5* (2012). For information regarding the difficulty of calculating how much is spent for rule of law development, see *infra* notes 12, 24, 94 and accompanying text.

7. See *Order in the Jungle: The Rule of Law Has Become the Big Idea in Economics. But It Has Its Difficulties*, *ECONOMIST*, Mar. 13, 2008, available at <http://econ.st/e68jmr> (providing an example of how pervasive the rule of law rhetoric has become in economic development circles).

8. As the example of Afghanistan illustrates, the United States often spends considerably more money, and with that money, carries more influence regarding the direction of aid programming. See discussion *infra* Part III.A.

9. See THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 40-53 (1999) [hereinafter *AIDING DEMOCRACY ABROAD*] (providing an overview of the

United States approaches this form of aid using the example of the decade-long rule of law development effort in Afghanistan.

The key flaw to the United States' approach is routinely including rule of law development assistance as a part of the overall development effort without regard to whether the recipient country is at a developmental stage where it is able to absorb some or all of this type of aid. This model is based on two assumptions: that rule of law development assistance will help build or improve rule of law; and that rule of law development assistance will not harm the development of rule of law. This model is applied to countries regardless of the difference in conditions. This means that rule of law development assistance is part of the development package to countries with relatively high levels of economic development, and to those with relatively low levels of economic development; to countries that are politically stable and peaceful, and to those that are in the midst of armed conflict.¹⁰ One of the changes in rule of law development assistance over the last two decades has been the recognition that aid should be particular to the circumstances in the country at the time.¹¹ Yet, this recognition has not led to asking the threshold question of whether it is appropriate to provide this type of aid given the particular circumstances in the country at the time. It is time to ask whether it makes sense to bring in foreign lawyers to work with the local legal system, to train lawyers and judges, to rewrite laws, and to provide the full range of assistance that is rule of law development assistance. There may be countries that need other types of aid more urgently, such as building roads, improving healthcare, improving education, and improving access to clean water.

To understand what is wrong generally with the U.S. approach to rule of law development, it is helpful to understand the assistance efforts

increase in democratization assistance, including rule of law assistance, during the 1990s).

10. One question is whether rule of law assistance efforts should be approached differently in a country in conflict (not post or pre-conflict). Scholars have concluded that rule of law assistance efforts in post-conflict countries require approaches and analysis specific to the post-conflict environment. *See, e.g.,* PER BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA: INTERNATIONAL SUPPORT TO LEGAL AND JUDICIAL REFORM IN INTERNATIONAL ADMINISTRATION, TRANSITION AND DEVELOPMENT COOPERATION (2006) [hereinafter BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA]; JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS (2006); Robert J. Muscat, *Lessons from Post-Conflict Aid Experience*, in BEYOND RECONSTRUCTION IN AFGHANISTAN: LESSONS FROM DEVELOPMENT EXPERIENCE (John D. Montgomery & Dennis A. Rondinelli eds., 2004). Thus far, scholars have not analyzed how to approach rule of law assistance in a country currently in conflict. The serious security situation in Afghanistan calls into question it being referred to as a "post conflict" country. *See* discussion *infra* Part IV.D.

11. *See* discussion *infra* Part II.D.

in Afghanistan, as it is in many fundamental ways a typical example of the U.S. approach to rule of law development. Over the last decade, the United States has spent approximately \$18.8 billion in Afghanistan, making it the single largest recipient of U.S. foreign assistance.¹² Despite a decade of assistance, Afghanistan remains a fragile and conflict-affected country. The security situation in Afghanistan has worsened in recent years,¹³ basic infrastructure remains poor, and the average Afghan citizen still lives in poverty.¹⁴ Despite education assistance, illiteracy rates remain high.¹⁵ Most Afghans still suffer from lack of access to clean drinking water, basic health care, and good nutrition.¹⁶ Afghanistan is a highly complex country for any type of development assistance, but particularly for rule of law development assistance.¹⁷ In addition to the complex internal environment, there is the added complexity of the many countries and intergovernmental organizations, including the United States, actively providing aid to Afghanistan.¹⁸ Despite these conditions, the rule of law development

12. STAFF OF S. COMM. ON FOREIGN RELATIONS, 112TH CONG., EVALUATING U.S. FOREIGN ASSISTANCE TO AFGHANISTAN (Comm. Print. 2011), *available at* <http://on.cfr.org/YJAFbF> [hereinafter FOREIGN RELATIONS COMM. REPORT]. This funding, however, is just part of total U.S. government funding going to Afghanistan and does not include funding from sources such as the U.S. State Department or the U.S. military. By one calculation, the U.S. government spent \$22.8 billion on all U.S. government assistance in the country. OFFICE OF INSPECTOR GEN. FOR U.S. DEP'T OF STATE & THE BROAD. BD. OF GOVERNORS, REPORT OF INSPECTION: RULE-OF-LAW PROGRAMS IN AFGHANISTAN 4 (2008), *available at* <http://1.usa.gov/YZj43v> [hereinafter INSPECTION REPORT]. However, it is difficult to calculate how much the Defense Department is spending on specific aid categories, such as rule of law related programs. *Id.* at 5.

13. *See, e.g., Security in Afghanistan*, INT'L CRISIS GRP., <http://bit.ly/WyLHC5> (last updated Aug. 23, 2011) ("Security has deteriorated across the country, with the highest civilian casualty rates since 2001, and the insurgency is spreading to areas previously considered relatively safe, including the provinces around the capital Kabul."). The Koran burning events are a recent example of the insecurity in the country. *See* Graham Bowley & Alissa J. Rubin, 2 *U.S. Officers Slain; Advisers to Exit Kabul Ministries*, N.Y. TIMES (Feb. 25, 2012), <http://nyti.ms/WTxHCx>.

14. Afghanistan's Human Development Index is "one of the worst in the world." CTR. FOR POL'Y & HUM. DEV., AFGHANISTAN HUMAN DEVELOPMENT REPORT 2007: BRIDGING MODERNITY AND TRADITION: RULE OF LAW AND THE SEARCH FOR JUSTICE 19 (2007), *available at* <http://bit.ly/irVDiu> [hereinafter AFG. HUM. DEV. REPORT].

15. *See id.* (estimating that the adult illiteracy rate is over 75%).

16. *See id.* at 19-20, 22-23. "As many as 68% of the population lack sustainable access to clean water, and 50% of Afghan children under five are underweight." *Id.* at 19-20.

17. *See generally* AMIN SAIKAL, MODERN AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL (2006) (providing a more comprehensive history of Afghanistan); *Afghanistan Conflict History*, INT'L CRISIS GRP., <http://bit.ly/14HD5La> (last updated Jan. 2010) (providing a shorter summary).

18. Donor nations pledged \$360 million specifically for rule of law development at the Rome Conference in July 2007. *See* Rome Conference on Justice and Rule of Law in

effort in Afghanistan has mirrored the basic model, or “standard menu,” used in a variety of other countries.¹⁹ The effort has included legislative drafting; assistance to build courthouses and other aspects of the legal system’s infrastructure; assistance to improve legal education; and training programs for lawyers, judges, and legal educators.²⁰ After a decade, it is time to consider the value and impact of these efforts and attempt to draw lessons to guide future development efforts in both Afghanistan and other fragile and conflict-affected countries. This article intends to start that critical process.

Part II explains the basic U.S. approach to rule of law development assistance, including the assumptions that rule of law development assistance will build rule of law and that it will not harm it. Part III examines the rule of law assistance efforts in Afghanistan over the last decade, including the increased emphasis on providing assistance to the informal justice sector. Part IV explores the challenges in Afghanistan that have impeded rule of law development and considers whether these challenges are such that the overall rule of law development effort in Afghanistan has harmed the development of rule of law. Part V reports the results of a small-scale original survey of rule of law assistance providers in Afghanistan. The respondents to this survey were uniformly critical of the rule of law development work in Afghanistan and raised concerns that support the need to question continuing “business as usual” in other fragile and conflict-affected countries.

Finally, Part VI of this article suggests that the experience in Afghanistan demonstrates the need to change how the United States approaches rule of law development. Part VI also challenges the model that rule of law development should be an integral part of every

Afghanistan, Rome, It., July 2-3, 2007, *Chairs Conclusions*, available at <http://bit.ly/WHv1Yn> [hereinafter Rome Conference Conclusions]. However, critics point out that money pledged is not money dispersed. See, e.g., MATT WALDMAN, OXFAM INT’L, *FALLING SHORT: AID EFFECTIVENESS IN AFGHANISTAN 2* (2008), available at <http://bit.ly/11uyEFQ>. To date, donors and the government of Afghanistan have concluded four documents providing the framework for rule of law and assistance efforts in Afghanistan: (1) Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, S.C. Res. 1383, U.N. SCOR, 4434th mtg., U.N. Doc. S/2001/1154 (Dec. 5, 2001) [hereinafter Bonn Agreement], available at <http://bit.ly/rTuLGw>; (2) LONDON CONF. ON AFG., JAN. 31 – FEB. 1, 2006, *THE AFGHANISTAN COMPACT* (2006), available at <http://bit.ly/14HDddK>; MINISTRY OF JUSTICE, GOVERNMENT OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, *JUSTICE FOR ALL: A COMPREHENSIVE NEEDS ANALYSIS FOR JUSTICE IN AFGHANISTAN* (2005), available at <http://bit.ly/WyPBLk> [hereinafter JUSTICE FOR ALL]; and (4) Rome Conference Conclusions, *supra*.

19. This “standard menu” includes reforming institutions, rewriting laws, upgrading the legal profession, and increasing legal access and advocacy. See CAROTHERS, *AIDING DEMOCRACY ABROAD*, *supra* note 9, at 168.

20. See *id.*; see also *infra* Part III.A.

assistance effort regardless of the circumstances in that particular country at the particular time. This article recommends that the United States change its rule of law assistance approach and that, in the future, it should not routinely include rule of law development assistance into all developmental aid packages. The United States should consider whether a particular country is ready for rule of law development assistance by analyzing the current conditions in the country—including the level of economic, political, and social development—and whether the country is currently in armed conflict. Depending on the level of development, it might make better sense for limited rule of law assistance, or to provide no rule of law assistance and instead to focus on other development goals and advocate for rule of law development at a political level.

II. RULE OF LAW DEVELOPMENT ASSISTANCE

A. *Background*

Rule of law²¹ development assistance is a relatively new type of development assistance. Traditionally, development assistance focused on economic aid and clearly defined projects, such as building bridges, building roads, digging wells, and providing vaccinations, health care, and education.²² Rule of law development assistance began during the “law and development movement” as early as the 1950s and expanded in the 1960s and 1970s.²³ Practitioners in this earlier era saw legal

21. This article will not define rule of law; instead, it will focus on the type of development work that falls under this broad category. For brief rule of law definitions, and for an explanation on the difference between a “thick” and “thin” approach to rule of law, see the following: MICHAEL J. TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* 12-37 (2008); BERGLING, *RULE OF LAW ON THE INTERNATIONAL AGENDA*, *supra* note 10, at 14-19; Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 31 (Thomas Carothers ed., 2006) [hereinafter *PROMOTING THE RULE OF LAW ABROAD*] (criticizing how the rule of law development field defines rule of law and the negative impact this has on rule of law development assistance efforts).

22. See, e.g., *supra* note 1.

23. See, e.g., Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT’L L.J. 209, 216-17 (2011) (stating that the law and development movement was seen as a failure by many of those who participated in it); Francis G. Snyder, *The Failure of ‘Law and Development,’* 1982 WIS. L. REV. 373, 381-83 (reviewing JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980)). But see Bryant F. Garth, *Rethinking the Processes and Criteria for Success*, in *COMPREHENSIVE LEGAL AND JUDICIAL DEVELOPMENT: TOWARD AN AGENDA FOR A JUST AND EQUITABLE SOCIETY IN THE 21ST CENTURY* 11 (Rudolf V. Van Puymbroeck ed., 2001) (arguing that categorizing the law and development movement as a failure is incorrect and reflects a short-term view of results). If looked at over a longer period (20 years), the seeds that were planted during

development as a necessary part of overall economic development. The current era of rule of law development assistance began in the 1990s, as former communist nations transitioned to new forms of government and the Soviet Union and Yugoslavia dissolved into many newly independent nations.²⁴

In the 1990s, rule of law promotion enthusiasts started to support or propose rule of law development programs for a larger variety of reasons including to improve economic development;²⁵ to improve human rights protections;²⁶ to reduce poverty;²⁷ to develop or strengthen democracy;²⁸ to bring better safety and security to post-conflict countries;²⁹ and to promote peace-building and/or conflict-prevention.³⁰ Rule of law promotion rose to new heights and, as Thomas Carothers observed, “One cannot get through a foreign policy debate these days without someone proposing the rule of law as the solution to the world’s troubles.”³¹

the law and development movement rooted and are part of the change in some Latin American countries, notably Brazil. *See id.* at 13.

24. *See, e.g.*, Tamanaha, *supra* note 23. As discussed in this article, using the example of Afghanistan, rule of law development aid can be provided in so many different ways that it can be difficult to find comprehensive statistics regarding how much money donors spend in this area. *See supra* note 12 and *infra* note 94. One estimate gives a total of \$127.9 million in 2006 for “legal and judicial development.” *See* JAN PERLIN & MICHELLE INDIA BAIRD, OPEN SOC’Y JUSTICE INITIATIVE, TOWARDS A NEW CONSENSUS ON JUSTICE REFORM: MAPPING THE CRIMINAL JUSTICE SECTOR 30 (Nov. 2008), available at <http://osf.to/V26aAg> (“It is clear, in any case, that aid in this category has been growing. It may therefore be concluded that this area of development has become established, despite remaining questions concerning how best to implement it and what it should entail.”).

25. For a more critical and recent view of whether law promotes development, see Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895, 937 (2008).

26. *See* Lelia Mooney et al., *Promoting the Rule of Law Abroad: A Conversation on its Evolution, Setbacks, and Future Challenges*, 44 INT’L LAW 837, 842-43 (2010); Randall Peerenboom, *Human Rights and Rule of Law: What’s the Relationship?*, 36 GEO. J. INT’L L. 809, 840 (2005).

27. *See, e.g.*, Mooney et al., *supra* note 26 at 843.

28. USAID considers rule of law to be part of democratization work and organizationally places it in that category. *See, e.g.*, *Democracy, Human Rights and Governance*, USAID, <http://1.usa.gov/11uyXQZ> (last updated Feb. 1, 2013). One question raised is whether democracy or rule of law should be aided together or whether rule of law is a necessary precursor to democracy. *See* Thomas Carothers, *How Democracies Emerge: The ‘Sequencing’ Fallacy*, 18 J. DEMOCRACY 12, 12-14 (2007), available at <http://bit.ly/12yKJsS> (arguing against taking a sequential approach); *see also* discussion *infra* Part VI.B.

29. *See generally* STROMSETH ET AL., *supra* note 10 (describing how rule of law assistance can be improved after future military interventions in post-conflict reconstruction).

30. PERLIN & BAIRD, *supra* note 24, at 17 (discussing the rationales for criminal justice development aid).

31. Thomas Carothers, *The Rule-of-Law Revival*, in *PROMOTING THE RULE OF LAW ABROAD*, *supra* note 21, at 31.

Many rule of law development programs do not have a singular goal but use many, if not all, of the above reasons.³² The specific assistance provided to an individual country varies to some degree depending on the circumstances in the country and, more importantly, on the type and degree of political engagement that the donor nation or organization has with the recipient country.³³

Rule of law development assistance is among the most complex form of foreign aid. It involves every sector of a society, including the economy, judiciary, education system, legal professionals, and the general public.³⁴ Rule of law requires a high level of buy-in from the local population and a certain level of development for absorption of technical aid.³⁵ Rule of law development assistance programs, therefore, usually engage on multiple levels throughout a society, ranging from highly technical programs for court administration and legislative reform to training for legal professionals to programs aimed at changing the attitudes of the general public.³⁶

The standard approach to rule of law development tends to overlook the reality that rule of law promotion is done on two levels: a political level and a developmental level.³⁷ The analysis of rule of law development work often assumes that political-level work is a part of the process as it is rare that development work is not complemented at the

32. Thomas Carothers, *The Problem of Knowledge*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 21, at 15, 17-18.

33. See generally Larry Diamond, *Foreign Aid in the National Interest: The Importance of Democracy and Governance*, in FOREIGN AID AND FOREIGN POLICY: LESSONS FOR THE NEXT HALF-CENTURY 61 (Louis A. Picard et al. eds., 2008) [hereinafter FOREIGN POL'Y LESSONS]; Steven W. Hook, *Foreign Aid in Comparative Perspective: Regime Dynamics and Donor Interests*, in FOREIGN POL'Y LESSONS, *supra*, at 86.

34. See, e.g., TREBILCOCK & DANIELS, *supra* note 21 (describing different parts of rule of law development and the challenges with making progress in these areas).

35. For a discussion on developing local ownership and why this might matter in rule of law development projects, see BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA, *supra* note 10, at 64-69.

36. See, e.g., CAROTHERS, AIDING DEMOCRACY ABROAD, *supra* note 9, at 157-206.

37. For a critical analysis of the failure to look beyond the aid component of rule of law work, see generally Amichai Magen, *The Rule of Law and Its Promotion Abroad: Three Problems of Scope*, 45 STAN. J. INT'L L. 51 (2009):

With only rare and minor exceptions, the existing, North American dominated rule of law literature, implicitly equates rule of law aid (financial and technical assistance) with the totality of external factors involved rule of law promotion. In reality, however, aid represents only one component—arguably a relatively minor one—in a broader spectrum of intervention mechanisms available to international actors, actually and potentially.

Id. at 52.

political level.³⁸ Diplomats and politicians perform political-level work. One example is when the U.S. President expresses public concern about the human rights situation in a particular country to the leader of that country.³⁹ Another example is when senior diplomats or international organizations express concern about particular topics or events.⁴⁰ Development professionals routinely acknowledge that rule of law development, or any development, requires a certain amount of “political will.”⁴¹ However, it is less common to see analysis of rule of law promotion work on a purely political level, without the developmental component.⁴² This was not always the case. The Helsinki Accords are an example, from a previous era, of political-level rule of law promotion, without a developmental component, that had a stated focus on human rights protections for countries that were signatories.⁴³ As will be discussed, in some countries it makes better sense to limit rule of law promotion to the political level and not to engage at a developmental level.⁴⁴

B. Governance or Assistance?

Donors give development assistance under two basic models. The first is a model of intervention where the international community⁴⁵ takes control of the country, including its government and legal system.⁴⁶ This

38. Reflecting this proposition is the fact that “the terms ‘rule of law aid’ . . . and ‘rule of law promotion’ are largely treated as synonymous and used interchangeably.” *Id.* at 98.

39. *Id.* at 110.

40. *Id.* at 109-10.

41. See, e.g., Diamond, *supra* note 33, at 69-75; BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA, *supra* note 10, at 64-69.

42. See Magen, *supra* note 37, at 98 (advocating that rule of law promotion can happen on multiple levels, beyond development aid, and that both academics and rule of law development professionals should recognize these multiple levels, including the political level work described in this article).

43. The Helsinki Accords included three commitment “baskets”: security, economic cooperation, and human rights. See Final Act of the Conference on Security and Co-operation in Europe, Aug. 1, 1975, 28 I.L.M. 527. Thirty-five nations signed the Helsinki Accords, including the United States and the Soviet Union. See *Signing of the Helsinki Final Act*, ORG. FOR SEC. AND CO-OPERATION IN EUR., <http://bit.ly/14XWY1Q> (last visited Feb. 10, 2013).

44. See *infra* Part VI.B.

45. The term “international community” is regularly used to refer to the variety of international donors and assistance providers at work in a particular country. In Afghanistan, this term refers to “the U.S. and its Western allies, [as they are] the dominant players in Afghanistan.” INT’L CRISIS GRP., AFGHANISTAN: THE NEED FOR INTERNATIONAL RESOLVE, at i (2008), available at <http://bit.ly/XrKque> [hereinafter NEED FOR INTERNATIONAL RESOLVE].

46. For a basic overview of this approach, see CALIN TRENKOV-WERMUTH, UNITED NATIONS JUSTICE: LEGAL AND JUDICIAL REFORM IN GOVERNANCE OPERATIONS (2010).

model is often referred to as “governance operations” or as part of “peace-building operations.” Under this model, representatives of the international community ultimately control legislative drafting and reform.⁴⁷ Also, under this model, international personnel often play direct roles within the domestic legal system, acting as judges and lawyers in courts within the country.⁴⁸ Although this model has been widely used in countries such as Kosovo, East Timor, and Bosnia and Herzegovina, it is not the focus of this article as the questions are necessarily different once the international community has decided to govern a nation. In that situation, the threshold question of whether to provide rule of law assistance necessarily shifts to the question of how to govern and how the laws and legal system should operate when outsiders control it.

This article instead focuses on questions regarding the second model under which rule of law development assistance is provided. Under this model, the recipient country maintains sovereignty while accepting international donor assistance.⁴⁹ In Afghanistan, this model was labeled the “light footprint” approach.⁵⁰ Under this model, international personnel working in the country may act as advisors in the legislative drafting process, or observe court proceedings, but they do not have the power to pass or approve legislation, or play any direct role in the legal system.⁵¹

C. *The Two Assumptions*

Rule of law development assistance is premised on two assumptions: that rule of law development assistance will help build or improve rule of law; and that rule of law development assistance will not harm the development of rule of law. As will be discussed in this Part, and later in the context of Afghanistan, policy-makers and rule of law assistance providers should accept neither assumption.

