

The Law Behind Rule of Law Promotion in Fragile States: The Case of Afghanistan

Astrid Wiik* & Frauke Lachenmann**

Table of Contents

A. Introduction.....	173
B. RoL Promotion in Afghanistan	174
I. Terminology.....	174
II. RoL Actors.....	176
III. RoL Promotion Activities.....	178
IV. Challenges and Shortcomings in RoL Promotion	180
C. Legal Basis and Mandate for RoL Promotion by International Organizations and States	183
I. Donor-Driven v. Local Owner- and Leadership	183
1. Light Footprint and Lead Nations (2001–2006).....	183
2. Towards Local Ownership (2005–2009).....	186
3. Mutual Accountability and Afghan Leadership (Since 2012).....	189
4. A Paradigm Change?.....	191
II. Bilateral Agreements	193
D. Legal Basis and Mandate for RoL Promotion by Non-State Actors.....	197
E. Rules Guiding the Programming and Implementation of RoL Assistance	200
I. International Legal Standards.....	200
1. Accordance with the UN Charter Principles	201
2. Human Rights Law.....	204
3. Development of Law Standards.....	206

* Dr. Astrid Wiik is a Research Fellow (Habilitation) at Heidelberg University Faculty of Law and a Senior Research Fellow at the Max Planck Foundation for International Peace and the Rule of Law.

** Dr. Frauke Lachenmann is a Senior Research Fellow at the Max Planck Foundation for International Peace and the Rule of Law.

4. Local Ownership.....	210
5. The International Rule of Law.....	213
II. National Legal Standards.....	214
1. Afghan Laws.....	214
2. Domestic Law of the Donor Country.....	215
F. Conclusion.....	218

Abstract

Rule of law (RoL) promotion has become a go-to-tool in the complex process of stabilizing and rebuilding (post-)conflict States. The process is driven by a heterogeneous group of national, foreign, and international actors who define and prescribe RoL norms and standards, who programme, finance, implement, and eventually monitor RoL reforms. While the legitimacy and effectiveness of RoL promotion has undergone scrutiny, particularly within the overall context of international development assistance, an aspect that has so far received little attention is the legality of RoL promotion. This concerns both the mandate of the various actors and the execution of RoL activities on the ground.

Since 2001, the international community has intensely supported the RoL in Afghanistan rendering it a veritable testing ground for RoL promotion. The article explores the legal framework for actors in RoL promotion in Afghanistan from 2001 up to the present day, with a focus on the German Government, its development cooperation agencies, and private non-governmental organizations (NGOs).

The article shows that while detailed rules bind the monitoring and evaluation of RoL activities in line with the existing international frameworks for development assistance, few laws and principles guide the programming and implementation of RoL promotion. The existing standards are generally too abstract to guide specific RoL promotion activities. Further concretization and harmonization is necessary in the interest of the sustainability of RoL promotion in Afghanistan – and elsewhere.

A. Introduction

Over the last decade, rule of law (RoL) promotion has become a go-to-tool in the complex process of stabilizing and (re-)building (post-)conflict States. RoL promotion in this context is driven by a heterogeneous group of national and international actors who define and prescribe RoL norms and standards, who programme, finance, implement, and eventually monitor RoL promotion activities. While the legitimacy and sustainability of RoL promotion has undergone scrutiny, an aspect that has so far received little attention is its *legality*. This concerns both the mandate of the various actors and the execution of specific RoL activities.

Since 2001, the international community has strongly supported the RoL in Afghanistan. Following 30 years of war and unrest, the Afghan State institutions were largely destroyed, “making the country a test case for law-based nation building”.¹ Germany is one of the central contributors in this process: Between 2009–2017, Germany alone disbursed €1.24 billion on good governance in Afghanistan, out of a total €3.5 billion investment in the country, making Germany the second largest donor in Afghanistan.²

This article explores the legal framework for key actors in RoL promotion in Afghanistan, with a focus on the German Government, its development cooperation agencies, and private non-governmental organizations (NGOs). It argues that a set of detailed rules exist that derives from the framework binding official development assistance (ODA) and also applies to RoL promotion in Afghanistan. However, these rules are not designed to guide specific RoL promotion activities. Further rule development and concretization is necessary in the interest of the legitimacy and sustainability of RoL promotion in Afghanistan and elsewhere.

¹ International Development Law Organization, ‘Afghanistan’ (2015), available at <http://www.idlo.int/where-we-work/asia/afghanistan> (last visited 12 December 2018); E. Gaston & E. Jensen, ‘Rule of Law and Statebuilding in Afghanistan: Testing Theory with Practice’, in S. Smith & C. Cookman (eds), *State Strengthening in Afghanistan: Lessons Learned, 2001–14*, Peaceworks (2016) 116, 69, 70.

² BMZ, ‘German Cooperation with Afghanistan 2009–2017’ (2017), available at http://www.germancooperation-afghanistan.de/sites/default/files/Datasheet_2017_EN.pdf (last visited 12 December 2018) [BMZ, German Cooperation with Afghanistan].

B. RoL Promotion in Afghanistan

I. Terminology

It is impossible to give a complete overview of the RoL actors and their activities in Afghanistan. In 2008, the US representative to the UN estimated that “more than 30 national embassies and bilateral development agencies, several UN agencies, four development banks and [International Financial Institutions], and about 2,000 nongovernmental organizations and contractors are involved in rebuilding [in Afghanistan]”³ – not to mention foreign militaries which have been involved in RoL promotion individually and as part of the international military coalition engaged in Afghanistan. The mapping of the field of RoL actors and RoL promotion activities is contingent on the concept of RoL and what is included under the term RoL promotion. Yet, no RoL concept was agreed on between the Afghan Government and the various international actors. In fact, not even the German Government operates with a uniform understanding of what is the RoL although attempts are currently being undertaken in this respect.⁴

What is the rule of law? Scholars have long distinguished between “thick” and “thin” concepts of RoL.⁵ The “thin”, formalistic model requires that government officials and citizens are bound by and act consistent with the law. The law as such must be public, general, clear, certain, known in advance, and applied to everyone in the same manner. This minimal view of RoL has the advantage of being amenable to a broad range of systems and societies. More substantive or “thicker” definitions of RoL, on the other hand, include references to fundamental rights, democracy, and/or criteria of justice or right, imbuing RoL with ethical overtones.

As early as 2004, the UN Secretary-General, recognizing that the UN members were struggling with conceptual disagreements, sought to “articulate

³ Cited by M. Tondini, ‘Justice Sector Reform in Afghanistan: From a ‘Lead Nation’ Approach to a ‘Mixed Ownership’ Regime?’, 15 *Transition Studies Review* (2009) 4, 660, 668 [Tondini, Justice Sector Reform in Afghanistan].

⁴ German Federal Government, *Krisen verhindern, Konflikte bewältigen, Frieden fördern, Leitlinien der Bundesregierung* (2017), 40 [German Federal Government, Leitlinien Bundesregierung]. In addition, RoL activities may be carried out together with other activities, or under broader concepts such as good governance, rendering any attempt at categorization imprecise.

⁵ Compare the seminal work by B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004).

a common language of justice”⁶ for the UN. His Report to the UN Security Council (UNSC) on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* defined RoL as

“a concept at the very heart of the [United Nation’s] mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”⁷

This comprehensive, “thick” approach became a blueprint for a number of later UN documents dealing with RoL such as the 2008 *Guidance Note of the Secretary-General on the UN Approach to Rule of Law Assistance* and the 2011 DPKO/OHCHR *UN Rule of Law Indicators Implementation Guide and Project Tools*. In 2016, the Venice Commission of the Council of Europe followed suit, warning against a purely formalistic understanding of RoL and claiming that

“despite differences of opinion, consensus exists on the core elements of the Rule of Law as well as on those of the *Rechtsstaat* and of the *État de droit*, which are not only formal but also substantive or material (*materieller Rechtsstaatsbegriff*). These core elements are: (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Non-discrimination and equality before the law.”⁸

⁶ UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616 (2004), 23 August 2004, 4.

⁷ *Ibid.*, para. 6.

⁸ Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, para. 18.