47. See *id.* at 164-69 (describing the process in Kosovo); see also *id.* at 159-64 (describing a different process in Bosnia and Herzegovina).

48. For one account of life as a U.S. prosecutor working in Kosovo for the U.N., see PHILIP KEARNEY, UNDER THE BLUE FLAG: MY MISSION IN KOSOVO (2008).

49. Thomas Carothers described this form of assistance in CAROTHERS, AIDING DEMOCRACY ABROAD, *supra* note 9, at 157-206.

50. For a critical view of this approach, see Francesc Vendrell, *The International Community's Failures in Afghanistan*, in THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION 53, 53-60 (Whit Mason ed., 2011).

51. Although, in practice, their influence can be substantial even without the authority to unilaterally make change. See, e.g., discussion *infra* Part III.A (regarding the U.S. influence in Afghanistan).

1. Rule of Law Development Assistance Will Help Build or Improve Rule of Law

Although rule of law development assistance has existed for over 50 years, this form of aid is still not well understood, in part because there are relatively few empirical studies.⁵² Rule of law practitioners plan projects and programs based on general understandings of what they think makes sense due to their experiences in other countries, rather than relying on guidelines or well-researched studies suggesting how to approach this type of development work.⁵³ Rule of law practitioners often understand that building the rule of law is long-term work that depends on many elements.⁵⁴ They assume that rule of law development programs will contribute to that development.⁵⁵

Critics suggest that part of the problem may be that rule of law development is discussed as a stand-alone field. In a recent article, Brian Z. Tamanaha cautions that considering law and development to be a distinct field “is a conceptual mistake that perpetuates confusion.”⁵⁶ According to Tamanaha, there is a lack of any “uniquely unifying basis” on which to “construct a ‘field’”⁵⁷ In his critique, Tamanaha discusses the wide variety of factors involved in influencing law and the development of legal systems, in what he terms the “Connectedness of

52. See generally STROMSETH ET AL., *supra* note 10; Thomas Carothers, *The Problem of Knowledge*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 21, at 15 [hereinafter Carothers, *The Problem of Knowledge*]; Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 21, at 161; BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erick G. Jensen & Thomas Heller eds., 2003). For an overview of the criticism of current rule of law efforts and scholarship, including the need for better empirical work, see Magen, *supra* note 37.

53. See generally Martin Krygier, *The Rule of Law and “The Three Integrations,”* 1 HAGUE J. ON RULE L. 21 (2009); Randy Peerenboom, *The Future of Rule of Law: Challenges and Prospects for the Field*, 1 HAGUE J. ON RULE L. 5 (2009); Veronica L. Taylor, *Frequently Asked Questions About Rule of Law Assistance (and Why Better Answers Matter)*, 1 HAGUE J. ON RULE L. 46 (2009).

54. For a brief history of the various areas that law and development scholars have focused on, including an analysis of how culture has been considered a key element in building the rule of law, see Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511, 517-38 (2009); see also Wade Channell, *Lessons Not Learned About Legal Reform*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 21, at 141-43.

55. For an earlier analysis of this assumption, see Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance Under post-Communist Democratization Programs*, 2002 J. DISP. RESOL. 327, 342-45 [hereinafter Alkon, *The Cookie Cutter Syndrome*].

56. Tamanaha, *supra* note 23, at 220 (“Law and development work is more aptly described as an agglomeration of projects advanced by motivated actors and supported by external funding.”).

57. *Id.* at 220.

Law Principle.”⁵⁸ Under this principle, everything in a particular country ranging from its culture, political and economic system, level of industrialization, language, religion, ethnic composition, and level of education affect the development of law to such a degree that outsiders may have only limited or minimal influence.⁵⁹ Tamanaha suggests that the better approach is to recognize that every society with “at least, a minimally functioning legal system” enjoys legal development, and foreign assistance is largely irrelevant in this process.⁶⁰ Rule of law assistance providers and donors engaged in this field do so with the opposite assumptions: that rule of law development is a field and that this type of aid will develop rule of law.⁶¹

2. Rule of Law Development Programs Will Do No Harm

Rule of law development programs are also based on the assumption that, because rule of law is so important, it is always better to do something. At worst, these programs will have limited achievements.⁶² This assumption may not be true. A poorly designed rule of law development program could do harm by either delaying or preventing progress towards rule of law. I have previously expressed the concern that promoting alternative dispute resolution processes in countries with endemic corruption could reinforce distrust in the formal legal system and may delay the development or improvement of rule of law.⁶³ As will be discussed in Part IV, there are serious concerns that assistance to the informal justice sector in Afghanistan may cause harm both to individual human rights and to the attitudes of the average Afghan citizen towards the formal legal system, which may ultimately delay or impede the development of rule of law.⁶⁴

D. *Changing Rule of Law Development Assistance*

Rule of law assistance has historically taken a “top down” approach, focusing on a country’s formal justice institutions, its judges, lawyers,

58. *Id.* at 214.

59. *Id.* at 214-16.

60. *Id.* at 241.

61. See Alkon, *The Cookie Cutter Syndrome*, *supra* note 55, at 342-45 (analyzing some of the underlying assumptions).

62. See, e.g., KLEINFELD, *supra* note 6, at 59-78.

63. See generally Cynthia Alkon, *Lost in Translation: Can Exporting ADR Harm Rule of Law Development?*, 2011 J. DISP. RESOL. 165 [hereinafter Alkon, *Lost in Translation*].

64. See *infra* Part IV.A.

prosecutors, and legislation.⁶⁵ There has been less focus on grassroots-level work.⁶⁶ Recently, aid providers have shown increased interest in informal or customary dispute resolution processes as part of an overall rule of law development effort, particularly in countries with far less established legal systems.⁶⁷ This newer focus area seems to follow donors thinking that they should start the aid process by analyzing the current state of legal development and by working with what currently exists. What exists is legal pluralism, or a society “in which multiple legal forms coexist.”⁶⁸ In the context of many countries receiving rule of law development assistance, having multiple legal forms means there might be a formal judicial system—with courts and procedures that resemble those found in countries around the world—alongside informal forms of dispute resolution, such as village tribunals, that operate based on custom and tradition instead of formal laws.⁶⁹ Rule of law development increasingly involves aid to these informal or traditional structures as part of the overall rule of law development assistance program, particularly in countries where the formal legal system is far less developed.⁷⁰ Yet, as will be discussed in the context of Afghanistan, there is no clear evidence that this approach helps the development of rule of law and, more importantly, there is serious concern that this type of assistance could cause harm.⁷¹

Despite the similar approaches and “standard menu” of rule of law development activities, rule of law assistance providers frequently refer to the need to individualize assistance programs to ensure they are appropriate for the specific country.⁷² The scholarship in this area also

65. See generally Golub, *supra* note 52 (questioning the assumptions in the “top down” approach to rule of law development). For another view of “bottom-up” legal development, with examples from Nepal, see Cohen, *supra* note 54, at 517-38.

66. See generally Golub, *supra* note 52.

67. See JANINE UBINK, INT’L DEV. LAW ORG., RESEARCH AND POLICY NOTE: CUSTOMARY JUSTICE SECTOR REFORM 2-5 (2011), available at: <http://bit.ly/YfnqgS>. See generally Julio Faundez, *Legal Pluralism and International Development Agencies: State Building or Legal Reform?*, 3 HAGUE J. ON RULE L. 18 (2011) (discussing development agencies giving more attention and aid to “Non-State Justice Systems”).

68. Brian Z. Tamanaha, *The Rule of Law and Legal Pluralism in Development*, 3 HAGUE J. ON RULE L. 1, 2 (2011).

69. *Id.* at 6-9.

70. See generally Faundez, *supra* note 67, at 18 (cautioning that donors will “not achieve meaningful progress” aiding formal and informal structures unless they “are willing to take a wider and political approach”). One goal of these programs is to develop better “linkages” with the formal justice sector. See, e.g., UBINK, *supra* note 67, at 7-12.

71. See discussion *infra* Parts III.A, IV.A.

72. See generally USAID, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK, A GUIDE FOR USAID DEMOCRACY AND GOVERNANCE OFFICERS (rev. ed. 2010), available at <http://1.usa.gov/TU5Q5c> [hereinafter USAID,

consistently recommends more individualization in developing assistance programs.⁷³ There are now a number of assessment tools to assist donor nations and organizations to individualize their aid packages so that they are specific to the needs and level of development for each country.⁷⁴ However, despite the improved resources and changes in rhetoric, the approach to providing rule of law development assistance still looks very similar in each country.⁷⁵ Furthermore, none of the existing assessment tools measure whether it is appropriate to provide rule of law development assistance in the first place. This focus is because such tools are intended for use after policy-makers have already decided to provide assistance, when practitioners are faced with the question of what to do with the expected funds. Thus, although there is increased rhetoric about individualizing assistance programs, there remains a failure to analyze the individual circumstances in each country to determine if it is appropriate to give rule of law development assistance as part of the overall aid package.

III. RULE OF LAW DEVELOPMENT WORK IN AFGHANISTAN

Afghanistan is a mountainous, landlocked country that is close in size to the U.S. state of Texas,⁷⁶ with an approximate population of 32 million.⁷⁷ Only around 13 percent, or 3.5 million people, live in the

GUIDE TO RULE OF LAW COUNTRY ANALYSIS]; UNITED NATIONS, GUIDANCE NOTE OF THE SECRETARY-GENERAL: UN APPROACH TO RULE OF LAW ASSISTANCE 1-2 (2008), *available at* <http://bit.ly/XZjOyI> [hereinafter GUIDANCE NOTE].

73. See, e.g., Tamanaha *supra* note 23, at 219 (“Law and development practitioners and scholars recognize this fundamental truth. ‘Context matters,’ ‘local conditions are crucial,’ ‘circumstances on the ground shape how things work’—this insight has been repeated so often it is nearly a cliché.”).

74. See e.g., USAID, GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 72, at 27-41 (discussing various assessment factors to understand the particular situation of the country). The American Bar Association, through the Central and East European Law Initiative and later the Rule of Law Initiative, created a number of assessment tools including the *Judicial Reform Index*, the *Prosecutorial Reform Index*, the *Legal Profession Reform Index*, and the *Legal Education Reform Index*. See *Rule of Law Initiative Publications*, AM. BAR ASS’N, <http://bit.ly/UK3ozQ> (last visited Feb. 10, 2013).

75. See Thomas Carothers, *The Rule of Law Revival*, in *PROMOTING THE RULE OF LAW ABROAD*, *supra* note 21, at 7-8. See generally BERGLING, *RULE OF LAW ON THE INTERNATIONAL AGENDA* *supra* note 10 (providing a more comprehensive study of current practices and approaches). For an earlier critique of the similarities in approach, see Alkon, *The Cookie Cutter Syndrome*, *supra* note 55, at 327.

76. *The World Fact Book—Area Comparative*, CENT. INTELLIGENCE AGENCY, <http://1.usa.gov/jgrwMs> (last visited Feb. 10, 2013).

77. See *Afghanistan Profile*, BBC, <http://bbc.in/Ry8OrQ> (last visited Feb. 10, 2013). In July 2012, the CIA estimated the population at 30.4 million, after “significantly revising the figure” from over 33 million based on Soviet census numbers. See *The World Fact Book—Afghanistan*, CENT. INTELLIGENCE AGENCY, <http://1.usa.gov/15B6Vg> (last visited Feb. 10, 2013).

capital of Kabul.⁷⁸ Afghanistan is a poor nation that has a conflict-plagued history and poor overall levels of development. Afghanistan, therefore, presents a highly complex environment for all development work, but particularly for rule of law development because it is the most complex form of development assistance.⁷⁹ Current international assistance to Afghanistan began in 2001, after the U.S. led NATO invasion following the September 11, 2001 terror attacks on the United States.⁸⁰ International donors have focused rule of law development efforts in two broad areas: substantive assistance and donor coordination.⁸¹ The substantive assistance efforts included assistance to write laws, build courts, and educate lawyers, judges, and law students.⁸² These efforts have been in the criminal justice sector and in civil and commercial law areas. Donor coordination was a part of the effort almost from the beginning of the assistance efforts in 2001 due to the large and varied group of donors.

A. *Substantive Rule of Law Development Assistance in Afghanistan*

There is no single definition of what qualifies as rule of law reform work in Afghanistan.⁸³ The lead nation approach, discussed below, separated justice sector reform from police, corrections, and counter-narcotics reform.⁸⁴ Clearly, under a broad definition, assistance to all of these sectors could qualify as rule of law development assistance. To focus the discussion, this article will limit the analysis to rule of law development work with legal professionals, dispute resolution processes, and the formal justice system. The article excludes police and

78. *The World Fact Book—Afghanistan*, *supra* note 77.

79. For earlier accounts of the challenges facing the international community in rule of law development in Afghanistan, see generally LAUREL MILLER & ROBERT PERITO, U.S. INST. OF PEACE, *ESTABLISHING THE RULE OF LAW IN AFGHANISTAN* (2004); J. Alexander Thier, *Reestablishing the Judicial System in Afghanistan* (Ctr. on Democracy, Dev. & Rule of Law, Stanford Inst. for Int'l Studies, Working Paper No. 9, 2004), available at <http://stanford.io/IMjITC>; AFG. HUM. DEV. REPORT, *supra* note 14, at 53-66 (“Establishing the rule of law in Afghanistan entails resolving multiple problems . . . key challenges [are] personal insecurity, past human rights violations, injustice towards women and children, the growing narcotics trade, institutionalized corruption, and land disputes. . .”).

80. For a brief description of the overall aid effort in the period following the “U.S.-led Intervention,” see INT’L CRISIS GRP., *AID AND CONFLICT IN AFGHANISTAN 6-7* (2011), available at <http://bit.ly/nrJ2v1>.

81. Astri Suhrke & Kaja Borchgrevink, *Negotiating Justice Sector Reform in Afghanistan*, 51 CRIME, L. & SOC. CHANGE, 211, 213-14 (2009).

82. See discussion *infra* Part III.A.

83. See, e.g., INSPECTION REPORT, *supra* note 12, at 7 (focusing on work in Afghanistan and stating “[t]here is no single universal definition of Rule of Law”).

84. See, e.g., NEED FOR INTERNATIONAL RESOLVE, *supra* note 45, at 5.

corrections work. Although the rule of law assistance effort in Afghanistan focused on the “standard menu” adopted in numerous other countries, rule of law providers also recognized that the starting point in Afghanistan was different from what they encountered in other countries.⁸⁵ In 2003, the U.N. Development Project reported that:

The physical infrastructure of [the justice] institutions has been destroyed during the past decades of war and political upheaval and requires rehabilitation. In addition, and more critically, the country’s legal “software”—the laws, legal decision, legal studies, and the texts of jurisprudence—are largely lost or scattered across the world.⁸⁶

Italy, as the lead nation in justice sector reform, initially focused its projects in three areas: legislation, infrastructure, and training and capacity building.⁸⁷ Italy’s decision on focus areas was not the result of a comprehensive assessment of the situation throughout Afghanistan.⁸⁸ This is not unique, as the international community routinely engages in rule of law assistance work without investing time to monitor and assess the current situation to plan appropriate programs.⁸⁹ Unfortunately, the international community continues to fail to engage in systematic or

85. For a description of the standard menu, see CAROTHERS, *AIDING DEMOCRACY ABROAD*, *supra* note 9, at 168.

86. U.N. DEV. PROGRAMME, *REBUILDING THE JUSTICE SECTOR OF AFGHANISTAN* IA (2003), *reprinted in* SETH JONES ET AL., *ESTABLISHING LAW AND ORDER AFTER CONFLICT* 77 (2005). By another account, “Afghanistan had been more comprehensively destroyed after twenty-two years of continuous war than any country since World War II apart from Vietnam.” AHMED RASHID, *DESCENT INTO CHAOS: THE UNITED STATES AND THE FAILURE OF NATION BUILDING IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA* 171 (2008).

87. See MATTEO TONDINI, *STATEBUILDING AND JUSTICE REFORM: POST-CONFLICT RECONSTRUCTION IN AFGHANISTAN* 48 (2010).

88. *Id.* (describing the focus of Italian projects as legislative reform, training and capacity building, and rehabilitation of infrastructure with no description of any assessment or process to choose these focus areas).

89. The U.N. recognized that this process is a continuing problem in conflict and post-conflict countries and, in 2011, released the *U.N. Rule of Law Indicators*, which are aimed at assessing the criminal justice sector in a given country. DEP’T OF PEACEKEEPING OPERATIONS & OFFICE OF HIGH COMM’R FOR HUM. RTS., *RULE OF LAW INDICATORS: IMPLEMENTATION GUIDE AND PROJECT TOOLS* (2011), *available at* <http://bit.ly/TU9Wu1>. The failure to assess the overall situation in Afghanistan was also not unique to rule of law development providers. When the NATO invasion began, Ahmed Rashid noted: Governments, UN agencies, multinational lending institutions, universities, and NGOs were preparing concept papers on how to start reconstructing Afghanistan, but nobody had a clue about the country. None of the agencies had the capacity or the contacts to be able to consult Afghans about their basic needs or development priorities. Since 1978 no comprehensive census had been taken and no economic data gathered. Most of the plans were “guesstimates.”

RASHID, *supra* note 86, at 171.

comprehensive assessments or monitoring of the justice system in Afghanistan.⁹⁰

Despite the designation of Italy as the lead nation in this area of reform, academics and rule of law workers on the ground observed that the United States was the *de facto* leader in all donor fields from the beginning of the assistance efforts.⁹¹ By March 2008, scholar Matteo Tondini calculated that the United States was funding 71 percent of all justice sector projects in Afghanistan.⁹² The result, according to Tondini, is that the United States' influence in this area is "hundreds of times more than other donors."⁹³

The United States provides rule of law assistance through four primary agencies: the U.S. State Department through the Bureau of International Narcotics and Law Enforcement Affairs (INL); the Department of Justice (DoJ); the U.S. Agency for International Development (USAID); and the Department of Defense (DoD).⁹⁴ The primary implementers of these programs are short-term direct hires or contract staff.⁹⁵ Through these agencies, the U.S. government funds and organizes rule of law programs that range from prison building,⁹⁶ to public legal education campaigns,⁹⁷ to the training of judges, lawyers,

90. INT'L CRISIS GRP., REFORMING AFGHANISTAN'S BROKEN JUDICIARY 3 (2010), available at <http://bit.ly/WVBtbk>.

91. See, e.g., TONDINI, *supra* note 87, at 62 ("[T]he projects carried out by international actors other than the U.S. would only be a fraction of the entire assistance sector.").

92. *Id.*

93. *Id.*

94. See *id.* at 82; see also EMBASSY OF THE UNITED STATES., KABUL, AFGHANISTAN, <http://kabul.usembassy.gov/offices2.html> (last visited Feb. 10, 2013) (listing the U.S. agencies working in Afghanistan); USAID Afghanistan, USAID, <http://1.usa.gov/a134I1> (last visited Feb. 10, 2013). However, it is difficult to determine how much money, in total, the United States has spent in this area. See, e.g., INSPECTION REPORT, *supra* note 12, at 23. Funding for the ROL (rule of law) program in Afghanistan is split among several U.S. government agencies. There is no one place where all funds spent specifically on ROL can be identified. ROL program funding is often multi-year and is combined with other programs such as police training and correction facilities, which makes identification of specific costs difficult. The U.N., other bilateral donors, and a variety of NGOs also fund ROL programs. The result is that there is currently no way to readily identify ROL funding and subsequently to identify duplicate programs, overlapping programs, or programs conflicting with each other. See *id.* at 24, 43-44 (providing an overview, by agency, of funding and types of projects).

95. INSPECTION REPORT, *supra* note 12, at 4.

96. See DEP'T OF STATE, <http://1.usa.gov/YJFhyB> (last visited Feb. 10, 2013).

97. See *Afghanistan Rule of Law Project*, USAID, <http://1.usa.gov/m5enIH> (last visited Feb. 10, 2013) [hereinafter *ARoLP*]; see also INSPECTION REPORT, *supra* note 12, at 18 (describing public outreach work including the translation and distribution of laws and production of radio and television programs, billboards, pamphlets "in comic book format," to explain rights under the new constitution and protecting those rights under the judicial system).

and prosecutors.⁹⁸ Between 2004 and 2007, the United States also built 40 courthouses throughout Afghanistan.⁹⁹ All of these projects have been in addition to those conducted by other donors and assistance providers, which have often overlapped with other projects and programs.¹⁰⁰

Drafting laws has been a mainstay in rule of law assistance programming in Afghanistan. One of the first tasks was to draft a new constitution and, in 2004, the new Afghan Constitution was signed and promulgated pursuant to provisions in the Bonn Agreement.¹⁰¹ The Bonn Agreement was the first in a series of agreements laying forth the basic foundations for the Afghan state after the NATO invasion and established that Afghanistan would remain fully sovereign.¹⁰² In addition, as has been the pattern in other countries, the international community assisted in writing and encouraged the passage of a full range of new laws.¹⁰³ As will be discussed, international involvement in the legislative drafting process has been heavily criticized.¹⁰⁴ Yet the passage of each new law provided an opportunity to conduct training. For example, the lead training organization in the early years of the assistance effort in Afghanistan was the primarily Italian-funded International Development Law Organization (IDLO), which conducted training in 2004 on the new Criminal Procedure Code for judges, lawyers, and police officers.¹⁰⁵

98. See, e.g., *ARoLP*, *supra* note 97; *Rule of Law Stabilization Program Formal Component*, USAID, <http://1.usa.gov/VLdZKW> (last visited Feb. 10, 2013).

99. See TONDINI, *supra* note 87, at 83. These courthouses were built despite serious questions about having judges and lawyers available to staff them. See discussion *infra* Part IV.A.

100. See TONDINI, *supra* note 87, at 83.

101. See *id.* at 49-51; BERGLING, *RULE OF LAW ON THE INTERNATIONAL AGENDA*, *supra* note 10, at 172-173. For a critical analysis of the constitutional drafting process, see REFORMING AFGHANISTAN'S BROKEN JUDICIARY, *supra* note 90, at 7-9. The 2004 Afghan Constitution reflects the conflicts between the role of secular and Islamic law and has been described as a "pick and choose process where everyone got something" that "virtually guaranteed continuation and expansion of the Afghan Conflict." See *id.* at 13. Unlike some of the legislative drafting processes described in this article, the constitutional drafting process included substantial Afghan involvement. See, e.g., TONDINI, *supra* note 87, at 49-51.

102. For more information on the Bonn Agreement, see *infra* notes 127-129 and accompanying text.

103. See Michael E. Hartmann & Agnieszka Klonowiecka-Milart, *Lost in Translation: Legal Transplants Without Consensus-Based Adaptation*, in *THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION*, *supra* note 50, at 266 (offering a critical analysis of this process).

104. See discussion *infra* IV.A.

105. See TONDINI, *supra* note 87, at 57. However, training has been criticized when non-Afghans lead the approach. See Michael E. Hartmann & Agnieszka Klonowiecka-Milart, *Lost in Translation: Legal Transplants Without Consensus-Based Adaptation*, in

The International Community also encouraged and assisted in the development of specialized courts, high commissions, and investigative bodies.¹⁰⁶ One example is the Criminal Justice Task Force that investigates and prosecutes serious drug cases.¹⁰⁷ Afghanistan is the largest producer of opium in the world.¹⁰⁸ Beginning in 2005, the U.S. State Department invested \$383 million in rule of law and justice institution development as part of its counter-narcotics efforts.¹⁰⁹ The drug cases prosecuted through this structure are not only highly complex but also highly dangerous for prosecutors and judges.¹¹⁰ Nevertheless, some have questioned whether these specialty courts are effective, while also criticizing them for “adding unnecessary complexity to the system” of justice.¹¹¹

Another type of rule of law assistance given in Afghanistan has been the placing of experts within particular institutions to act as on-site advisors.¹¹² Under this type of assistance, a foreign expert with years of experience in a particular field—for example, a prosecutor—is placed in the appropriate governmental office to provide daily advice and assistance. It is hoped that this type of assistance will help build capacity both with particular individuals who interact with the foreign expert and on a broader institutional level.¹¹³

THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION, *supra* note 50, at 266, 278 (statement of Att’y Gen., Abdul Jabar Sabit) (“I will not have my prosecutors taught their criminal procedure and penal codes by lawyers from Australia and Argentina who fly in for six weeks and then fly out!”). However, aware of this concern, some organizations focused on bringing experts from other Muslim countries, such as Egypt and Tunisia. The International Development Law Organization (IDLO), for example, used numerous experts from Egypt. IDLO considered Egypt a relevant source of expertise as some of the laws in Afghanistan, such as the Civil Code, were modeled on Egyptian laws. Telephone Interview with Geralyn Busnardo, former Dir. of the Int’l Dev. Law Org. Office in Afg. (June 12, 2011) [hereinafter Busnardo Interview].

106. REFORMING AFGHANISTAN’S BROKEN JUDICIARY, *supra* note 90, at 3.

107. *Id.* at 18-19.

108. See, e.g., *Illicit Drugs*, CENT. INTELLIGENCE AGENCY WORLD FACTBOOK, <http://1.usa.gov/b5yRrs> (last visited Feb. 10, 2013).

109. U.S. GOV’T ACCOUNTABILITY OFFICE, AFGHANISTAN DRUG CONTROL: STRATEGY EVOLVING AND PROGRESS REPORTED, BUT INTERIM PERFORMANCE TARGETS AND EVALUATION OF JUSTICE REFORM EFFORTS NEEDED (Mar. 2010), available at <http://1.usa.gov/a7mRLt>.

110. See REFORMING AFGHANISTAN’S BROKEN JUDICIARY, *supra* note 90, at 19.

111. See *id.*

112. Suhrke & Borchgrevink, *supra* note 81, at 211, 213.

113. See, e.g., D. Daniel Sokol & Kyle W. Stiegert, *Exporting Knowledge through Technical Assistance and Capacity Building*, 6 J. COMPETITION L. & ECON. 233 (2010) (examining the impact of long term advisors in anti-trust technical assistance efforts and describing that this type of assistance works best if the ministry has relatively more power within the country’s economic and political system and that it worked better when established with bilateral, rather than multi-lateral, donors).

One broad category of assistance that does not fall into the “standard menu” has been assistance provided for informal dispute resolution processes.¹¹⁴ The Bonn Agreement and subsequent documents recognized this area due to the fact that traditional or customary dispute resolution processes are still very much a part of Afghan society.¹¹⁵ As will be discussed in Part IV, the average Afghan citizen is far more likely to use informal dispute resolution processes, and the international community has recognized that fact through a number of projects focused on informal dispute resolution processes or customary law.¹¹⁶ The United States is a primary assistance provider for what it terms “community based dispute resolution processes.”¹¹⁷ This assistance has included: supporting Afghan non-governmental organizations working in this field; training village elders on Afghan and Sharia law and human rights; conducting public outreach about dispute resolution topics; and establishing working groups of elders and actors from the formal justice system to improve coordination between the two sectors.¹¹⁸ The United States increased its investment in these types of projects and recently earmarked \$25 million for assistance to the informal justice sector in Afghanistan.¹¹⁹

What all of these projects have in common is high costs for international personnel. Each project or program is organized around the international staff and consultants who administer the programs and act as expert advisors or trainers. Due to factors such as the poor security situation,¹²⁰ the costs are considerably higher than in other countries and reportedly range from \$250,000 to \$1 million per year for each

114. See discussions *infra* Part IV.A. Although assistance to customary/traditional justice programs is becoming more frequent. *Id.*

115. See BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA, *supra* note 10, at 146. For a listing of the relevant documents, see *supra* note 18.

116. See, e.g., USAID, AFGHANISTAN RULE OF LAW STABILIZATION PROGRAM (INFORMAL COMPONENT) ASSESSMENT: FINAL REPORT (2011), available at <http://1.usa.gov/W3yQWI> [hereinafter USAID FINAL REPORT] (describing USAID’s rule of law development work in Afghanistan’s informal justice systems).

117. *Id.* at 19.

118. See *id.*

119. REFORMING AFGHANISTAN’S BROKEN JUDICIARY, *supra* note 90, at 31. At least \$10 million will be spent on a formal study of the informal justice sector in the country. *Id.* There are serious questions about whether this is an appropriate area for rule of law development assistance. See discussion *infra* Part IV.A.

120. See discussion *infra* Part IV.D.

international staff member.¹²¹ By one estimate, these costs consume 25 percent of all aid to Afghanistan.¹²²

B. Donor Coordination

Rule of law development workers almost immediately faced a chaotic situation due to the large and diverse group of international actors involved in providing assistance in Afghanistan. In total, 39 countries were in the International Security Assistance Force (ISAF).¹²³ An even larger number gave assistance on some level with, for example, a total of 60 countries and institutions pledged to give assistance during the London Conference in 2006.¹²⁴ The international organizations that are actively engaged in Afghanistan include the U.N., the European Union, and NATO.¹²⁵ In addition, the World Bank, the Asian Development Bank, and numerous non-governmental organizations are also actively engaged in the country. In December 2001, just weeks after NATO forces successfully ousted the Taliban from central control of the country,¹²⁶ Afghan delegates, without Taliban representatives, approved the Bonn Agreement that established the framework for Afghanistan's initial legal and political future.¹²⁷ Under the Bonn Agreement, Afghanistan would remain a sovereign nation with interim local leadership.¹²⁸ The agreement included provisions for a relatively quick

121. See FOREIGN RELATIONS COMM. REPORT, *supra* note 12, at 22. These costs include salary, benefits, extra pay for dangerous conditions, security arrangements, and living quarters. *Id.*

122. POST-CONFLICT RECONSTRUCTION IN AFGHANISTAN, *supra* note 87, at 98. Others place the number even higher. See, e.g., WALDMAN, *supra* note 18, at 3.

123. See BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA, *supra* note 10, at 145. The U.N. Security Council authorized the establishment of the ISAF "to help the Interim Administration maintain security in Kabul and its surrounding areas." *Id.*

124. NEED FOR INTERNATIONAL RESOLVE, *supra* note 45, at 7; see also *infra* notes 142-144 and accompanying text.

125. See *id.*

126. But see TONDINI, *supra* note 87, at 17:

[T]he Taliban was never completely driven from the country and have continued to have an influence on both politics and the on-going conflict. By one estimate 'at the beginning of 2008, the Karzai Government controlled just under one-third of the country (30-31%). The remaining part was split between the Taliban (10-11%) and local tribes (58-60%).'"). In 2007, one estimate reported that 54% of the country "hosted a permanent Taliban presence.

127. See Bonn Agreement, *supra* note 18; see also BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA, *supra* note 10, at 144-45 (2006).

128. See generally Bonn Agreement, *supra* note 18. After some delays, the first Presidential elections were held in October 2004. See *Afghanistan's Presidential Election*, CBC NEWS (Oct. 12, 2004), <http://bit.ly/YZo2xd>.

electoral process.¹²⁹ Afghanistan's full sovereignty meant that the structure for rule of law assistance in the country was different from that of countries such as Kosovo and East Timor where the U.N. actively controlled the judiciary, police, prison systems, and promulgation of laws.¹³⁰ In contrast, in Afghanistan, the U.N. adopted a "light footprint" approach and did not assume authority to pass laws or control the administration of the state.¹³¹ Many observers saw the "light footprint" approach adopted in Afghanistan to be the result of "lessons learned" from previous U.N. governance operations in places like the Balkans.¹³² A primary stated goal of the "light footprint" approach was to have "local ownership" of the assistance process.¹³³ The lead nation approach was intended to aid in this effort and to help coordinate the large number of international players.¹³⁴ Italy was designated the lead nation in justice sector reform.¹³⁵ However, the lead nation approach did not prevent

129. Bonn Agreement, *supra* note 18. Many are critical of the push for elections, particularly in politically unstable and volatile environments. *See generally* PAUL COLLIER, WARS, GUNS, AND VOTES 8, 20-21 (2009) (arguing that building a "façade" through elections "is likely to frustrate democratic accountability, rather than fast-track it," and concluding democracy was "more dangerous" in low-income countries"); AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY (2003) (examining the connection between democracy in developing nations and worsening ethnic conflict).

130. *See* MILLER & PERITO, *supra* note 79 at 4. For a more detailed explanation of the U.N. Mission in Kosovo and Administration in East Timor, *see* TRENKOV-WERMUTH, *supra* note 46, at 50-150.

131. *See* discussion regarding the Criminal Procedure Code, *infra* Part IV.A. Although in practice the international community wielded considerable power and has been criticized for putting pressure on Afghan authorities to, for example, promulgate laws that were substantially written by outsiders without any meaningful Afghan input.

132. *See* MILLER & PERITO, *supra* note 79, at 4-5 ("[A] light UN footprint would force donor nations to accept their responsibility for assisting Afghanistan, rather than putting responsibility on the UN and then underfunding the mission and blaming it for the resulting failure."); *see also* BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA, *supra* note 10, at 142-43. For a view that the international community "may sooner or later revert to a model of international governance" and away from the "light footprint" approach, *see* TRENKOV-WERMUTH, *supra* note 46, at 9.

133. TONDINI, *supra* note 87, at 20. However, the model in Afghanistan has been characterized as more of a "mixed ownership regime." *Id.* at 87-90; *see* BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA, *supra* note 10, at 142. One concern is that the lead nation approach weakens a "sense of national accountability and ownership," thereby working against the original goal. *Id.* For a discussion on some of the reasons "local ownership" was difficult, *see* AID AND CONFLICT IN AFGHANISTAN, *supra* note 80, at 8-13.

134. *See generally* Emma Sky, *Afghanistan Case Study: The Lead Nation Approach*, in CRISIS STATES RESEARCH CENTRE, LOCAL OWNERSHIP OF SECURITY SECTOR REFORM: A GUIDE FOR DONORS 59-66 (Laurie Nathan ed., 2007), available at <http://bit.ly/XWhRVJ>; NEED FOR INTERNATIONAL RESOLVE, *supra* note 45, at 10.

135. *See* TONDINI, *supra* note 87, at 47; *see also* BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA, *supra* note 10, at 146; NEED FOR INTERNATIONAL RESOLVE, *supra* note 45, at 5. The United States was the lead nation to assist the armed forces;

complaints about a lack of donor coordination from assistance providers, observers, and scholars.¹³⁶ Critics have also stated that the lead nation approach is to blame for the lack of a coherent policy for rule of law assistance providers.¹³⁷

As part of the Bonn process, Consultative Groups were formed to improve coordination and to put “local ownership” into the aid process.¹³⁸ The Justice Sector Consultative Group began work in January 2003 with the aim of coordinating all work in the justice sector.¹³⁹ It was chaired by the Afghan Ministry of Justice, with Italy acting as “focal point.”¹⁴⁰ This Consultative Group was further subdivided into *ad hoc* working groups on particular topics.¹⁴¹ By January 2006, at the London Conference on Afghanistan, delegates signed the Afghanistan Compact and introduced the Interim Afghanistan National Development Strategy, which included four rule of law benchmarks.¹⁴² As part of this process, the Afghan government wrote a

Germany was the lead nation to assist the police; Japan was the lead nation for disarmament; and the United Kingdom was designated the lead nation for counter-narcotics. *Id.*

136. See, e.g., TONDINI, *supra* note 87, at 58-60 (describing coordination problems between international aid organizations and within and between Afghan institutions); NEED FOR INTERNATIONAL RESOLVE, *supra* note 45, at 10 (describing the variety of nations and organizations involved and the impact of coordination problems on overall development and security goals).

137. BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA, *supra* note 10, at 146. However, aid providers regularly complain about the lack of coordination, which is often the result of the lack of structure in how aid is provided with bilateral assistance efforts often working towards very different goals than multi-lateral efforts, or other bilateral assistance. *Id.* For a more nuanced view of coordinating donor efforts in postwar environments, see Roland Paris, *Understanding the “Coordination Problem” in Postwar Statebuilding*, in THE DILEMMAS OF STATEBUILDING: CONFRONTING THE CONTRADICTIONS OF POSTWAR PEACE OPERATIONS 53 (Roland Paris & Timothy D. Sisk eds., 2009).

138. See TONDINI, *supra* note 87, at 46-47, 91.

139. *Id.* at 46-47.

140. *Id.* at 47.

141. *Id.*

142. The benchmarks, all to be accomplished by the end of 2010, were:

- (1) To establish the civil, commercial, and criminal legal framework required by the constitution and distribute it to the public and judicial and legislative institutions;
- (2) Justice institution should be fully operational in each province of Afghanistan, and the average time to resolve contract disputes should be “reduced as much as possible”;
- (3) Conduct a review and reform the due process, miscarriage of justice, and corruption oversight procedures by the end of 2006 and “fully implemented . . . by end-2010”; and
- (4) Rehabilitate the justice infrastructure and have separate prison facilities for women and juveniles.

ISLAMIC REPUBLIC OF AFG., AFGHANISTAN NATIONAL DEVELOPMENT STRATEGY: AN INTERIM STRATEGY FOR SECURITY, GOVERNANCE, ECONOMIC GROWTH & POVERTY

ten-year plan, “Justice for All,”¹⁴³ and a five-year national development plan, the interim Afghanistan National Development Strategy (i-ANDS).¹⁴⁴

Following the London Conference, the Consultative Groups were reorganized to bring them in line with the Afghan government’s new organizational vision.¹⁴⁵ The Governance, Rule of Law, and Human Rights Consultative Group initially had 75 members and divided into eight working groups, one of which was the Rule of Law Working Group.¹⁴⁶ This Working Group was further divided into sub-working groups.¹⁴⁷ Each group included Afghan and international members.¹⁴⁸ The July 2007 Rome Conference on the Rule of Law reaffirmed the international community’s commitment and the participants demonstrated this commitment with pledges to contribute more to the rule of law sector.¹⁴⁹ The Rome Conference led to further changes in donor coordination, including the problematic process of adopting a National Justice Sector Strategy, which was to be implemented by a National Justice Program.¹⁵⁰ Donors also agreed to establish the Provincial Justice Coordination Mechanism to better coordinate central and provincial justice sector assistance.¹⁵¹

REDUCTION 222-23 (2005), *available at* <http://bit.ly/11uBZop> [hereinafter AFG. NAT’L DEV. STRATEGY]. Arguably, other benchmarks in the Compact are also rule of law benchmarks, but the Afghan government specifically designated the list above as rule of law benchmarks.

143. *See* JUSTICE FOR ALL, *supra* note 18 (discussing the ten-year plan).

144. AFG. NAT’L DEV. STRATEGY, *supra* note 142, at 25 (discussing the five-year plan). For descriptions of the plan, see Suhrke & Borchgrevink, *supra* note 81, at 219; TONDINI, *supra* note 87, at 65-66.

145. TONDINI, *supra* note 87, at 66.

146. *Id.* at 66.

147. *Id.* The sub-groups included: Law Reform (further divided into a criminal and civil law committee); Infrastructure; Justice Institutions and Judicial Reform (divided into committees to reform the judiciary, Attorney General’s Office, and the Ministry of Justice); Legal Education and Training (divided into committees on Legal Higher Education, Professional Training, Establishment of the National Legal Training Center); Access to Justice and Legal Aid; Corrections (divided into committees on Reconstruction and Rehabilitation of Prisons, Training, Administrative Reforms, Establishment of a Maximum Security Facility at Pul-e-Charkhi Prison); and Women and Children in Justice. *Id.*

148. *Id.* at 66.

149. The total pledged was \$360 million. *See* Rome Conference Conclusions, *supra* note 18. Others have stated that the total amount was \$98 million, including \$15 million from the United States, \$30 million from Canada, and \$13.6 million from Italy. INSPECTION REPORT, *supra* note 12, at 5; *see* Rome Conference on Justice and Rule of Law in Afghanistan, Rome, It., July 2-3, 2007, *Joint Recommendations*, *available at* <http://bit.ly/W3zDqL> [hereinafter *Joint Recommendations*].

150. TONDINI, *supra* note 87, at 70-77.

151. *See* *Joint Recommendations*, *supra* note 149; TONDINI, *supra* note 87, at 71.

The larger aid providers also had to confront issues of internal coordination.¹⁵² For example, the United States not only has multiple agencies and departments charged with providing rule of law assistance but also a variety of grantees and contractors.¹⁵³ Coordination between these various players broke down and, “by late 2005, internal U.S. coordination meetings on [rule of law] were best characterized as shouting matches between representatives of different agencies.”¹⁵⁴ By early 2006, the U.S. Embassy created a U.S. Mission Rule of Law Coordinator to address these problems.¹⁵⁵ However, as with so many organizational structures put in place in Afghanistan, the position seemed in constant flux. The position shifted from a Department of Justice position to a U.S. State Department Foreign Service Officer position to the Ambassador rank position of Coordinating Director of Rule of Law and Law Enforcement.¹⁵⁶

On a practical level, the variety of organizational and coordination structures and the regular changes in those structures has had a direct impact on the day-to-day work of assistance providers since the beginning of the assistance efforts in Afghanistan. Due to the organizational and coordination structures, international aid providers spend no small amount of their time attending meetings, exchanging e-mails, and writing reports, plans, and strategies in an effort to understand what others are doing and to avoid duplication.¹⁵⁷

IV. CHALLENGES FOR RULE OF LAW DEVELOPMENT ASSISTANCE IN AFGHANISTAN

The challenges impeding rule of law development in Afghanistan are the types of challenges that are common in other fragile and conflict-affected nations. Therefore, as part of the process of drawing lessons from Afghanistan for future rule of law assistance efforts, it is important to consider what these challenges are and whether they support or refute the two main assumptions that rule of law development work will build rule of law and that rule of law development work will not harm the

152. See, e.g., INSPECTION REPORT, *supra* note 12, at 8.

153. *Id.* Coordination with the military is another special category and challenge. *Id.* at 12-13.

154. *Id.* at 8.

155. *Id.* at 9.