It is doubtful whether the Venice Commission's optimism concerning a RoL consensus is warranted: Recent experiences such as the controversial negotiations regarding Sustainable Development Goal No. 16 have shown that far from all UN members, not even all members of the Council of Europe, subscribe to a substantial, human rights-infused and democracy-oriented definition of RoL, which is bound to lead to discrepancies in their assistance approaches.⁹

Rachel Kleinfeld Belton has noted yet another discrepancy that influences RoL promotion. She points out that definitions of RoL commonly fall into two categories: (1) those that emphasize the ends that the rule of law is intended to serve within society (e.g. law and order, predictability of judgments), and (2) those that highlight the institutional attributes believed necessary to activate the rule of law (such as comprehensive laws, efficient courts, trained lawyers and judges). For practical and historical reasons, Kleinfeld claims, legal scholars and philosophers have favoured the first type of definition; whereas practitioners of RoL development programs, struggling with the conditions on the ground, tend to use the second type of definition.¹⁰ It follows that international donors and practitioners are not necessarily on the same page as far as their understanding of the goals of RoL, and the means towards its achievement, are concerned.

II. RoL Actors

At the international level, there are two key groups of RoL providers in Afghanistan: the UN with its specialized development agencies, and multilateral development banks. The EU can be added as an international actor *sui generis*.¹¹ The UN Assistance Mission in Afghanistan (UNAMA) was established by the UNSC in 2002, upon request by the Afghan Government. Headed by the Special Representative of the UN Secretary-General for Afghanistan, it is designed as a political assistance mission and ensures a coherent development approach by the international community. In addition to UNAMA, a UN Country Team for Afghanistan bundles the activities of the specialized UN agencies, funds

⁹ On the negotiation history of SDG 16, see A. Wiik & F. Lachenmann, 'Rule of Law and the Sustainable Development Goals', in F. Lachenmann, T. J. Röder & R. Wolfrum (eds), 18 *Max Planck Yearbook of United Nations Law* (2014), 286, 304.

¹⁰ R. Kleinfeld Belton, 'Competing Definitions of the Rule of Law: Implications for Practitioners', *Carnegie Papers Rule of Law Series* (2005) 55, 16.

¹¹ P. Dann & M. Riegner, 'Globales Entwicklungsverwaltungsrecht', in P. Dann, S. Kadelbach & M. Kaltenborn (eds), *Entwicklung und Recht* (2014), 723, 728.

and programmes, the World Bank, the International Monetary Fund, and other affiliated members.¹²

Foreign States make up the largest donor group. They carry out their RoL activities through different agencies, organizations, and contracting international governmental and non-governmental organizations. As regards Germany, three federal ministries have competences in civilian RoL promotion to Afghanistan:¹³ the Federal Ministry for Economic Cooperation and Development (BMZ), the Federal Foreign Office (AA) and the Federal Ministry of the Interior. BMZ implements its RoL activities predominantly through the German Society for Development Cooperation (GIZ) and the KfW Development Bank and focuses on long-term development measures, while the Federal Foreign Office works with a number of different organizations and focuses on crisis stabilization and prevention. The Ministry of the Interior has relied on public officials – mostly police officers – to carry out specific RoL activities.

The German Government programs, finances, and implements its activities directly¹⁴ or jointly with other donors, German State institutions, such as political foundations, with Afghan line ministries, government organizations, international organizations such as UNDP, domestic or international NGOs, and subnational governance bodies, such as community development councils and Provincial Councils.¹⁵ The German Government cooperates with a total of 83 German, international and Afghan NGOs to implement the projects it

¹² These are: Asian Development Bank, Food and Agriculture Organization, International Fund for Agricultural Development, International Labour Organization, International Monetary Fund, International Organization for Migration, Office for the Coordination of Humanitarian Affairs, Office of the High Commissioner for Human Rights, UN Human Settlements Programme, UNAIDS, UNAMA, UNCTAD, UNDP, UN Department of Safety and Security, UNEP, UNESCO, UNFPA, UNHCR, UNICEF, UNIDO, UNMAS, UNODC, UNOPS, UNW, World Bank, World Food Programme, WHO.

¹³ The Ministry of Defense has also carried out RoL assistance directly through the armed forces, see German Federal Government, *Fortschrittsbericht Afghanistan 2014*, (2014), 53 [German Federal Government, *Fortschrittsbericht Afghanistan 2014*]; German Federal Government, *Deutsches Engagement im Bereich der Sicherheitssektorreform*, BT-Drucks, 18/11458 (3 July 2017), 7 [German Federal Government, *Sicherheitssektorreform*].

¹⁴ Predominantly with regard to capacity-building of police forces. See German Federal Government, *Fortschrittsbericht Afghanistan 2014*, *supra* note 13, 23–25.