156. The position is currently held by Ambassador Hans Klemm, former U.S. Ambassador to East Timor, who is a career foreign service officer with no significant experience in rule of law development or law enforcement and who is not a lawyer. See *Coordinating Director of Rule of Law and Law Enforcement*, EMBASSY OF THE U.S., KABUL, AFG., <http://1.usa.gov/14Y0ucy> (last visited Feb. 11, 2013).

157. One concern is that these meetings are often used to collect information, not to share it. Busnardo Interview, *supra* note 105.

development of rule of law. In Afghanistan, there are four fundamental areas that pose challenges for rule of law development assistance: (1) the level of legal development; (2) the poor overall level of economic and social development; (3) the level of institutional/political development; and (4) ongoing armed conflict.

A. *The Level of Legal Development*

Historically, Afghanistan's formal legal system was poorly developed and rarely reached beyond urban areas.¹⁵⁸ There are three often-competing forms of law in Afghanistan: secular statutory law, Islamic Sharia law, and customary tribal law.¹⁵⁹

Traditionally, the sources of law in Afghanistan were customary tribal law and Islamic law.¹⁶⁰ Legal reforms in the 1960s and 1970s added secular statutory law into the mix with the adoption of substantive and procedural codes.¹⁶¹ However, because these codes were not easily accessible, even judges and prosecutors that worked during those eras did not have a solid understanding of the codes.¹⁶² The Taliban did not recognize statutory or secular law and dismantled many of the formal legal structures.¹⁶³ This left most Afghans with the choice of bringing their disputes to an informal or customary tribal dispute resolution process or doing nothing to resolve them.¹⁶⁴

Therefore, at the time of the NATO invasion, Afghanistan almost entirely lacked a formal legal system. Matteo Tondini concludes that the low level of legal development in 2001 meant that the "international community was not required to restore the justice system in place, but to build it up for the first time."¹⁶⁵ The existing legal system had been

158. Ali Wardak, *Building a Post-War Justice System in Afghanistan*, 41 CRIME, L. & SOC. CHANGE 319, 326 (2004).

159. See REFORMING AFGHANISTAN'S BROKEN JUDICIARY, *supra* note 90, at 13-18 (discussing how these competing laws create challenges).

160. For a description of Shari'a law and customary law in Afghanistan, see Susanne Schmeidl, *Engaging Traditional Justice Mechanisms in Afghanistan: State-building Opportunity or Dangerous Liaison?*, in THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION, *supra* note 50, at 152-57.

161. See TONDINI, *supra* note 87, at 94; see also Suhrke & Borchgrevink, *supra* note 81, at 215-17; REFORMING AFGHANISTAN'S BROKEN JUDICIARY, *supra* note 90, at 1-6.

162. See TONDINI, *supra* note 87, at 94.

163. See REFORMING AFGHANISTAN'S BROKEN JUDICIARY, *supra* note 90, at 6-7, Suhrke & Borchgrevink, *supra* note 81, at 218.

164. See *supra* note 163.

165. TONDINI, *supra* note 87, at 94.

reduced to Islamic and tribal courts.¹⁶⁶ Afghanistan had few courthouses and, perhaps more importantly, few trained legal personnel.¹⁶⁷

No reliable figures exist for the numbers of judges, prosecutors, and lawyers in the period just before the NATO invasion. By early 2006, there were reportedly 1,500 judges nationwide.¹⁶⁸ However, there was no standard requirement for education levels of judges. According to Afghan Supreme Court statistics gathered in 2005, education levels varied from below a 12th grade education to a university degree in law and political science.¹⁶⁹ There were also few trained lawyers in the country. In 2007, 236 lawyers were registered with the Ministry of Justice.¹⁷⁰ After the passage of a new law creating an independent bar association, the number of registered lawyers increased to 600.¹⁷¹ In addition, by 2007, there were approximately 2,500 prosecutors nationwide.¹⁷²

Additionally, there were few formal laws from the Taliban period, and no complete and available copy of the applicable laws in the country existed.¹⁷³ The immediate question for the international community, if not for the average Afghan citizen, was what laws to recognize because no set of easily accessible laws existed.¹⁷⁴ During the Bonn Agreement's interim period, the laws in force were the 1964 Afghan Constitution and the compilation of laws and regulations passed since 1964, unless such laws contradicted the Constitution or the Bonn Agreement.¹⁷⁵ However, some codes, such as the 1974 Criminal Procedure Code, were not adopted in this interim period.¹⁷⁶ Instead, a former Italian Magistrate, Hon. Dr. Guiseppe di Gennaro, drafted an interim Criminal Procedure Code that was in force pending the adoption of a new code by the

166. See, e.g., MILLER & PERITO, *supra* note 79, at 7-10; TONDINI, *supra* note 87, at 25.

167. See *supra* note 166.

168. TONDINI, *supra* note 87, at 63.

169. Out of a total of 1050 judges, only 100 had a university degree, while 500 judges had Sharia law degrees; 200 had between a 12th and 14th grade education, while 250 had below a 12th grade education. TONDINI, *supra* note 87, at 63. The basic law degree in Afghanistan is at the university, not graduate, level. See, e.g., *Political Science and Law*, AM. UNIV. OF AFG., <http://bit.ly/XZm74J> (last visited Feb. 11, 2013) (describing Bachelor of Law degree that will be offered beginning in Spring 2013).

170. TONDINI, *supra* note 87, at 70.

171. *Id.*

172. *Id.*

173. *Id.* at 25.

174. One of the early tasks for the International Development Law Organization was to physically collect all the existing laws to "put an end to the situation of legal anarchy." *Id.* at 54.

175. *Id.* at 27.

176. Hartmann & Klonowiecka-Milart, *supra* note 103.

Afghan parliament.¹⁷⁷ Both Afghans and international observers heavily criticized this Criminal Procedure Code because of the perception that Judge Gennaro did not consult with Afghans during the drafting phase and because of the concern that the new code did not reflect a sufficient understanding of the conditions in Afghanistan.¹⁷⁸

Overall, the legislative drafting program has been heavily criticized.¹⁷⁹ Some have criticized the approach because the international community has tended to not consult or work closely with Afghan counterparts, but instead has often written or rewritten laws with no “formalized, transparent consultative[,] and consensus building process.”¹⁸⁰ Although rule of law workers, observers, and scholars have raised serious questions about the legislative drafting process itself, fewer questions have been raised about the underlying need for the international aid community to be heavily engaged in this process.¹⁸¹

Corruption is endemic and reportedly worsening.¹⁸² Corruption is often blamed as the primary reason that Afghans regularly bypass the formal justice system and instead resolve their disputes through customary law and informal dispute resolution processes.¹⁸³ Corruption is a problem throughout Afghanistan, not just in the justice sector.¹⁸⁴ However, prosecutors, police, and judges are all reportedly susceptible to pay-offs in exchange for dropping cases, and the low pay of all of these

177. TONDINI, *supra* note 87, at 27; Hartmann & Klonowiecka-Milart, *supra* note 103, at 275-76.

178. Suhrke & Borchgrevink, *supra* note 81, at 213-14; REFORMING AFGHANISTAN'S BROKEN JUDICIARY, *supra* note 90, at 10-11; Hartmann & Klonowiecka-Milart, *supra* note 103, at 276-82 (questioning why the 1974 criminal procedure code was not adopted and whether there was a need for a new criminal procedure code at all).

179. See Hartmann & Klonowiecka-Milart, *supra* note 103, at 275; *see also infra* Part V.

180. Hartmann & Klonowiecka-Milart, *supra* note 103, at 275.

181. For example, only a few of the survey respondents raised this concern, which reflects the overall environment in which this work is done. *See infra* Part V.

182. See, e.g., Scott Shane, Mark Mazzetti & Dexter Filkins, *State's Secrets Day 5: Pervasive Afghan Graft, Starting at the Top*, N.Y. TIMES, Dec. 3, 2010, at A1. *See generally* USAID, ASSESSMENT OF CORRUPTION IN AFGHANISTAN (2009), available at <http://usat.ly/XrP4bH>.

183. THOMAS BARFIELD ET AL., U.S. INST. OF PEACE, THE CLASH OF TWO GOODS: STATE AND NON-STATE DISPUTE RESOLUTION IN AFGHANISTAN 21 (n.d.), available at <http://bit.ly/127maPa>. For a more detailed description of the formal legal institutions and customary practices, see Wardak, *supra* note 158; *see also The Justice Sector in Helmand: A Way Forward*, a report of the Provincial Reconstruction Team in Lashkar Gah and Task Force Helmand (Aug. 2007) (on file with author). “The only system that effectively counts is the informal, customary system. No amount of extra funding or assistance is going to change that.” *Id.* at 1.

184. See, e.g., Dexter Filkins, *Loss of Faith in Afghan Leaders May Hurt Push Against Taliban*, N.Y. TIMES, Sept. 4, 2010; Jean MacKenzie, *Corruption in Afghanistan: The Elephant in the Room*, GLOBAL POST (Apr. 15, 2011), <http://bit.ly/WVCBvD>.

professional groups combined with the availability of relatively large amounts of cash from illegal drugs undoubtedly helps fuel the problem in the justice sector.¹⁸⁵ Anti-corruption rhetoric often categorizes corruption as the problem leading to other problems, instead of viewing corruption as simply an indicator of existing problems. Reflecting this thinking, the Afghan Attorney General reportedly said, “Corruption is the mother of all crimes in Afghanistan.”¹⁸⁶

However, corruption in Afghanistan may instead be an example of unintended consequences or indicate areas where the society is not able to absorb change. For example, the expansion of the formal justice sector has reportedly led to an increase in abuses such as arbitrary detention, in part because judges and prosecutors do not understand or misinterpret the law¹⁸⁷ and in part due to corruption.¹⁸⁸ Because the international community has focused aid on the formal justice system, there are now more police officers and detention facilities.¹⁸⁹ These new “resources” have at times been misused; people have been detained or imprisoned so that pay-offs will be made to judges, prosecutors, police officers, and the complaining victim to get charges dismissed or cases thrown out.¹⁹⁰ There have been increasing calls for additional focus on the informal justice sector.¹⁹¹ As stated above, from the early days, the international community and the Afghan government recognized the primacy of the informal justice sector.¹⁹² However, in the early years of the assistance effort, there was little attention or assistance given to aid the informal justice sector.¹⁹³ As the years have gone by, and as frustration has grown with the lack of progress in developing the formal justice sector, many in the aid community are revisiting this decision and

185. REFORMING AFGHANISTAN’S BROKEN JUDICIARY, *supra* note 90, at 26. As one indication of this problem’s magnitude, in 2009, 12 prosecutors in the Anti-Corruption Unit of the Attorney General’s Office took a polygraph test asking whether they had taken a bribe or worked with insurgent groups in the last two years. *Id.* The results were that “90 per cent probably had been involved in graft schemes or were linked to insurgents.” *Id.*

186. INSPECTION REPORT, *supra* note 12, at 20.

187. REFORMING AFGHANISTAN’S BROKEN JUDICIARY, *supra* note 90 at 28.

188. *Id.* at 22.

189. *See id.*; INT’L CRISIS GRP., POLICING IN AFGHANISTAN: STILL SEARCHING FOR A STRATEGY 2 (2008), available at <http://bit.ly/XrPej6>.

190. REFORMING AFGHANISTAN’S BROKEN JUDICIARY, *supra* note 90, at 25-29.

191. *See generally* LIANA SUN WYLER & KENNETH KATZMAN, CONG. RESEARCH SERV., R41484, AFGHANISTAN: U.S. RULE OF LAW AND JUSTICE SECTOR ASSISTANCE 1, 41 (2010), available at <http://bit.ly/hpsDQV>.

192. *See generally supra* notes 115-116.

193. USAID FINAL REPORT, *supra* note 116, at 13 (discussing current work in this area, including earlier work by the U.S. Institute of Peace).

advocating for more assistance to the informal justice sector.¹⁹⁴ Advocates for this type of assistance recommend it as a way to aid or complement counter-insurgency work in the hope that aid to the informal justice sector will help build better links to the formal justice sector to strengthen it.¹⁹⁵ However, customary justice is criticized due to the treatment of women and other less powerful people within these traditional and informal processes.¹⁹⁶ Both national and international laws are routinely violated in the informal justice sector.¹⁹⁷ Critics also contend that the goal of linking the formal and informal justice systems “rest[s] on faulty assumptions about the practicalities of implementation in a political system shaken to its core by corruption and violent insurgency.”¹⁹⁸ One concern is that the parts of the country where informal justice processes are most heavily used are also areas most affected by the insurgency so that it is difficult to monitor abuses and compliance with the law.¹⁹⁹ Donors working in this area do not seem to consider the possible impact this form of assistance might have on public opinion and public perceptions of the formal legal system.²⁰⁰ There have been few studies and little empirical work on the impact of funding and other aid to informal justice sectors.²⁰¹ It is therefore difficult to conclude with certainty that supporting the informal justice sector will have any influence on building legitimacy for the formal justice sector. Unfortunately, in the absence of any information supporting the linkage, it seems to be wishful thinking that this type of assistance will have that

194. See INSPECTION REPORT, *supra* note 12, at 15-17 (recommending a closer look at work in the informal justice sector).

195. USAID FINAL REPORT, *supra* note 116, at 19 (discussing reasons to support the informal justice sector).

196. See, e.g., Rod Nordland & Alissa J. Rubin, *Child Brides Escape Marriage, But Not Lashes*, N.Y. TIMES (May 31, 2010), <http://nyti.ms/VRj8vL>. The incident reported in the article is the beating of two child brides after they escaped from their elderly husbands and were returned to the village, tried and sentenced to 40 lashes. See *id.* This incident is an example of “runaway customary justice.” REFORMING AFGHANISTAN’S BROKEN JUDICIARY, *supra* note 90, at 28; see also U.N. ASSISTANCE MISSION IN AFG. & OFFICE OF U.N. HIGH COMM’R FOR HUM. RTS., HARMFUL TRADITIONAL PRACTICES AND IMPLEMENTATION OF THE LAW ON ELIMINATION OF VIOLENCE AGAINST WOMEN (Dec. 2010), available at <http://bit.ly/WVCGzg>.

197. REFORMING AFGHANISTAN’S BROKEN JUDICIARY, *supra* note 90, at 31.

198. *Id.*

199. *Id.*

200. See, e.g., USAID FINAL REPORT, *supra* note 116, at 19.

201. See *id.* at 13; see also ERICA HARPER, INT’L DEV. LAW ORG., WORKING WITH CUSTOMARY JUSTICE SYSTEMS: POST CONFLICT AND FRAGILE STATES 1, 174 (2011). Studying customary justice projects in eight countries, Harper observed, “[W]hat is effective is situation-specific and contingent upon a variety of factors including, among others, social norms, the presence and strength of a rule of law culture, socio-economic realities and national and geo-politics.” *Id.*

impact in Afghanistan.²⁰² Additionally, although at first glance it may seem a good idea to work with what exists in a given country, there are serious questions about what the typical rule of law development worker might contribute in terms of meaningful transfer of knowledge or assistance in contexts that are often extremely localized and require high levels of understanding of the culture.²⁰³ In the context of Afghanistan, in addition to questions about whether such aid is ultimately supporting the development of the formal justice sector, there are serious concerns that providing assistance to the informal justice sector contributes to an impression that the international community is approving processes that are abusive towards women.²⁰⁴ This impression may ultimately harm the development of rule of law.

B. The Level of Economic and Social Development

Afghanistan is a poor nation with low socio-economic indicators in virtually every category.²⁰⁵ Infant mortality is the highest in the world.²⁰⁶ Illiteracy rates are high; some estimate that only 28 percent of the total population is literate, with as few as 12 percent of women able to read.²⁰⁷ Basic infrastructure is poor in Kabul and in a handful of other cities, and worse to non-existent in the rest of the country.²⁰⁸ There is no reliable system of public transportation either within or between cities. The

202. REFORMING AFGHANISTAN'S BROKEN JUDICIARY, *supra* note 90, at ii ("In its desperation to find quick fix solutions, the international community, the U.S. in particular, has begun to look to the informal justice sector as a means to an undefined end.").

203. See UBINK, *supra* note 67, at 18 (cautioning about the complexity in engaging in this area).

204. See generally Jean MacKenzie, *Afghan Women Trapped in Tribal Court System*, GLOBAL POST (Mar. 7, 2012), available at <http://bit.ly/A0jVIB> (reporting on how women are treated in the customary justice system, and how this treatment has not linked the formal and informal justice systems together in a way that shows better respect for human rights).

205. *The World Fact Book—Afghanistan*, *supra* note 77 ("Much of the population continues to suffer from shortages of housing, clean water, electricity, medical care, and jobs.").

206. *Id.* The infant mortality rate is 121.63 deaths per 1,000 live births. *Id.*

207. *Id.* Although the United States and other donors provide support for education programs, at least some observers view this area as a lost opportunity, particularly due to the failure to invest heavily in this area in the early years after the NATO invasion. RASHID, *supra* note 86, at 183-84 (2008) ("The literacy program was the largest ever undertaken in any Muslim country. If the Bush Administration had remained focused on this alone, it would have served as a remarkable beacon for Muslims worldwide. . . .").

208. RASHID, *supra* note 86, at 191. One problem is the growth in population and the failure of the infrastructure to keep up. *Id.* For example, Kabul had 400,000 residents in 1978 and grew to an estimated 3.6 million in 2005. *Id.* This population growth was not planned, and the state made no provisions to provide water or electricity to the shantytowns around the city. See *id.*

roads, where they exist, are poor.²⁰⁹ Electricity remains unreliable or unavailable.²¹⁰ Easy access to fresh water is still a problem for many Afghans.²¹¹ Afghanistan is also a highly complex cultural environment with multiple ethnic groups, tribes, warlords, and others vying for power both nationally and, in many instances, within particular organizations.²¹² Afghanistan is a male-governed culture that restricts, by tradition if not by law, opportunities for women.²¹³

For the rule of law assistance provider, the level of economic and social development creates a number of problems. Rule of law depends on a certain level of education, both for the public and the legal community. Ideally, rule of law development programs should be conducted nationwide, not simply in the capital and a few other major cities. The logistical difficulties of moving around the country, in addition to the security problems, have meant that more of the work is focused in Kabul where only a small percentage of the overall population lives. The poor infrastructure, combined with the mountains and distances between towns, can create serious problems in the administration of justice. It can take days to transport defendants from the place of their arrest or detention to the trial, and that is assuming the local authorities have a vehicle and personnel for the journey.²¹⁴ Witnesses may or may not have access to transportation to court.²¹⁵

In addition to logistical problems created by poor roads and a lack of infrastructure, rule of law development programs suffer from the fact that the average Afghan is more focused on daily survival and less on the larger rule of law ideas. The reality is that the average Afghan struggles to provide food, housing, and other necessities for themselves and their families.²¹⁶ In such an environment, it is a challenge to motivate the

209. See *id.* at 186. For a general description of how better roads would improve Afghanistan's economy, see *id.* at 192-93. Road building has proven to be both difficult and expensive, as exemplified by the process of building the Kabul-Kandahar section of the road from Kabul to Herat. *Id.* at 186.

210. See *The World Fact Book—Afghanistan*, *supra* note 77.

211. See *id.*

212. See Thomas Barfield, *Culture and Custom in Nation-Building: Law in Afghanistan*, 60 ME. L. REV. 347 (2008) (describing the complex cultural environment and its impact on development efforts); see also Jolyon Leslie, *Culture and Contest*, in *THE FUTURE OF AFGHANISTAN* 73-80 (J. Alexander Thier ed., U.S. Inst. of Peace 2009), available at <http://bit.ly/12J9BOK> (describing cultural aspects of development in the near future in Afghanistan).

213. See Jennifer Kristen Lee, *Legal Reform to Advance the Rights of Women in Afghanistan within the Framework of Islam*, 49 SANTA CLARA L. REV. 531 (2009) (describing the situation of women in Afghanistan and the challenge to protect their rights through legal reform).

214. See, e.g., REFORMING AFGHANISTAN'S BROKEN JUDICIARY, *supra* note 90, at 17.

215. *Id.*

216. See generally AFG. HUM. DEV. REPORT, *supra* note 14.

average person to focus on what may seem like distant and irrelevant concepts such as rule of law development. Most Afghans rarely interact with the formal legal system, and the formal laws in place matter much less than what the actual practices are in most parts of the country.²¹⁷ Rule of law development requires a certain level of “buy-in,” and it requires not just legal professionals but also the general population to accept and follow laws.²¹⁸ This buy-in is difficult to achieve when such a significant part of the population focuses on basic survival.

C. *The Level of Institutional/Political Development*

Afghanistan has a weak central government that does not control the entire country. The country does not have a strong central bureaucracy or strong political institutions.²¹⁹ Every part of the government suffers from a lack of adequately trained workers. The bureaucracy is not fully functional or developed, and basic government services are not regularly provided. One of many challenges is finding trained personnel, a challenge that is exacerbated by the opportunities and salaries offered by the large number of employers that are international organizations and aid providers.²²⁰ Tribal, ethnic, and family loyalties tend to be the predominant factors from the top to the bottom of state structures. There is little recognition of a modern nation-state, much less loyalty to it.

These problems create a number of challenges for rule of law workers. Because a strong national government is lacking, it is difficult

217. See, e.g., REFORMING AFGHANISTAN’S BROKEN JUDICIARY, *supra* note 90, at 6-7.

218. See Cynthia Alkon, *Plea Bargaining as Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?*, 19 TRANSNAT’L L. & CONTEMP. PROBS. 355, 377-84 (2010) [hereinafter Alkon, *Plea Bargaining as Legal Transplant*] (discussing the importance of attitudes of the general public for rule of law).

219. Afghanistan consistently ranks high on Foreign Policy’s *Failed State Index*. See *Failed State Index*, FOREIGN POL’Y, <http://atfp.co/jTdaIt> (last visited Feb. 12, 2013). In 2011, Afghanistan ranked as the seventh worst failed state in the world, just behind Zimbabwe and Haiti. *Id.* Among the 12 factors that Foreign Policy considers in the rankings, Afghanistan rated worst in “Security Apparatus,” followed by “Delegitimization of the State.” *Id.*

220. RASHID, *supra* note 86, at 181. For example, after the NATO invasion, former Minister of Finance Ashraf Ghani complained, “Within six months of starting my job as finance minister, my best people had been stolen by international air organizations who could offer them forty to a hundred times the salary we could.” *Id.* At the time, civil servants were earning an average of USD \$50 per month, compared to USD \$1,000 per month for drivers working for international organizations. *Id.* In an effort to combat this problem, a fund was established to supplement public employee salaries. For a critical report on the salary supplements, see OFFICE FOR INSPECTOR GEN. FOR AFG. RECONSTRUCTION, ACTIONS NEEDED TO MITIGATE INCONSISTENCIES IN AND LACK OF SAFEGUARDS OVER U.S. SALARY SUPPORT TO AFGHAN GOVERNMENT EMPLOYEES AND TECHNICAL ADVISORS (2010), available at <http://bit.ly/14Y1c9t>.

to conduct programming on a national scale. Low levels of institutional development mean that basic capacity cannot be assumed, and rule of law development projects either have made the mistake of assuming higher levels of capacity or have spent considerable resources compensating for the lack of capacity.²²¹ At least one report stated that, by 2005, the Afghan government “could spend only 44% of the money it received for development because it had no capacity to plan and monitor projects.”²²² The focus on local ownership of rule of law development planning, due to the “light footprint” approach, is difficult in practice when the local actors have limited capacity, experience, or background for policy planning, let alone implementation.²²³

D. Ongoing Armed Conflict

Armed conflict also plagues the country.²²⁴ From the Soviet invasion in 1978, through the civil war that brought the Taliban to power—and now under NATO troops—conflict has continued and worsened by most accounts.²²⁵ The ongoing insurgency creates problems for development at all levels.²²⁶ Due to the security situation, it is difficult for everyone, including Afghans and international development workers, to travel freely around the country.²²⁷ The insurgency has closed governmental offices, including courthouses.²²⁸ The ongoing violence and threats of violence and general concerns about security are the reported reasons that many judges and prosecutors have moved to Kabul or other larger urban areas.²²⁹ Unfortunately, these fears seem well founded because judges and prosecutors have been killed,

221. See *infra* Part V.

222. RASHID, *supra* note 86, at 194.

223. TONDINI, *supra* note 87, at 88.

224. See, e.g., J. Alexander Thier, *Introduction: Building Bridges*, in *THE FUTURE OF AFGHANISTAN*, *supra* note 212, at 2-3.

225. See Taimoor Shah, Alissa J. Rubin & Jack Healy, *Turban-Hidden Bomb is Detonated at Service for Karzai's Brother*, N.Y. TIMES (July 15, 2011), <http://nyti.ms/VR4pGz> (reporting U.N statistics that find a 15% increase in civilian casualties from the year before); see also J. Alexander Thier, *Introduction: Building Bridges*, in *THE FUTURE OF AFGHANISTAN*, *supra* note 212, at 2-3; *Security in Afghanistan*, INT'L CRISIS GRP. (last updated Aug. 23, 2011), available at <http://bit.ly/WyLHC5>.

226. See generally BERGLING, *RULE OF LAW ON THE INTERNATIONAL AGENDA*, *supra* note 10, at 157 (discussing some of the possible approaches the international community could take to improve the security situation.).

227. See *infra* Part V.C.6.

228. See *REFORMING AFGHANISTAN'S BROKEN JUDICIARY*, *supra* note 90, at 17-18. As of July 2010, the International Crisis Group reported that “at least 69 primary district courts” were closed due to “insurgent activity.” *Id.*

229. See *REFORMING AFGHANISTAN'S BROKEN JUDICIARY*, *supra* note 90, at 24.

kidnapped, and threatened.²³⁰ The security problems in areas outside Kabul also contribute to the problem of “ghost personnel,” which refers to when an employee’s name remains on the rolls and they continue to be paid, but the employee does not live or work in his assigned province.²³¹ In areas controlled by the Taliban, there are additional concerns including reports that the Taliban prevents people from coming to court or using formal court structures.²³²

In terms of on-going development work, the armed conflict precludes work in the more insecure areas of the country. The security environment also means that most international development workers live in housing provided by their employer—surrounded by their work colleagues with security guards—making it difficult to enjoy a “normal life” when they are not working.²³³ Most organizations place restrictions on where and when international staff can leave their protected compounds and regularly declare lock-downs requiring the staff to remain in their protected compounds and not go to dinner, go shopping, or even visit friends at other protected compounds.²³⁴ The restrictions that aid workers live with limit both the work they are doing and the information they are able to gather to help with the planning and implementation of their projects.²³⁵ Perhaps equally important, the severe restrictions on daily activities influence who decides to work in Afghanistan and how long they remain.²³⁶ Given these conditions, it is not surprising that many aid workers have no prior experience in Afghanistan or local language skills.²³⁷ Furthermore, some aid workers have no legal background.²³⁸ Analysts continue to criticize the lack of expertise and experience of many international advisors working in

230. *Id.*

231. *Id.* The existence of ghost personnel does not prevent supervisors from collecting those employees’ salaries.

232. REFORMING AFGHANISTAN’S BROKEN JUDICIARY, *supra* note 90, at 24-25.

233. See Patrick Cockburn, *Kabul’s New Elite Live High on Western Largess*, INDEP. (May 1, 2009), available at <http://ind.pn/XqIye>. Many employers restrict when or if their employees can go to dinner, shopping, or the gym (in the few places where such activities are even possible). One development worker in Afghanistan commented to the author about the living arrangements: “I now know what prison is like and why it makes people do crazy things.”

234. Busnardo Interview, *supra* note 105.

235. See *infra* Part V.C.6; see also notes 295-296 and accompanying text.

236. See *infra* note 297 and accompanying text.

237. See *infra* Part V.C.3-4; TONDINI, *supra* note 87, at 100-01. However, not having prior experience in the country and not speaking the local language are common for rule of law development workers and are not deficiencies unique to aid workers in Afghanistan.

238. See REFORMING AFGHANISTAN’S BROKEN JUDICIARY, *supra* note 90, at 10.

Afghanistan, which is in part due to the difficult living conditions, including the overall security situation.²³⁹

V. SURVEY OF RULE OF LAW DEVELOPMENT WORKERS IN AFGHANISTAN

This article will now discuss the results of an independent survey of rule of law development workers in Afghanistan. This survey was conducted to gather more information about how those involved in direct implementation of rule of law development projects in Afghanistan viewed their work and the rule of law assistance effort in the country. While descriptive accounts of donor efforts in Afghanistan exist,²⁴⁰ there is little empirical research on international rule of law promotion work in any country, including Afghanistan.²⁴¹ The research that does exist tends to focus on particular projects or particular types of work and may be written by those who have a stake in that particular project.²⁴² At the same time, many donor and implementing organizations create

239. *See id.* at 10-11.

240. For an example of a common descriptive document, see generally U.N. ASSISTANCE MISSION IN AFG., JUSTICE SECTOR OVERVIEW (2007) (on file with author). This 39-page document describes ongoing assistance work in Afghanistan by listing which organizations are working on which issues. Such documents can be invaluable in coordination efforts, but they do not provide meaningful analysis or criticism regarding the overall rule of law assistance effort.

241. *See* Thomas Carothers, *The Problem of Knowledge, in* PROMOTING THE RULE OF LAW ABROAD, *supra* note 21, at 15, 25-27 (discussing how little rule of law practitioners understand about how rule of law development actually happens and the lack of “well-grounded knowledge” in part due to the fact that many people doing rule of law development work are lawyers who are “not oriented toward the empirical research necessary for organized knowledge accumulation”); *see also* Taylor, *supra* note 53, at 46, 50-51 (“Many academic colleagues, development practitioners, lawyers and policy makers and students are troubled by the knowledge vacuum in rule of law assistance. . . . The lack of precision and predictability in rule of law assistance is also attributable to a widespread lack of baseline research through which to develop ‘thick’ descriptions of the target legal system before we attempt the latest rule of law intervention.”). For a more detailed analysis of the institutional framework of rule of law assistance efforts, see Veronica L. Taylor, *The Rule of Law Bazaar, in* RULE OF LAW PROMOTION: GLOBAL PERSPECTIVES, LOCAL APPLICATIONS 325 (Per Bergling et al. eds., 2009).

242. *See, e.g.,* D. Brooks Smith, *Promoting the Rule of Law & Respecting the Separation of Powers: The Legitimate Role of the American Judiciary Abroad*, 7 AVE MARIA L. REV. 1 (2008) (analyzing the role of U.S. judges in rule of law reform projects) (written by a U.S. Court of Appeals Judge who participated in such projects). For an example from Afghanistan, see Lt. Cmdr. Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, ARMY LAW. 45 (July 2007). For an example of how empirical research can contribute to better understanding of the actual results of rule of law development work, see Cohen et al., *Truth & Consequences in Rule of Law: Inferences, Attribution & Evaluation*, 3 HAGUE J. ON RULE L. 106 (2011).

impediments to empirical research by imposing restrictions that limit how, or if, their employees can speak about their work.²⁴³

The survey respondents were overwhelmingly critical of current rule of law development work in Afghanistan. Most did not even compliment their own programs or projects. Few had any kind words for their own governments, and criticized the governments and intergovernmental organizations actively engaged in rule of law development work. The responses repeated several main themes: lack of coordination between international development workers and organizations; lack of understanding of the history, culture, and legal environment in Afghanistan; lack of long-term vision and planning; and a lack of qualified, competent, or well-trained international rule of law assistance providers.²⁴⁴ While many of their reflections apply to development work generally, the more critical comments are specific to challenges facing rule of law development assistance in Afghanistan.

A. *Survey and Sample Size*

The survey posed questions divided into three broad categories: (1) experience in Afghanistan, (2) experience before Afghanistan, and (3) opinions about rule of law promotion work in Afghanistan.²⁴⁵ A number of questions sought basic demographic information about the respondents including age, gender, citizenship, and educational background.²⁴⁶ Colleagues with experience in Afghanistan or empirical methods reviewed the first draft of the survey. Based on their comments, I revised and distributed the survey.²⁴⁷

I developed an e-mail list to distribute the survey by e-mailing friends and former colleagues to ask if they knew of anyone who was currently, or had previously been, engaged in rule of law work in

243. See *infra* Part V.B.

244. Criticisms of rule of law assistance work are not unique to Afghanistan. See generally BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA, *supra* note 10. For a general critique of aid efforts in Afghanistan (not specific to rule of law), see WALDMAN, *supra* note 18, at 2 (“Far too much aid has been prescriptive and driven by donor priorities—rather than responsive to evident Afghan needs and preferences. Too many projects are designed to deliver rapid, visible results, rather than to achieve sustainable poverty reduction or capacity-building objectives.”). For a historical perspective on aid to Afghanistan, see Yuri V. Bossin, *The Afghan Experience with International Assistance*, BEYOND RECONSTRUCTION IN AFGHANISTAN: LESSONS FROM DEVELOPMENT EXPERIENCE (John D. Montgomery & Dennis A. Rondinelli eds., 2004).

245. See *infra* Appendix A.

246. See *infra* Appendix A (questions 19-22).

247. See *infra* Appendix A (revised and final version). Response bias could be a problem, and many of the potentially “loaded” or “political” questions were put in the middle of the survey and mixed in with more neutral questions (such as questions about experience, languages, and professional training) in hopes of reducing this problem.

Afghanistan.²⁴⁸ Those inquiries went out to a wide range of individuals with a mix of nationalities; my goal was to gather as many names as possible to reflect the variety of people working in Afghanistan.²⁴⁹ The final list compiled through these contacts included 160 names. I also contacted the United States Institute for Peace (USIP) International Network to Promote the Rule of Law (INPROL) and asked to post the survey on its website.²⁵⁰ INPROL agreed to post the survey and assisted in searching its database for individuals with stated experience in Afghanistan. This list generated 85 additional names that were not on the previous list.²⁵¹

Throughout June and July in 2008, I distributed the survey by e-mail to 221 people²⁵² and through posting as a Query to the INPROL website.²⁵³ In March 2009, the survey was sent again as a follow up to non-responding names in the original survey group. The follow up included a cover letter from a lawyer who worked in Afghanistan and personally knew the people on the reduced list in the hopes that a personal connection might help encourage a response.²⁵⁴

248. Respondents defined for themselves what it meant to be “engaged in rule of law work in Afghanistan.”

249. The e-mail stated, “I want to make sure that I am reaching the largest and most inclusive group possible,” and asked, “If you know of anyone who has worked, or is working in Afghanistan doing rule of law development work (by any definition of the term), can you please send me their name and e-mail address?” E-mail from author to numerous solicited respondents (June 2008) (on file with author).

250. The survey is viewable to INPROL members at the following web address: <http://www.inprol.org/node/3782>. Posted on July 9, 2008, the Query stated:

I am a member of INPROL and a law professor in the United States researching rule of law work in Afghanistan. If you have experience doing rule of law or legal sector work in Afghanistan, I would appreciate you filling out the attached survey. For the purposes of this survey I am defining rule of law work very broadly. . . . All responses will remain anonymous. This means I will not link your name or organization to any specific statement. I intend to publish the results in an academic law journal. . . . I would like the survey to go to as many people as possible. Therefore, if you know of others who are or have worked in rule of law development in Afghanistan who are not members of INPROL, please either send them this survey or send their email addresses to me so I can forward it to them. I am happy to answer any questions you may have about the survey. Thank you in advance for your assistance.

251. Unfortunately, no one responded to the INPROL posting or to e-mails sent to INPROL members. This lack of response may reflect limitations regarding the networking effect of that forum, at least at the time.

252. See *infra* Appendix B. Eight surveys returned to the author with “undeliverable” or “delivery failure” notices.

253. See *supra* note 250.

254. E-mail from author to reduced list of solicited respondents (Mar. 9, 2009) (on file with author).

B. Response Rate to Survey

In total, 30 people responded to the survey, a 13.6 percent response rate overall.²⁵⁵ Of those respondents, 10 people replied to the e-mail stating why they were unable or unwilling to respond to the survey, which made the useable response rate 9 percent. Several current or former U.N. employees declined to respond because, as one said, “U.N. Staff are very restricted contractually in their freedom to respond to such requests” and to do so would require advance approval.²⁵⁶ A few people declined to respond because they were no longer working in Afghanistan.²⁵⁷

Several others who received the survey initially sent back questions about my promise of anonymity. Potential respondents perceived that some of the questions in the survey were sensitive or political, and they therefore wanted additional assurance that their responses would not be linked to them in any way.²⁵⁸ A number of respondents also wanted to know who was funding the survey and seemed concerned that the survey had a political agenda. I confirmed that no governmental or non-governmental entity funded this survey. I further assured respondents that the decision to conduct the survey was due to a personal research interest with no greater political agenda, perspective, or goal.

Perhaps the most interesting exchange was with the U.S. Embassy in Kabul. In an e-mail dated June 27, 2008, an employee of the U.S. Embassy in Kabul requested “assurance” that “any responses will be entirely confidential and not for attribution, not by name, title or affiliation. . . . Are you able to provide us with that assurance?”²⁵⁹ I sent a more detailed response, assuring respect for anonymity and encouraging responses from U.S. government personnel to ensure that their perspective would be included in the final survey results.²⁶⁰ On June 29, 2008, the same employee wrote:

255. By October 2008, 26 responded; one responded in January 2009, and three responded in March 2009.

256. E-mail from anonymous respondent to author (June 27, 2008) (on file with author) [hereinafter June 27 e-mail].

257. These e-mails are on file with the author.

258. The vast majority of the respondents are not permanent employees of the organizations who employ them in Afghanistan. *See infra* Part V.C.1. Instead, these respondents have short-term contracts and, presumably, want their contracts in Afghanistan renewed or at least want to stay on good terms with their employer. It is clear from the cautious responses that many respondents did not want to become known as “trouble-makers” or to be identified as overly critical of the work they (and their employers) were doing in Afghanistan.

259. *See* June 27 e-mail, *supra* note 256.

260. The complete text of the Author’s e-mail response dated June 27, 2008, was:

I heard from the US Embassy in Pakistan that you had also requested a response from them. After consulting with the RSO [Regional Security Office], they have elected not to respond. That prompted me to notify our RSO. Since then, ROL [Rule of Law] and RSO and PAS [Public Affairs Section] have met and discussed the issue, and I have also been in touch with Embassy Pakistan [sic]. The result of those discussions is that we have decided not to respond, and that decision applies to all Embassy components. . . . I'm sorry that we are unable to help.²⁶¹

One of the earlier e-mailed surveys went to a person who had moved from the U.S. Embassy in Afghanistan to the U.S. Embassy in Pakistan, thus unintentionally sparking the cross-border exchange.²⁶² Another staff member of the U.S. Embassy in Afghanistan sent a follow up e-mail to me apologizing for his inability to respond to the survey, due to the e-mail quoted above, and went on to state that "we do have a lot of security issues that are unique to Afghanistan."²⁶³ This e-mail seemed to imply that the reason for the prohibition was due to security concerns.²⁶⁴

Yes, I will not attribute any statement by name, or affiliation. When I write the results up I anticipate I may use citizenship, and level of seniority and/or state from a diplomatic office, or aid organization, but not directly attribute which country the diplomatic office or aid organization is from. For example, I may say, a senior diplomat from a western country said "False." Or a senior aid official from a western country said: "False." Alternatively I may also say a US Citizen with many years' experience working in Afghanistan responded "False."

I will generally report how many responses I receive from governmental, non-governmental and inter-governmental sources. And, how many respondents are citizens of what countries. But, as I said, I will not list with specificity which countries the governmental organizations are from.

I am attaching an article I wrote a few years ago based on a survey I did of women labor arbitrators in the USA. Although the topic is very different, it should give you a sense of the style of writing and how I will approach writing up the responses to this survey. As with this survey I promised to those respondents that what they said would remain anonymous.

I hope this helps. If you have further questions before responding, please let me know.

My goal is get a large response rate to make sure that what I ultimately report is a more accurate picture. Obviously, I think hearing the views of those of you working in US government positions is an extraordinarily important part of this and I would not like to see it left out.

E-mail (on file with author).

261. E-mail from anonymous respondent to author (June 29, 2008) (on file with author) [hereinafter June 29 e-mail].

262. Due to the method of compiling the list of names and e-mail addresses, I did not know where each person was working or their positions and was unaware that any e-mails had reached Pakistan.

263. See June 29 e-mail, *supra*, note 261.

264. *Id.*

Despite this prohibition, a number of current employees of the U.S. government in Afghanistan, and people who had previously worked directly for a U.S. government agency, elected to respond. The final such response came a few days after “all Embassy components” were instructed not to respond when a staff member stationed at the U.S. Embassy in Kabul, apparently unaware of this prohibition, returned a completed survey.²⁶⁵

*C. Survey Results*²⁶⁶

The response rate for this kind of survey is small but not atypical. Although the sample of 20 useable responses is statistically insignificant, it is valuable both in terms of providing a glimpse into how rule of law providers in the country view their work and in highlighting some of the methodological challenges in conducting this type of empirical research. The survey illustrates challenges in accessing the target respondent group, particularly from outside the country.

In this article I report the responses from the survey without evaluating the accuracy of the opinions or statements given by the respondents. Some of the respondents were highly critical of specific programs or organizations. Consistent with my promise of anonymity, I do not name or give identifying information about specific projects, organizations or individuals, but instead characterizes the general type of work to which respondents refer. There were also some specific criticisms of countries, governmental aid organizations, and intergovernmental organizations. The country or organization is named when the comment is generic and not tied to a particular or identifiable project or individual.

1. Who Responded to the Survey?

Within the 20 valid responses, the average age was 51; over 65 percent of the respondents were older than 50, while 15 percent were under 35 years old. An equal number of men and women responded to

265. E-mail from anonymous respondent to author (July 2, 2008) (on file with author). I did comply with the U.S. Embassy in Kabul’s request and did not send any further notices or e-mails to those known to be working at the U.S. Embassy. However, the method of compiling the list of e-mail addresses meant that I was often unaware of where a particular individual worked because many of the e-mail addresses were not work addresses.

266. I assigned respondents a random number to protect their anonymity. Citations will refer to those numbers only in the form of [Survey Respondent #]. All responses are on file with the author.

the survey. Virtually all of the respondents were lawyers.²⁶⁷ Of the 20 respondents, 11 of them—or just over half—were U.S. citizens. The remaining respondents included citizens of Austria, Belgium, France, Germany, Italy, Ireland, Sweden, and the United Kingdom.²⁶⁸ The average number of years working in Afghanistan was one year and seven months. One respondent reported being in Afghanistan for just over four years, the longest reported time. The shortest time was two-and-a-half weeks.²⁶⁹ Just over half of the respondents completed the survey while they were still in Afghanistan. The nine remaining respondents had been away from Afghanistan an average of one year and five months before completing the survey.²⁷⁰

Strikingly, over one third of the respondents did not have any prior work experience in rule of law development assistance before going to Afghanistan.²⁷¹ Two of those respondents did have experience in other countries doing other types of development work.²⁷² These numbers mean that, for 25 percent of the respondents, Afghanistan was the first time they worked outside their home country doing any kind of development work at all.

As a group, however, the respondents were highly experienced, which is consistent with the age spread. On average, respondents had worked for more than 14 years in their home countries in addition to their international experience. Only five of the respondents had less than five years work experience in their home countries. Of those who reported prior experience in rule of law development, the average cumulative experience was eight years in the field. Of that number, just under half (46 percent) had more than five years work experience doing rule of law development work in other countries, and over 30 percent had worked in the field for three to five years. Only one of the respondents with prior work experience in rule of law development had experience limited to one country other than Afghanistan. The remaining respondents had experience in a wide range of countries and regions including in Central Asia (not Afghanistan), Eastern Europe, Asia, and Africa.

267. For purposes of this survey, “lawyer” includes anyone with a degree in law, even if they are not licensed to practice in their home country. Only one respondent reported that they were not a lawyer and/or did not have a legal education.

268. Three of the respondents reported dual citizenship. Two nationalities are not reported in this list for confidentiality purposes.

269. Seven of the respondents were in Afghanistan for less than one year.

270. Two months was the shortest time away from Afghanistan at the time of completing the survey; two years and eight months was the longest time.

271. Seven respondents (35%) listed no experience in response to this question.

272. The specific countries are not named for confidentiality purposes.

The 20 respondents were also evenly divided in terms of management experience. Forty-five percent of the respondents described their job as “senior management.” All but one of those respondents had rule of law development experience before beginning work in Afghanistan.²⁷³ Thirty-five percent (seven respondents) described their job as a “consultant” with no direct personnel management responsibilities. Twenty percent (four respondents) described themselves as “mid-level management,” and one wrote “entry level professional.” Most of the respondents were on temporary contracts and had not previously worked for the organization that employed them in Afghanistan.²⁷⁴ Only four respondents described themselves as permanent employees of the organization they were working for in Afghanistan.

The average contract term was 14 months. The shortest contract term was two-and-a-half weeks; the longest reported contract term was three years.²⁷⁵ Just over 63 percent of the respondents had extended their contract beyond its original term. In contrast, only two respondents did not finish their original contract term in Afghanistan.

2. Why Work in Afghanistan?

Respondents’ reasons for accepting a position in Afghanistan varied. Most respondents gave several reasons for accepting the job. Four of the 20 respondents specifically cited the high pay as a reason that they accepted their jobs. Six of the 20 said they went to work in Afghanistan because it would be interesting. Several others said they took the job because they wanted to be involved in rule of law development in Afghanistan specifically.²⁷⁶ One took the job for “adventure.”²⁷⁷ Another took the job out of “curiosity.”²⁷⁸ Several said they wanted the experience of working in a Muslim country (indicating that Afghanistan was their first job in a Muslim country). One took the job “[b]ecause Alexander the Great was there in the past.”²⁷⁹ And one

273. The average years of experience of that group was 6.2 years, with a low of 0.5 years and a high of 13 years. The one respondent without rule of law development experience had experience in other types of development work.

274. Of the 20 respondents, 16 were on temporary contracts; of this number, only 5 had worked for the organization before. Thus, 11 respondents had temporary contracts with employers for which they had not previously worked.

275. Three respondents reported three years as their contract term.

276. See Survey Respondent #7, #12, #19, *supra* note 266.

277. *Id.* #1. Respondent #8 also stated, “I do like challenges and adventure.” However, this was not that respondent’s stated reason for taking the position.

278. Survey Respondent #18, *supra* note 266.

279. *Id.* #6.

took the job “[b]ecause America needs to participate in rule of law development work in Afghanistan.”²⁸⁰

3. Training in Rule of Law or about Afghanistan before Beginning the Job

Few of the organizations paid for training before deployment to Afghanistan. Seventy percent of respondents did not receive any training on Afghanistan or rule of law development before beginning their jobs in Afghanistan.²⁸¹ Only 25 percent had some training,²⁸² but the longest “training” period was eight days. Some of the respondents came to Afghanistan with specific graduate level degrees focused on international relations and/or Afghanistan. None of the respondents had specific training in rule of law before deploying to Afghanistan, although many had experience in rule of law development due to previous work.

4. Language Training/Skills of Respondents

Afghanistan’s official languages are Dari and Pashto, although many other languages are spoken. The language of donor development tends to be English.²⁸³ The respondents’ knowledge of the two main local languages was poor. Only one of the 20 respondents spoke Pashtu at a self-described “basic” level. One of the 20 respondents described their level in Dari as “fluent.”²⁸⁴ One respondent reported “proficient” Dari.²⁸⁵ Two respondents described their level in Dari as “basic” and four reported that they knew a “few words” or a “few phrases” in Dari. Eleven of the respondents—or 55 percent—said they spoke no Dari at all. Of those who reported any level of proficiency in Dari, only two reported studying the language before they started working in Afghanistan (one at a “fluent” level and one at a “basic” level). None of the respondents said that language training was part of their pre-

280. Survey Respondent #16, *supra* note 266.

281. Respondent #10 left this question blank and was counted as “no training.”

282. One respondent identified as self-studied; the respondent is not included in the above calculations. In fairness, many of the respondents would probably agree that they were “self-trained” by reading or doing other work in advance of arriving in Afghanistan.

283. See *The World Fact Book—Afghanistan*, *supra* note 77 (“Afghan Persian or Dari (official) 50%, Pashto (official) 35%, Turkic languages (primarily Uzbek and Turkmen) 11%, 30 minor languages (primarily Balochi and Pashai) 4%, much bilingualism, but Dari functions as the lingua franca.”).

284. Survey Respondent #3, *supra* note 266. This respondent was a native speaker of one of the regional languages closely related to Dari. *Id.* For a description of the close relationship between some of the main languages in the region, see WILLIAM O. BEEMAN, NAT’L COUNCIL FOR EURASIAN & EAST EUROPEAN RES., PERSIAN, DARI & TAJIK IN CENTRAL ASIA (2005), <http://bit.ly/UEDjA2>.

285. Survey Respondent #13, *supra* note 266.

deployment training.²⁸⁶ The survey did not ask a specific question about interpreting services in Afghanistan and only one respondent discussed the difficulty of finding qualified interpreters.²⁸⁷ English was the working language in 94 percent of the offices.²⁸⁸ Seven respondents reported two working languages in their offices; of these seven respondents, four had Dari as the second language. The other working languages in the respondents' offices were French, Italian, or German.

5. Types of projects

The respondents were similarly divided between those who worked for governmental, intergovernmental, and non-governmental organizations, and those employed at "for profit" organizations. Six of the respondents worked in governmental jobs.²⁸⁹ Five of the respondents worked in inter-governmental jobs.²⁹⁰ Nine respondents described their employer as a non-governmental organization. Of that number, six were contractors at "for profit" private organizations. The respondents' work included providing assistance to a variety of institutions in the legal community including the judiciary, the prosecutors, the commerce ministry, the mining ministry, legal education, and legal aid. Respondents also reported work in specific subject areas such as gender equality, criminal justice sector reform, and reform to commercial and mining laws.

6. Local Security and Travel Restrictions

The respondents were generally grim in their assessments of the security situation in Afghanistan. Seventy-five percent of the respondents rated security as bad or thought it was bad and getting worse, or simply said it was worse. Of the remaining respondents, two said they did not know the current situation, and one said the following: "When? It is changing month-to-month."²⁹¹ One respondent felt that the

286. Few development organizations provide regular and intensive language training pre-deployment, particularly when they depend on short-term contractors, a category that describes most of this survey's respondents.

287. See Survey Respondent #7, *supra* note 266.

288. One respondent did not have an office in Afghanistan, so this figure is calculated using 19 total offices.

289. For this survey, "government job" means someone with a direct contract with an individual government; for example, someone directly contracting with the Swedish Embassy or their governmental aid organizations has a government job.

290. For this survey, an "inter-governmental job" means working directly for an inter-governmental organization, such as the U.N. or one of the U.N. agencies.

291. Survey Respondent #5, *supra* note 266.

security precautions exceeded what was necessary.²⁹² Some of the respondents gave details of difficult security situations they found themselves in, including rocket attacks and riots. One commented on the difficult security environment in a country “where there’s a kidnap industry as well as an insurgency.”²⁹³ One respondent said:

I also increasingly have a 1950s/60s Viet Nam feeling: if I’m sitting in a room with [ten] Afghans, as likely as not [seven] of them [will] switch allegiance at nightfall (including the [three] from the Ministry of the Interior).²⁹⁴

Another respondent said that the security situation was “[e]xtremely dangerous” and “[o]ne of [the] two major detriments inhibiting real [rule of law] and mission success (the other being corruption).”²⁹⁵

A full 75 percent of the respondents also said that the poor security situation played a role in the planning or implementation of rule of law development programs. Most of these respondents cited the inability to work in many provinces outside Kabul and the fact that many of their employers enforce travel restrictions that limit their movement both during and outside work hours. One respondent said that the security situation “[a]lmost totally inhibits the gaining of the knowledge required to overcome the ignorance [of rule of law development providers,] which in turn provides a good excuse to apply the cookie cutter solutions of seminars and ‘trainings.’”²⁹⁶ Moreover, one respondent explained how the security environment impacts hiring and retaining qualified staff as fewer “people are willing to go and work there, especially senior people, and the ones who do . . . stay for shorter periods.”²⁹⁷

Despite these stated security concerns, 65 percent of the respondents said that their organizations were working outside Kabul, typically in Jalalabad and Herat.²⁹⁸ However, many of these same respondents reported increasing difficulty in working outside Kabul, and some gave specific examples of places they could no longer work due to security concerns.

292. *See id.* #16.

293. *Id.* #7.

294. *Id.* #8.

295. *Id.* #11.

296. *Id.* #17.

297. Survey Respondent #2, *supra* note 266.

298. Of respondents’ organizations, eight worked in Jalalabad, seven in Herat, six in Mazar-e-Sharif, and five in Kunduz.

7. Respondent Evaluations of the Impact of Rule of Law Development Work within Five Years and over Ten Years

Most of the respondents were not very optimistic about either the short- or mid-term impact of their work. Half the respondents stated that the impact within five or ten years would be “nothing” or “very little.” Three of the respondents did not answer the question. Many of the respondents who gave more optimistic assessments gave answers that were contingent on the security situation improving or follow-up on the projects. For example, one respondent stated, “It will be a question of whether there is consistent follow-on work: with the proper follow-on work, it might be substantial; on the other hand, about 50% of the people I trained in [another country] shot each other.”²⁹⁹

Some of the respondents had a specific view of the future of their projects, listing which projects would exist in five or ten years. One respondent anticipated there would be legal aid offices in all provinces within ten years.³⁰⁰ Another predicted that within five years there would be a reorganized Attorney General’s Office, a new Criminal Procedure Code, and “a dedicated [a]nti-corruption prosecution unit, fully vetted trained, equipped, experienced and successful!”³⁰¹ That same respondent expected that, in ten years and beyond, there would be “[a]nti-corruption so successful that the Afghan people can begin to trust their government. [This success will result in a] complete, transparent and successful criminal justice system under formal, constitutional law with only civil cases remaining within the informal justice system and procedures.”³⁰²

8. Views of Rule of Law Development Work in Afghanistan

Respondents were blunt in their assessments of their own and others’ rule of law efforts in Afghanistan. One respondent stated that “[rule of law efforts are] fragmented and useless.”³⁰³ Another respondent stated, “Overall I felt that much of the ROL (rule of law) work by early 2007 had undermined stability and ROL.”³⁰⁴ Many respondents criticized the United States’ efforts specifically. For example, one respondent stated that “[t]he entire American work there is a huge

299. Survey Respondent #8, *supra* note 266 (country deleted for confidentiality).

300. *See id.* #10.

301. *Id.* #11.

302. This particular respondent had no prior rule of law development experience before Afghanistan, although extensive professional experience in his/her home country. *See id.*

303. *Id.* #1.

304. *Id.* #20.

interagency fight for turf.”³⁰⁵ Other respondents criticized specific actions of the Italians, the British, and the U.N. One respondent stated, “I cannot begin to tell you how little regard I had for the U.N. and U.N.D.P. [the United Nations Development Program]. They somehow managed to consistently hire people who were kids or were non-performing.”³⁰⁶

The assessments of rule of law work in Afghanistan as a collective enterprise were no better. One respondent stated, “[M]y overall impression of rule of law development work in Afghanistan was quite negative. Most projects were lightweight and unfocused.”³⁰⁷ That same respondent further discussed the overall situation in Afghanistan:

You cannot imagine how little capacity there was in the country after so many years of war. I did an assessment of provincial prosecutors and found that less than [a third] were educated beyond high school. Almost 50% had less than a high school education. Where do you start when you’re training working professionals with no real education in anything, let alone law?³⁰⁸

Some respondents interpreted the question as asking about the general state of rule of law in Afghanistan and not as an evaluation of donor assistance efforts. Of those responses, one commented, “[P]eople don’t care about written law. They care about customs only.”³⁰⁹ Another responded that the general state of rule of law is “[v]ery bad, extremely poor and most of the authorities are not willing to learn.”³¹⁰

Many respondents commented on the lack of coordination within the international development community. As one respondent said, “We have many on our team [who] have served in Bosnia, Serbia, Iraq, Kosovo, and Macedonia and they all say that they have never seen so much waste or lack of coordination as they see in Afghanistan.”³¹¹

Some respondents criticized the mode of ongoing project activities. For example, one respondent said: “The international community is training only. They are not responsible for monitoring and evaluation.”³¹² One respondent criticized the process of legislative development saying, “I was utterly outraged by the inattention to democratic, participatory processes in the development of statutes by

305. Survey Respondent #1, *supra* note 266.

306. *Id.* #7.

307. *Id.*

308. *Id.*

309. Survey Respondent #6, *supra* note 266.

310. *Id.* #14.

311. This response was in a cover letter attached to a returned survey (on file with author).

312. Survey Respondent #15, *supra* note 266.

donor projects. Many had little, if any, meaningful input from local counterparts.”³¹³

Several of the respondents criticized the rewriting of laws. One respondent said:

In my view, crime control in post-conflict countries is critical and it is routinely crippled by so-called comprehensive reforms written by international experts. International experts should **never** undertake a complete re-write of a criminal procedure code in a post-conflict country. . . . They should add selected, new provisions on investigative techniques and the elements required to meet human rights standards to the existing code, re-writing only those provisions that absolutely have to be changed to conform to the sections that are added. Delay complete re-writes until much later in the development process.”³¹⁴

Additionally, some of the respondents expressed concern about their fellow rule of law providers and advisors. As one stated, “Law reform people in Afghanistan have not the slightest awareness of how different Afghan culture is to anything European; [h]ow the state plays little to no role in the great majority of peoples’ lives and the overall consequences of this on their view of law.”³¹⁵

Many of the respondents commented on the political nature of international development work. One respondent stated, “Countries and organizations with projects in Afghanistan want to report back to their respective superiors that their work is effective in building democracy for the nation.”³¹⁶ Another stated that “[t]he work was of little importance. Looking like important work was being done was important. Pictures with local judges, prosecutors, village leaders were important. The program [itself] was of little importance.”³¹⁷ That respondent went on to say that the substance of the training did not matter “as long as we could say at the end that we have trained a certain number of [legal personnel].”³¹⁸

9. Views about Valuable Projects in Afghanistan

When asked what kinds of projects or activities constituted valuable rule of law work in Afghanistan, five of the respondents declined to answer. Of the remaining 15 respondents, a few reported that the

313. *Id.* #20.

314. *Id.* #7.

315. *Id.* #17.

316. *Id.* #16.

317. Survey Respondent #1, *supra* note 266.

318. *Id.* #1 (deleting specific category of personnel for confidentiality).

projects they were working on were highly valuable, and some commented that they did not see other projects so they could not give examples. Additionally, one respondent stated that it “is not realistic to evaluate programs over short time frames” and therefore gave no answer.³¹⁹

Of those who found valuable rule of law work in Afghanistan, at least one respondent pointed to the Afghan Constitution as being “well done.”³²⁰ Others gave some very specific examples of valuable rule of law work in Afghanistan. For instance, one respondent noted that “bringing lawyers to prison in Lashkar Gah to speak to prisoners” was successful because it gave the prisoners access to legal advice.³²¹ Several respondents cited specific training programs as valuable, with one respondent noting, “I think . . . in-depth and systematic training is essential to strengthen [rule of law].”³²² Another respondent gave an example of one valuable training program that worked well because “senior Afghan experts” lectured on Afghan law, and international trainers only taught international standards of law.³²³ The respondent said that such an approach to training was “a strong combination.”³²⁴ Additionally, anti-corruption work also featured in some of the examples of successful rule of law work mentioned by respondents. According to one respondent, a valuable project would be the following:

Implementation of PRR (Priority Reform and Restructuring) in the Attorney General’s Office through the [European Commission] would immediately increase salaries of prosecutors to a living wage. As a consequence, law enforcement officers would not need corruption to sustain their families. Confidence in the enforcement of law would raise the respect towards the judiciary and prosecution and beginning to increase trust in the rule of law.³²⁵

Although the question specifically asked for positive examples, many of the respondents seemed unable to focus on positive examples and spoke of negative examples and structural problems preventing success, such as lack of coordination and limited budgets relative to the needs. One respondent started by saying that “[a]ll programs done by international organizations are useful in their own place.”³²⁶ However, the same respondent went on to say that “[t]he problem lies with laws and

319. *Id.* #8.

320. *Id.* #18.

321. *Id.* #17.

322. *Id.* #2.

323. *See* Survey Respondent #7, *supra* note 266.

324. *Id.*

325. *Id.* #16.

326. *Id.* #15.

regulations and institutions. There are conflicting and [divergent] laws and regulations without clear direction. Laws are made without need and impact assessment.”³²⁷

10. Examples of Rule of Law Projects with “No Value”

When asked about rule of law projects with “no value,” some respondents objected to the wording of the question because, as one asked, “[H]ow do you measure that?”³²⁸ Three respondents did not answer the question, and one simply said “none.”³²⁹ One respondent said “Legal Reforming projects carried by USAID Organizations” (sic).³³⁰ One respondent offered a “[n]o comment” and said, “I just would prefer not to commit to writing” examples of bad projects.³³¹ That respondent did, however, state that a “generic example” of a project with no value would be one where the donor cut funds by a significant percent or imposed unrealistic time frames for completion.³³² That respondent said, “I understand not sacrificing the good to the perfect, but in Afghanistan there is a lot of sacrifici[ng] . . . the satisfactory and competent to the purely schlock.”³³³

Many of the respondents criticized the general policy approach and framework within which rule of law work was being undertaken. One respondent said, “In the absence of a *coherent* plan for national or even regional development virtually every program . . . in Kabul is doomed in the middle to longer term.”³³⁴ Another respondent said, “[T]he idea that more money means better progress [is] incorrect. More money means more corruption. Afghanistan has little capacity to absorb what the international community brings to it.”³³⁵ That respondent did criticize some specific programs including those that gave material aid as those items “disappeared with the head of the institution once he was replaced.”³³⁶ The same respondent also stated that “study tours are more of a vacation, rather than an actual learning process.”³³⁷

327. *Id.*

328. *Id.* #10.

329. Survey Respondent #5, *supra* note 266. The respondent stated, “[N]one were of no value, that I could see, but I didn’t see much.” *Id.*

330. *Id.* #3.

331. *Id.* #8.

332. *Id.*

333. *Id.*

334. *See* Survey Respondent #17, *supra* note 266 (emphasis in original).

335. *Id.* #19.

336. *Id.*

337. *Id.*

Several of the respondents were critical of training programs, either specific training programs or the general approach. One respondent criticized “the training of judicial/legal personnel”³³⁸ because the programs were expensive, provided only “basic training,”³³⁹ and the results have “been often really poor”³⁴⁰ in “transfer of knowledge.”³⁴¹ One respondent singled out a commercial law legislative drafting project as a poor example because it was done “without due regard for participation or Shari’a compliance issues.”³⁴²

11. Recommendations to Policy-Makers Regarding Rule of Law Work in Afghanistan

The respondents in this survey reacted in a variety of ways to the complicated question of what advice they would give those responsible for rule of law development policy in Afghanistan. Only a few of the respondents agreed with each other on any given point. They offered no uniform opinion or suggestion; however, their replies were uniformly critical of existing policies and seemed to recognize the need to change the approach to rule of law development work in Afghanistan. One respondent did not answer this question.³⁴³ Another respondent said simply, “I don’t know.”³⁴⁴ The remaining answers ranged from the simple “organize,”³⁴⁵ “co-ordinate with existing stakeholders,”³⁴⁶ or “ignore the IMF,”³⁴⁷ to more complex responses.

Two of the respondents suggested that the focus should be on crime control, security, and corruption. One respondent stated, “Address security and corruption *aggressively*. Without those two issues successfully addressed, we will never win over the confidence of the people, nor their hearts [and] minds . . . [and] we will have another Viet Nam.”³⁴⁸ Two of the respondents suggested focusing on basic infrastructure. As one respondent said,

The entire system in Afghanistan is in shambles. The law schools, the courts, the police and prosecutors and even the laws, so the question is where to start. . . . Afghanistan first needs some sort of

338. *Id.* #12.

339. *Id.*

340. *See* Survey Respondent #12, *supra* note 266.

341. *Id.*

342. *Id.* #20.

343. *Id.* #4.

344. *Id.* #14.

345. *Id.* #17.

346. Survey Respondent #10, *supra* note 266.

347. *Id.* #18.

348. *Id.* #11 (emphasis in original).

better infrastructure—roads, clean water, electricity, schools. Once some of this is done people may have the energy to work on rule of law.³⁴⁹

Several respondents mentioned the need to focus on education both at a basic level and with the law faculties.

Many of the respondents criticized the hiring practices of rule of law donors and implementing organizations (both governmental and non-governmental). One respondent suggested that the high salaries are not necessarily attracting the most qualified and devoted international personnel.³⁵⁰ One respondent advised organizations to “[b]ring in better qualified people to lead programs.”³⁵¹ Some of the respondents were critical of the attitude of some rule of law development professionals. As one respondent stated, “It would be helpful if outsiders listened more.”³⁵² Another respondent stated, “[I]t is better to have no project than to have a project with unqualified or inflexible foreign staff.”³⁵³ Other respondents suggested that organizations provide better training to their international staff. One respondent suggested that prosecutors coming from common law jurisdictions should get training in “prosecution in civil law traditions.”³⁵⁴ This same respondent suggested six weeks of language training before going to any post-conflict country, including Afghanistan.³⁵⁵

In contrast to the concerns about high pay for internationals, several respondents suggested better pay for Afghans, including payment to attend training and participate in working groups. As one respondent stated, “One problem is that no one within the system is paid a living wage, so they often supplement their salaries with bribes.”³⁵⁶

Several respondents also criticized the short-term focus of funders combined with their need to measure and evaluate projects after relatively short time frames. One respondent complained that the short time frames are “ridiculous”³⁵⁷ and require measuring every quarter “while most technical legal assistance in Afghanistan has a significant *generational* component.”³⁵⁸ That respondent went on to say that rule of law development programs are “confronting a set of issues that will

349. *Id.* #1.

350. *See id.* #3.

351. *Id.* #19.

352. Survey Respondent #8, *supra* note 266.

353. *Id.* #5.

354. *Id.* #7.

355. *See id.*

356. *Id.* #1.

357. *Id.* #8.

358. Survey Respondent #8, *supra* note 266.

require [one or two] generations (ten years for the easy stuff, 30 for [the] harder [issues]).”³⁵⁹

Several respondents criticized the large budgets for such short time frames. One respondent suggested “revising expenditure policies”³⁶⁰ and “[a]iming at more limited (but achievable) results in the short term.”³⁶¹ One respondent recommended that donors should not “fall all over each other trying to give money and support to the Afghan government.”³⁶² Another criticized “throwing \$100 million”³⁶³ over a five-year period instead of “\$10 or \$20 million over 25 or 50 years, consistently and reliably applied.”³⁶⁴ That same respondent put the costs of rule of law development work in context, saying, “The entire three year cost of my program is about equivalent to the cost of [two] cruise missiles. When I am asked how effective my program is, I point this out and ask, at that cost, how effective does it have to be?”³⁶⁵

Related to the concern about short time frames and evaluation of projects and programs was the concern expressed by several respondents that the goals of projects as a whole are not realistic for Afghanistan. As one respondent said, “Get real: you can’t do it all in terms of the rule of law needs of Afghanistan and the society can’t absorb all the change. . . .”³⁶⁶

D. Survey Summary

The survey responses paint a vivid, albeit largely anecdotal, picture of the troubled rule of law development effort in Afghanistan. Few of the respondents had anything positive to say about either their work in Afghanistan or the work of other rule of law development projects. Respondents noted the lack of international coordination within the development community and the waste and duplication this creates. Respondents were critical of their fellow development workers and how many fail to understand the historical and cultural context in Afghanistan. Many of the respondents also commented on the lack of longer-term vision. They criticized donors’ demands that their projects “deliver results” within what they considered to be unrealistically short time frames. Most of the respondents who commented on this issue

359. *Id.*

360. *Id.* #12.

361. *Id.*

362. *Id.* #16.

363. *Id.* #8.

364. Survey Respondent #8, *supra* note 266.

365. *Id.*

366. *Id.* #7.

considered the most realistic time frames in the context of Afghanistan to be “generational” or “multi-generational.”

For all of the strongly worded complaints and blunt suggestions, perhaps what is most interesting is what was missing. Specifically, none of the respondents said the problem was a lack of funding. Although many of the respondents commented on the magnitude and severity of the problems in Afghanistan in all areas of development (not merely rule of law), none of the respondents seemed to think that a large additional infusion of funding or personnel would help rule of law development. However, many respondents criticized the allocation of existing funds. A few of the respondents seemed to question the overall approach and whether, given the general level of development in Afghanistan, it was appropriate to continue to spend money on rule of law development at the expense of more basic development programs such as infrastructure, healthcare, and education.

VI. LESSONS FROM AFGHANISTAN: RULE OF LAW DEVELOPMENT IN FRAGILE NATIONS

The survey findings and the overall experience in Afghanistan over the last decade illustrate the many challenges facing rule of law development in a nation that is already suffering extreme poverty, lack of basic infrastructure, a poorly developed formal legal system, extremely low levels of literacy, and armed conflict. The main lesson from Afghanistan is that development aid should not routinely include the full package of rule of law development programs for countries facing these challenges due to serious concerns about whether providing such assistance will improve the overall level of rule of law. Instead, it may make better sense to do only minimal rule of law development work in certain targeted areas or, depending on the circumstances, to do other development work first and leave the rule of law development work for later in the development process.

A. *Less is More: Limiting Assistance for Rule of Law Development*

As was discussed in Part III, rule of law aid providers gave Afghanistan the full package of rule of law assistance programs and projects.³⁶⁷ Although rule of law assistance providers aimed to provide this assistance in a way that was appropriate and targeted to the circumstances in Afghanistan, this targeting was not done with a look at the big picture and what might be considered realistic projects for clear results in the medium term (ten years or more). In countries facing

367. See discussion *supra* Part III.A.

challenges similar to those in Afghanistan, such as a lack of basic infrastructure and extreme poverty, it could make better sense to limit the type of rule of law development assistance.³⁶⁸ This recommendation would mean that donors and aid providers would need to move away from the tendency to focus on overhauling the entire formal legal system, including an aggressive legislative reform agenda, and replace it with other approaches.

Development organizations and agencies have recently begun to recognize the importance of development in what are often termed “fragile and conflict-affected states.”³⁶⁹ This recognition has led to writing strategic documents recommending that, because development work in these nations is different, how aid is given should be approached differently.³⁷⁰ In 2005, USAID put forward their “*Fragile States Strategy*,” stating that “[i]t is guided by the overarching principle that we need to engage carefully and selectively. [The strategy] recognizes that there are countries where our assistance may not be able to make a difference.”³⁷¹ However, this recognition that development work in fragile nations is different has not yet meant that there is a clear direction regarding what kinds of development assistance works best in such environments, nor an answer on how rule of law development assistance fits into the overall picture.³⁷² Nonetheless, the various strategies share the common idea that rule of law is an important part of such efforts.³⁷³

The Organization for Economic Cooperation and Development (OECD) developed “*Principles for Good International Engagement in Fragile States*.”³⁷⁴ Richard Zajac Sannerholm suggests building from the

368. See Deval Desai et al., *Rethinking Justice Reform in Fragile and Conflict-Affected States: The Capacity of Development Agencies and Lessons from Liberia and Afghanistan*, 3 WORLD BANK LEGAL REV. 241, 260-61 (2012).

369. *Id.* at 241.

370. See *id.* The U.N. Development Program, the World Bank, the African Development Bank, the European Commission, the United Kingdom, the Netherlands, France, and Germany are part of this process. *Id.*

371. USAID, FRAGILE STATES STRATEGY, at v (2005), available at <http://1.usa.gov/XdZrBr> [hereinafter FRAGILE STATES].

372. See Desai et al., *supra* note 368, at 242-47. This is not to suggest that there are not focus areas. For example, USAID has four principles for work in fragile states: “engage strategically,” “focus on sources of fragility,” “seek short-term impact linked to longer-term structural reform,” and “establish appropriate measurement systems.” FRAGILE STATES, *supra* note 371, at 5-6.

373. See Desai et al., *supra* note 368, at 243. USAID states, “Where possible, support reforms within government institutions, particularly those responsible for the rule of law, core social services, and food security.” FRAGILE STATES, *supra* note 371, at 7. There is no definition of “where possible.”

374. ORG. FOR ECON. COOPERATION & DEV., PRINCIPLES FOR GOOD INTERNATIONAL ENGAGEMENT IN FRAGILE STATES & SITUATIONS (Apr. 2007), available at <http://bit.ly/127ozt6> [hereinafter INT’L ENGAGEMENT PRINCIPLES]. These principles are

OECD's ideas, combining them with the concept of "Good Enough Governance" to develop a "guiding framework" for rule of law work in crisis and post-conflict countries.³⁷⁵ Supported by the UK Department for International Development (DfID), "Good Enough Governance" focuses on "core functions" that the state should meet in the area of rule of law instead of trying to fix everything at once.³⁷⁶ Under this approach, rule of law assistance providers would not focus on highly controversial areas, areas that would affect the power balance, or areas that are beyond the ability of the particular country to absorb or change in the near future.³⁷⁷ This approach might include focusing on legal education and improving skills and infrastructure (such as case management systems) within the existing structures, and foregoing building new courthouses or trying to put into place new legal institutions (such as human rights ombudsman). It may also include foreign donors exercising restraint and not putting pressure on the country to reform every major law. Under this approach, donors should target a few areas, such as new laws allowing for commercial arbitration—if it is not already allowed—without rewriting the entire commercial code or civil procedure code.³⁷⁸

The advantage of reducing the amount of rule of law assistance (and instead targeting it in a few areas) is that it will lower expectations both within the country itself and in the international donor community.³⁷⁹

"[intended] to complement the partnership commitments set out in the Paris Declaration on Aid Effectiveness." *Id.*

375. Rickard Zajac Sannerholm, *In Search of a User Manual: Promoting the Rule of Law in Unruly Lands* (2007), reprinted in *RULE OF LAW PROMOTION*, *supra* note 241, at 189, 205-08.

376. *Id.* at 206. DfID has six criteria for this approach:

[1] selectivity, focusing only on the major causes of instability and the main capacities of the state; [2] achieving visible results in the short term, however modest, to build momentum for future reform; [3] avoiding the most politically or socially controversial issues; [4] avoiding reforms that are too ambitious for the implementation capacity of the country; [5] ensuring that reform does not erode whatever capacity already exists; and [6] strengthening accountability and legitimacy of government whenever possible.

Id.

377. *Id.* at 206-08.

378. This recommendation assumes that an assessment has been completed to determine whether the new law is needed or whether the existing framework would be sufficient for now. One example is in the area of human trafficking. Every criminal code includes the acts that constitute human trafficking, such as kidnapping, assault, and sexual assault. While it is clearly easier to prosecute human trafficking with specific code sections for a crime that often involves many acts, the lack of such a section does not prohibit prosecution of human trafficking. The question is whether the law is "good enough," not whether it is a model.

379. USAID has as one of its four core principles "seek short-term impact" because "experience demonstrates that without short-term, visible impact, a fragile situation is likely to continue to deteriorate." *FRAGILE STATES*, *supra* note 371, at 6.

Both donors and recipients expect significant and quick changes when large amounts of money and large projects are conducted. In the context of a country facing serious poverty, a lack of infrastructure, and a lack of lawyers and judges, a conscious decision to give limited rule of law development aid may keep expectations more realistic and decrease “donor fatigue.”³⁸⁰ For the recipients, setting small and attainable goals may help slowly build trust in the formal legal system, rather than reinforcing the existing mistrust.

The problems with this suggestion will be deciding where and how to target such assistance and getting donors to agree. Perhaps not surprisingly, the existing frameworks, such as the OECD’s “*Principles for Good International Engagement in Fragile States and Situations*,” are broadly worded and subject to varying interpretations in terms of what kind of aid might comply with the principles.³⁸¹ Deciding what type of limited assistance makes sense is not easy, particularly considering how little is understood about what types of assistance bring positive change towards rule of law in any environment, but particularly in a fragile state.³⁸² The absence of any clear evidence of what types of assistance works better will contribute to disagreement among donors about what type of assistance to focus on, even if they agree with the idea to limit the overall rule of law assistance to a particular country. Some donors may think that supporting top-down structures, such as courts, is where the focus should be. Others may want to focus on traditional or customary justice or more bottom-up approaches.³⁸³ Without clear ideas of what works, there is a tendency to want to “do something,” which in the end may actually be destructive to the development of rule of law.³⁸⁴ Another challenge is illustrated in Afghanistan: even when there are attempts to coordinate rule of law development assistance, donors will do as they please and are not constrained by the efforts to coordinate.³⁸⁵

It could be useful to develop a set of guiding principles for limited rule of law development assistance to aid the process of deciding how

380. DfID describes donor fatigue as “achieving visible results in the short term, however modest, to build momentum for future reform.” Sannerholm, *supra* note 375, at 206.

381. See INT’L ENGAGEMENT PRINCIPLES, *supra* note 374.

382. See discussion *supra* Part III.

383. See *supra* notes 191-204 and accompanying text.

384. An example here is support to customary justice in Afghanistan. See MacKenzie, *supra* note 204. For an example of the “do something” thinking, see Desai et al., *supra* note 368, at 260 (recommending that donors do “experimental programs” in fragile countries, or “pilot programs,” as part of trying to determine what might work before engaging in larger scale work).

385. See discussion *supra* Part III.B.

and where to limit assistance.³⁸⁶ These principles could include both the conditions that should lead to their adoption in a particular country—such as endemic poverty, lack of infrastructure, minimal institutional development, and overall low socio-economic indicators including high rates of illiteracy—and suggest areas for the initial focus of rule of law aid under such circumstances. Due to the current focus on rule of law in the U.N. and other multi-lateral organizations, it is unlikely that such organizations will find it politically possible to develop such a set of guiding principles because doing so would likely suggest the appearance of downgrading the importance of rule of law in general.³⁸⁷ There is also a continuing tendency by inter-governmental organizations, such as the World Bank, to see rule of law as the solution to problems in fragile states, without clear direction as to how international assistance providers can contribute to developing rule of law in such circumstances.³⁸⁸

It is therefore more realistic, although far from easy, to focus on one donor: the United States. As stated before, the United States could exert significant influence on other donors and organizations if it decided to change how it conducts rule of law development assistance.³⁸⁹ Even if others continued “business as usual,” such a change would mean that the United States would be adopting policies that reflect lessons learned and would thereby provide more meaningful assistance without repeating the same mistakes. The challenge within the United States is that at least four departments provide rule of law development assistance.³⁹⁰ But even if just one of those departments, such as the U.S. Agency for International Development, changed its process and developed a version of the *Guiding Principles for Limited Rule of Law Engagement*, or simply revised its *Fragile States Strategy*³⁹¹ to include specific recommendations on rule of law development in such countries, it could have a significant impact on how rule of law assistance is given by U.S.

386. See Sannerholm, *supra* note 375, at 189. “Surprisingly little attention has been given to the normative boundaries for post-conflict rule of law reform. There is no international framework for organising and implementing rule of law activities in post-conflict societies.” *Id.* at 191.

387. See, e.g., GUIDANCE NOTE, *supra* note 72.

388. “The president of the World Bank, Robert Zoellick, has argued that ‘a fundamental prerequisite for sustainable development [in fragile and conflict-affected states] is an effective rule of law,’ using this as a rallying cry for broader development engagement in justice reform in [fragile and conflict-affected states].” Desai et al., *supra* note 368, at 242.

389. As the situation in Afghanistan illustrates, the United States is often the largest donor and may exercise great influence for this reason. See *supra* note 91- 93 and accompanying text.

390. These departments include the Department of State, Department of Justice, Department of Defense, and USAID. See *supra* note 94.

391. FRAGILE STATES, *supra* note 371.

donors.³⁹² The challenge, even with just one donor such as the United States, is that the decision to give foreign aid to a particular country is a political and policy level decision. Although it could be argued that deciding what type of assistance to give to a particular country is simply a technical decision, it has serious political connotations. That is, declaring a country ready for only limited rule of law assistance creates practical political difficulties that may interfere with the overall foreign policy goals for a particular country.³⁹³ However, this practical constraint, which may prevent full implementation of such a change in policy, should not impede at least the concept's development.³⁹⁴

B. Stop Rule of Law Development Aid

The second suggestion may be even more politically difficult to implement but is one that deserves serious consideration: rule of law development workers and policy-makers should recognize that there can be circumstances when it does not make sense to give *any* rule of law development assistance in the context of an overall development assistance effort. Deciding to accept this proposal does not mean that policy-makers and rule of law development workers are stating that rule of law does not matter or that it is not an important goal. Rather, this suggestion recognizes that rule of law development assistance is a highly complicated form of assistance that requires a society that is ready, on a number of levels, to make meaningful changes. Just as Abraham Maslow recognized that there are "higher and lower needs" in human development, there is also a "Hierarchy of Needs" in the international development context.³⁹⁵ If the average person in a particular country is struggling for basic survival because of either endemic poverty or armed conflict, it is unrealistic to expect them to focus on more theoretical

392. One challenge is that it is highly political to declare a state "fragile" and, therefore, to impose the *Fragile States Strategy* approach. USAID funding and aid programs in Afghanistan, not to mention funding and assistance from other U.S. government sources, for example, has clearly not been constrained by the *Fragile States Strategy*. See *supra* notes 83-157 and accompanying text; FRAGILE STATES, *supra* note 371.

393. Afghanistan is a prime example of this struggle. See *supra* note 392.

394. One recent example of the United States changing its approach to development is the Millennium Challenge. See *About MCC*, MILLENNIUM CHALLENGE CORP., <http://www.mcc.gov/pages/about> (last visited Feb. 12, 2013). The Millennium Challenge is a stand-alone aid program that does not change the overall U.S. approach to giving development assistance, but rather acts as a supplemental approach, which distinguishes it from the suggestion to change the overall approach. However, despite criticism and concerns about the Millennium Challenge, it exemplifies that it is possible for the United States to take a different approach towards development assistance.

395. ABRAHAM H. MASLOW, MOTIVATION AND PERSONALITY 97-104 (2d ed. 1970).

concepts or higher-level needs such as rule of law development. Rule of law development demands that individual citizens, and legal professionals, have a certain attitude including that they believe in the legitimacy of their legal system and agree to follow the law.³⁹⁶

There are two basic reasons not to engage in rule of law development assistance in fragile countries: it is not money well spent and it may ultimately do harm to individuals and to the development of rule of law. Donors have limited funds for development in any given country. That money is better spent on basic needs in countries such as Afghanistan.³⁹⁷ The second concern is the harm that rule of law development projects may have in such an environment. For example, the United States built 40 courthouses in Afghanistan.³⁹⁸ By most accounts, many of these courts were not used or quickly went into disrepair.³⁹⁹ Under these circumstances, the average Afghan likely sees these newly constructed courthouses as monuments to the formal justice system's failure. This view does not help develop an attitude of trust in the formal legal system. There can also be more immediate harms to the average Afghan trust in the formal legal system. For instance, trust may be further diminished when the international community is responsible for building jails and expanding the police force, and such increased capacity to enforce the law is used not to decrease crime but rather to imprison people and collect bribes for their release.⁴⁰⁰ As previously stated, there are also serious concerns about the harm that supporting the informal justice sector in Afghanistan might be doing to the individuals who face abusive treatment from those processes and to the overall development of rule of law and trust in Afghanistan's formal justice system.⁴⁰¹

Rule of law development scholars are questioning some of the assumptions implicit in large-scale aid efforts, and there is a large and growing body of literature critical of aid given for state-building, peace-building, and governance operations.⁴⁰² Peace-making and

396. For more extensive discussions on the importance of legitimacy and attitudes of the public in the context of rule of law development, see Alkon, *Lost in Translation*, *supra* note 63, at 171-74; Alkon, *Plea Bargaining as Legal Transplant*, *supra* note 218, at 377-84.

397. However, under most bureaucratic structures, it is not easy to shift money from one developmental sector to another, for example, taking money from rule of law development and putting it into education or healthcare development assistance.

398. INSPECTION REPORT, *supra* note 12, at 43.

399. See REFORMING AFGHANISTAN'S BROKEN JUDICIARY, *supra* note 90, at 25.

400. See *supra* notes 189-190 and accompanying text.

401. See *supra* notes 191-204 and accompanying text.

402. See generally TRENKOV-WERMUTH, *supra* note 46 (studying U.N. governance operations and how the U.N. handled legal and judicial reform, focusing on Kosovo and

democratization scholars question the impact of moving quickly towards elections and question how realistic general democratization work can be without strong local institutions.⁴⁰³ These democratization studies criticize the free market democracy approach that focuses on introducing free market capitalism while moving quickly towards elections and democratic forms of government.⁴⁰⁴ This literature instead argues for “sequencing”: the idea that countries should work on rule of law and a fully functional state first and only later focus on democratization.⁴⁰⁵

Thomas Carothers, however, criticizes this approach, stating that it is based on the mistaken assumption that “autocrats can and will act as generators of rule of law development and state-building” and that a country in the process of democratizing is not able to do these tasks.⁴⁰⁶ Nonetheless, the “sequencing” debate focuses on the question of whether to do rule of law development alongside democratization work, or just focus on developing strong institutions and rule of law.⁴⁰⁷ Those who have engaged in this debate are not looking at this question in the context of the most fragile countries in the world, such as Afghanistan. Those who support “rule of law first” also tend to ignore how rule of law is developed and how little we understand about it; those who support this approach instead focus on the problems with democratization and the perceived push for elections.⁴⁰⁸

East Timor); ROLAND PARIS, *AT WAR'S END: BUILDING PEACE AFTER CIVIL CONFLICT* (2004) (relaying a study of peace-building operations in the 1990s and concluding that the record of success was limited); RICHARD J. PONZIO, *DEMOCRATIC PEACEBUILDING: AIDING AFGHANISTAN AND OTHER FRAGILE STATES* (2011) (describing a study focused on Afghanistan that critiques the impact of international aid and peace-building efforts on political and institutional development in the country).

403. See, e.g., EDWARD D. MANSFIELD & JACK SNYDER, *ELECTING TO FIGHT: WHY EMERGING DEMOCRACIES GO TO WAR* 7 (2005) (“[I]ncomplete transitions from autocracy toward democracy are fraught with the danger of violent conflict in states whose political institutions are weak.”).

404. See, e.g., MANSFIELD & SNYDER, *supra* note 403; CHUA, *supra* note 129; FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* (2007).

405. Democratization in this context refers to assistance for elections and democratic forms of governing. See generally CHUA, *supra* note 129; ZAKARIA, *supra* note 404.

406. Thomas Carothers, *The “Sequencing” Fallacy*, 18 J. DEMOCRACY 12, 14 (2007).

407. See, e.g., MANSFIELD & SNYDER, *supra* note 403, at 18. But see John W. Harbeson, *Post-Millennium U.S. Aid for Africa: Reconciling Freedom and Security, Theirs and Ours*, in *FOREIGN AID AND FOREIGN POLICY*, *supra* note 33, at 239 (arguing, in part, that promotion of democracy strengthens fragile states).

408. See generally MANSFIELD & SNYDER, *supra* note 403 (mentioning the importance of rule of law and how it should come first alongside institutional development and other factors, such as the development of a national identity, but focusing the discussion on war in (and between) newly democratizing states); CHUA, *supra* note 129 (focusing not on rule of law development, but on elections and free market capitalism).

In the context of the sequencing debate, Thomas Carothers argues against a sequence, or priority, for such work and suggests instead a policy of “gradualism” that would focus on “building democracy slowly in certain contexts, but not avoiding it or putting it off indefinitely.”⁴⁰⁹ Carothers suggests that there are five factors that should be considered “core facilitators or nonfacilitators” that make democratization “harder or easier” but not “certain or impossible.”⁴¹⁰ These factors include: (1) the level of economic development; (2) the concentration of sources of national wealth; (3) identity-based divisions; (4) historical experience with political pluralism; and (5) nondemocratic neighborhoods.⁴¹¹

State-building and peace-making scholars are critically examining efforts in Afghanistan and questioning the fundamental assumption of whether to provide state-building assistance. These scholars are also examining what kinds of aid make sense.⁴¹² However, most studies include only a passing reference to rule of law and do not focus on this subcategory of aid.⁴¹³ Therefore, as thoughtful as many of these studies are about the big issues of democratization assistance and peace-building, they tend to give only cursory analysis to rule of law development work and instead accept the mantra that rule of law is necessary.⁴¹⁴ Generally, these studies do not clearly distinguish between countries that remain fully sovereign and, in that case, how rule of law development work might be different in such countries compared to countries that receive aid as part of a governance or peace-building operation.⁴¹⁵

409. Carothers, *The “Sequencing” Fallacy*, *supra* note 406, at 14.

410. *Id.* at 24.

411. *Id.*

412. See Astri Suhrke, *The Dangers of a Tight Embrace: Externally Assisted Statebuilding in Afghanistan*, in *THE DILEMMAS OF STATEBUILDING*, *supra* note 137, at 227 (criticizing the lack of “critical thinking about the basic framework of international involvement and the underlying assumption that, on balance, it clearly has a positive effect”).

413. See generally *id.*; *BUILDING STATES TO BUILD PEACE* (Charles T. Call & Vanessa Wyeth eds., 2008) (focusing on rule of law in one of the book’s 15 chapters); *PARIS*, *supra* note 402; *NATION-BUILDING: BEYOND AFGHANISTAN AND IRAQ* (Francis Fukuyama ed., 2006); *MICHAEL MCFAY, ADVANCING DEMOCRACY ABROAD: WHY WE SHOULD AND HOW WE CAN* (2010); *FRANCIS FUKUYAMA, STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY* (2004). But see PONZIO, *supra* note 402 (analyzing rule of law within the context of democratization).

414. As Thomas Carothers observed in 1998, “One cannot get through a foreign policy debate these days without someone proposing the rule of law as the solution to the world’s troubles.” THOMAS CAROTHERS, *The Rule of Law Revival*, in *CRITICAL MISSION: ESSAYS ON DEMOCRACY PROMOTION* 121, 121 (2004).

415. See, e.g., *PARIS*, *supra* note 402 (using case studies from states in both categories such as Bosnia and Herzegovina, Croatia, Nicaragua, El Salvador, Sierra Leone, and Kosovo); *PONZIO*, *supra* note 402, at 72 (defining “five broad types of peace operations”).

Scholars in economic development and other more traditional forms of foreign assistance are also asking questions about what works and whether the development programs are in fact assisting the “bottom billion” to move out of dire poverty.⁴¹⁶ These studies question some of the assumptions inherent in economic development work and offer suggestions of what approaches might make better sense.⁴¹⁷ William Easterly cautions against grand utopian goals, suggesting “the aim should be to make individuals better off, not transform governments or societies.”⁴¹⁸ Economists Abhijit Banerjee and Esther Duflo argue for a “patient, step-by-step”⁴¹⁹ approach to fight poverty and make aid more effective; they caution that there are “no magic bullets to eradicate poverty.”⁴²⁰

Legal scholars are also questioning the value of rule of law development work. Law and development scholars have a long history of critical analysis of this type of work.⁴²¹ Scholars in this field have criticized aid providers for being, at best, overly naïve and missing key

416. See generally WILLIAM EASTERLY, *THE WHITE MAN’S BURDEN: WHY THE WEST’S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* (2006); PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* (2007); *WHAT WORKS IN DEVELOPMENT?: THINKING BIG AND THINKING SMALL* (Jessica Cohen & William Easterly eds., 2009). For a critique of the unintended and potentially debilitating consequences of food aid in Somalia, see MICHAEL MAREN, *THE ROAD TO HELL: THE RAVAGING EFFECTS OF FOREIGN AID AND INTERNATIONAL CHARITY* (1997).

417. One suggestion is to focus aid on those countries where the poorest billion people live. COLLIER, *supra* note 416, at 189-90. Supporting a market approach, Collier states, “Poverty is not romantic. The countries of the bottom billion are not there to pioneer experiments in socialism; they need to be helped along the already trodden path of building market economies.” *Id.* at 191.

418. EASTERLY, *supra* note 416, at 368. Easterly offers six “basic principles” to improve aid but cautions that “none of these suggestions is the Big Answer to world poverty, or even how to fix foreign aid.” *Id.* at 382.

419. ABHIJIT V. BANERJEE & ESTHER DUFLO, *POOR ECONOMICS: A RADICAL RETHINKING OF THE WAY TO FIGHT GLOBAL POVERTY* 16 (2011).

420. *Id.* at 268. Banerjee and Duflo review numerous studies and examine what has worked and what has not worked in economic development. They conclude that there are “five key lessons” to improve the lives of the poor. These lessons are: “the poor often lack critical pieces of information and believe things that are not true”; “the poor bear responsibility for too many aspects of their lives”; there are good reasons that some markets are missing for the poor, or that the poor face unfavorable prices in them”; “poor countries are not doomed to failure because they are poor”; “expectations about what people are able or unable to do all too often end up turning into self-fulfilling prophecies.” *Id.* at 268-73.

421. See, e.g., Snyder, *supra* note 23; JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980); David M. Trubek and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062. For a more recent critique, see *THE NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 3.

understandings,⁴²² or, at worst, exporting a form of imperialism.⁴²³ Scholarship and critiques of law and development focus on how law can affect economic development, including poverty reduction.⁴²⁴ The critiques, however, have looked less at questions such as whether rule of law development work can improve the human rights situation or can aid in conflict prevention or peace-making.⁴²⁵

One critic, Brian Z. Tamanaha, concludes that foreign assistance does not change the process of legal development in any country.⁴²⁶ Therefore, Tamanaha suggests that shutting down rule of law development projects around the world would not have much impact on legal systems in countries currently receiving such aid because they would continue to function as they are.⁴²⁷ In Tamanaha's view, there would simply be fewer training programs, fewer trips abroad, and less money for training, computerization, and salaries.⁴²⁸ Tamanaha also predicts that, without the "artificial boost"⁴²⁹ of current rule of law development projects, legal development would start to build from local agendas and would be run by people who understand the context in which the current legal system operates and through which change must proceed.⁴³⁰

Tamanaha's analysis is prescriptive by focusing on what should be done in the future for rule of law projects. He focuses on the key question of whether the international community should fund such projects. Assuming that it is unrealistic to expect rule of law development work to cease in the near future, it is still possible to build from Tamanaha's analysis by looking at when, and under what

422. For a general critique of how aid was given in the early years after the dissolution of the Soviet Union, see JANINE R. WEDEL, *COLLISION AND COLLUSION: THE STRANGE CASE OF WESTERN AID TO EASTERN EUROPE* (2001). For a critique of rule of law assistance, see GARDNER, *supra* note 421; see also Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179 (1999).

423. See generally UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* (2008).

424. See, e.g., THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 3. For a summary of the history of the law and development movement and thoughts about the future, see David M. Trubeck, *The Owl and the Pussy-Cat: Is there Future for "Law and Development"?*, 25 WIS. INT'L L. J. 235 (2007). For an analysis of the law and development's movement away from economic and market reform to more "social" issues, see Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT'L L. 199 (2004).

425. See *supra* note 424.

426. See Tamanaha, *supra* note 23, at 241-42.

427. *Id.*

428. *Id.* at 242.

429. *Id.* at 242.

430. *Id.* at 241-43.

circumstances, international donors should exclude rule of law development assistance from their aid package to a particular country. The lesson of Afghanistan is that the international donor community needs to ask the threshold question of *whether* to provide rule of law development assistance before engaging in any assistance effort and should not assume that it must be a part of any overall development program.

Thomas Carothers provides a useful typology of key “facilitators or nonfacilitators” for democratization.⁴³¹ The concept of facilitators or nonfacilitators may also be applied to rule of law development and, in this context, the facilitators and non-facilitators are: (1) if a country is in armed conflict; (2) if its socioeconomic development is extraordinarily low; (3) if it has low levels of institutional/political development; and (4) if the recipient country has a low functioning or nominally existing formal legal system.⁴³² Having one or more of these conditions should not automatically disqualify a country from rule of law development assistance, but it should trigger a process to examine whether to provide assistance at that particular time.

Of these four conditions, whether there is ongoing armed conflict is the most serious question to consider. Rule of law development work, on an operational level, requires peace. Rule of law development programs and projects should be developed after assessing the current conditions and should remain flexible to changing conditions. Rule of law development workers should also be in a position where they can continuously evaluate the conditions both within their individual projects and in the country at large. If and when there is rule of law development work, it should be conducted around the country and not restricted to certain cities, towns, or villages. It is difficult, if not impossible, to do these things if the country is at war. On a very simple level, if foreign lawyers are issued flak jackets and helmets on arrival in a country, it is not the time to send in civilian lawyers. Clearly, the peacemakers and security forces need to finish their work first.

The goal of identifying these four conditions, based on the lessons from Afghanistan, is to encourage critical thinking before starting large-scale rule of law development projects. The hope is that delaying rule of

431. Carothers, *The “Sequencing” Fallacy*, *supra* note 406, at 24.

432. Sequencing proponents talk about “preconditions” that must exist before beginning democratization work. Those conditions include “useable state bureaucracy, rule of law, autonomous political parties, a free and lively civil society, and an institutionalized economic society.” MANSFIELD & SNYDER, *supra* note 403, at 281. Other preconditions include “political inclusion of the working class . . . resolution or management of ethnic or cultural divisions . . . [and] institutional infrastructure needed to manage the turbulent processes of increased political participation. . . .” *Id.*

law projects until the conditions are better might encourage more thoughtful rule of law development work that, in turn, will have a more meaningful impact. Nevertheless, the recommendation that there are times when rule of law development assistance should not be part of the larger assistance package does not preclude rule of law advocacy on a political level. And, of course, it does not prevent local actors from working towards legal reform on their own.

This suggestion has the same political limitations as when developing Guidelines for Limited Rule of Law Assistance. Focusing on the United States, the suggestion is to add an assessment of whether to include rule of law development aid in the general aid package before the United States provides rule of law development assistance in any country. Currently, even if donors wanted to conduct such an assessment, rule of law development workers and policy-makers have no single tool to aid them in making the determination of whether it is appropriate to conduct rule of law development programs in a particular country. One option would be for USAID to develop such a baseline assessment tool to be conducted before committing to rule of law development programming in any particular country, using as a starting point the four factors proposed in this article.⁴³³ Although the ultimate decision of whether to give aid, and what aid to give, is highly politicized and serves greater foreign policy objectives, the creation of such an assessment tool might start the process of moving beyond the assumption that rule of law development work is a necessary part of all development assistance.

VII. CONCLUSION

Rule of law development assistance providers and policy-makers should critically examine the efforts in Afghanistan and not repeat the mistakes made there when delivering aid in other countries. Every country that receives foreign aid deserves an individualized analysis to determine what kind of aid makes sense in the particular context of that nation and at the particular stage of development. This individualized analysis must include the possibility that certain types of aid should not be part of the process. The lesson from Afghanistan is that rule of law development assistance should not necessarily be a part of a general

433. There are also non-governmental organizations, including the American Bar Association Rule of Law Initiative, that have developed numerous assessment tools. *See ABA Rule of Law Initiative*, AM. BAR ASS'N, <http://bit.ly/XCqA2w> (last visited Feb. 12, 2013). But, if such tools will be required before funding is given, they need to be created by the U.S. Government. USAID could (and should) call on the expertise of those who have already produced assessment tools, such as the American Bar Association.

foreign aid package. Serious consideration should be given to when it is timely to bring in thousands of foreign legal professionals and pay them millions of dollars to work towards developing the legal system.

The United States could lead the way in changing policies to stop the “standard menu” of assistance regardless of particular circumstances in fragile and conflict-affected countries by developing a more nuanced approach to rule of law development. The decision to provide foreign assistance should not mean that the United States, or any other donor, provides all types of foreign assistance—including rule of law assistance—but rather should mean the beginning of a process to decide, in a selective manner, what types of aid make sense for the particular country at that particular time. In the short term, in fragile and conflict-affected countries, it may make better sense not to provide rule of law development assistance and focus instead on other more urgent types of aid, while continuing to advocate on a political and policy level for improved rule of law.

APPENDIX A: SURVEY QUESTIONS AND FORMAT

Survey on Rule of Law Development Work in Afghanistan

*Thank you for taking the time to fill out this survey and return it by **July 18, 2008** to the address listed at the end of this survey. All responses will remain anonymous. The final survey results will be published in an academic law journal.*

1. Please answer the following questions for each position you have held in Afghanistan (please include all positions including those relating specifically to rule of law development in Afghanistan). If you have held more than three positions, please add the information below.

Questions:	Current Position	Previous Position	Previous Position
What were the dates you worked in Afghanistan?			
Are you on a temporary contract or a permanent employee on temporary assignment to Afghanistan?			
If you are on a temporary contract, had you worked for that organization before your assignment to Afghanistan?			
How long was/is your contract or assignment in Afghanistan (6 months, 1 year, indefinite. . .etc.)			
Did you extend your contract beyond the original period? If yes, please note for how long.			
What level is your position? __Senior Management __Mid-Level Management __Entry Level Professional __Consultant with no direct personnel management responsibility __Other (please be specific)			

What is the working language of your office?			
What kind of organization do you work for: __Governmental __Non-Governmental (NGO) __Inter-Governmental __Bi-lateral __Other (please describe)			
How many employees (including long-term consultants) work in your organization (please include both international and national staff)? How many (or what percentage) are lawyers? How many (or what percentage) are support staff?			
What is the annual rule of law assistance budget for your organization in Afghanistan?			
What are your job responsibilities?			
Where does your program work in Afghanistan? Please list all cities.			

2. Why did you accept your first position in Afghanistan?

3. Please list any training you received on rule of law or Afghanistan before beginning work in Afghanistan (please include the sponsoring organization for the training, the topic/s of the training, and the length of the training).

4. Have you worked in rule of law development in other countries? If yes, please list where and for how long in each place/position.

5. Have you worked in development not related to rule of law in other countries? If yes, please list what types of development work, where and for how long.

6. Please list any other countries you have worked in other than your home country, excluding those you already listed in Questions 4 and 5 (please include the type of position and length of time).

7. What do you anticipate the effect of your work in Afghanistan to be in 1 - 5 years? 10 years and beyond?

8. What is your general opinion of rule of law development work in Afghanistan? Please do not limit your comments to your specific project or program.

9. Please describe what you see as the most valuable rule of law projects or programs currently or previously done in Afghanistan and why they are/were valuable.

10. Please describe any rule of law projects or programs currently or previously done in Afghanistan that you thought were of **no** value and why they are/were **not** valuable.

11. If you could advise policymakers in the international community responsible for funding and supporting rule of law development projects in Afghanistan, what advice would you give them?

12. Does your organization restrict your movement in the city in which you work? If yes, please describe the restrictions placed on you.

13. How would you describe the security environment in Afghanistan?

14. Does the security environment play a role in the planning or implementation of rule of law development programs by your organizations? If yes, how?

15. Does the transportation infrastructure play a role in the planning or implementation of rule of law development programs by your organization? If yes, how?

16. Is there anything else you think is important to understand about planning, organizing, or implementing rule of law development assistance in Afghanistan?

17. Do you speak Dari?

If yes, what is your level of proficiency?

☐ Native speaker

☐ Fluent

☐ Proficient

☐ Basic

☐ A few words

If yes, did you speak Dari before you started working in Afghanistan?

18. Do you speak Pashto?

If yes, what is your level of proficiency?

☐ Native

☐ Fluent

☐ Proficient

☐ Basic

☐ A few words

If yes, did you speak Pashto before you started working in Afghanistan?

19. Are you a lawyer?

If yes, how many years did you practice law in your home country?

If no, what are your university and/or graduate degree/s in?

How many years experience do you have working in that profession before coming to Afghanistan?

20. What is your citizenship (if you hold more than one passport, please list all citizenships)

21. Are you male or female?

22. What is your age?

*Thank you again for taking the time to assist in this survey. Please return the survey by **July 18, 2008** to Professor Cynthia Alkon, [e-mail and surface address information deleted]*

As stated above, all answers will remain anonymous. Please note if you would like to receive a copy of the final article and the preferred address (email or surface).

I would also appreciate it if you could please forward this survey to anyone you know who has worked in rule of law development in Afghanistan.

APPENDIX B: COVER LETTER

I am a law professor in the United States researching rule of law work in Afghanistan. Attached is a survey asking you about your experiences and views of rule of law development work in Afghanistan.

It should take you a minimum of 20-30 minutes to complete. All responses will remain anonymous. This means I will not link your name or organization to any specific statement. I intend to publish the results in an academic law journal. I am hopeful that this survey will help to provide a new perspective in the academic literature on development work in Afghanistan. If you would like a copy of the published article, please just let me know when you respond and please be sure to include the email or surface address.

I would like the survey to go to as many people as possible. Therefore, if you know of others who are or have worked in rule of law development in Afghanistan, please either send them this survey or send their email addresses to me so I can forward it to them. For the purposes of this survey I am defining rule of law work very broadly.

I am happy to answer any questions you may have about the survey. Thank you in advance for your assistance.

Sincerely,

Cynthia Alkon
Assistant Professor of Law
[additional address information deleted]