¹⁵ BMZ, 'Neue entwicklungspolitische Strategie für die Zusammenarbeit mit Afghanistan im Zeitraum 2014–2017', BMZ-Strategiepapier 3/2014, 15 [BMZ, *Strategie Afghanistan*].

funds.¹⁶ This multi-agency approach is typical for RoL promotion by States, owed to the different areas of competence.¹⁷

III. RoL Promotion Activities

The German Government has broadened its RoL-related engagement in Afghanistan over the years.¹⁸ Initially, it focused on Security Sector Reform, particularly police reform, which remains a priority. However, it has since 2003 expanded to other areas, including justice sector and administration reform. Since 2012, the BMZ's Afghanistan strategy lists good governance, of which RoL is declared a sub-component, as one of its five strategic sectors.¹⁹ BMZ-funded RoL activities and programs pursue as an overall objective the establishment of stable and responsive State institutions.²⁰

Important RoL-projects carried out by GIZ for the BMZ include: the project 'Promotion of the Rule of Law in Afghanistan' (since 2003), which provides capacity trainings for the judicial and quasi-judicial sector, mentoring for judicial employees and mediators, and legal awareness-raising campaigns for civil society in relation to the judicial sector;²¹ another project organizes study meetings and trainings for mullahs on women's rights to obtain their support in improving the situation of women;²² the Open Policy Advisory Fund (OPAF) (2010–2016) supports the Afghan Government in addressing corruption, transparency and administration reform with the aim of increasing respect for the rule of law by State institutions; the Governance Forum for Afghanistan

¹⁶ A list is available at <http://www.germancooperation-afghanistan.de/en/page/ngo-partners> (last visited 12 December 2018).

¹⁷ See, for instance, the list of tasks of various US agencies – and their multiple programs – listed in United States Department of State and the Broadcasting Board of Governors, Office of Inspector General, 'Report of Inspection, Rule-of-Law Programs in Afghanistan (2008)', Report Number ISP-I-08–09, 8, available at <https://oig.State.gov/system/files/106946.pdf> (last visited 12 December 2018).

¹⁸ A. Suhrke, 'Exogenous State-Building: The Contradictions of the International Project in Afghanistan', in W. Mason (ed.), *The Rule of Law in Afghanistan* (2011), 225, 238. For a standardized set of RoL activities, see UN Secretary-General, *UN Approach to Rule of Law Assistance, Guidance Note of the UN Secretary-General*, April 2008 [UN Secretary-General, RoL Assistance].

¹⁹ GIZ, *State-Building in a Fragile Environment – Strengthening Afghan Institutions Through the Work of Returning and Integrated Experts* (2016), 30 [GIZ, State-Building in a Fragile Environment].

²⁰ *Ibid.*, 31.

²¹ GIZ, *Good Governance in Afghanistan* (2017), 10-11 [GIZ, Good Governance].

²² *Ibid.*, 12–13.

(Gov4Afg) (since 2015), which aims at establishing a good-governance-focused knowledge management system to be used for political and legislative decision-making;²³ the Regional Capacity Development Fund (RCDF) and its follow-up programme ‘Promotion of Good Governance in Afghanistan’ (RCD), which funds a variety of projects containing RoL objectives at the national and subnational government level in Kabul and six northern Afghan provinces.²⁴ Activities include up to 14 monthly capacity trainings for public officials on specific administrative issues, such as budgeting, but also on specific relevant legal topics such as the public procurement law, as well as projects intending to increase public participation and dialogue between government agencies and citizens.²⁵

In addition, the Federal Foreign Office supports a number of RoL projects. These include projects addressing security, good governance, especially public administration reform, higher education, and cultural preservation.²⁶ One central RoL project is the ‘Special Programme for Supporting the Development of Afghan Ministries and Administrative Systems at National and Sub-National Level’ (since 2010), which is implemented by GIZ and the Centre for International Migration (CIM), and through which approximately 70 so-called Integrated and Returning Experts have been placed in key positions in central government “with a great deal of influence”²⁷, mostly in the areas of good governance and security, to support and mentor Afghan public officials and fill gaps in the local labour market.²⁸ Tasks of experts at the independent Joint Anti-Corruption Monitoring and Evaluation Committee (MEC) include, for instance, the drafting of anti-corruption legislation and capacity building within their team.²⁹ Other Federal Foreign Office-funded programmes include capacity trainings for the Afghan police and the judicial sector, transitional justice initiatives, and administrative reform projects, such as a project on strengthening administrative law in Afghanistan.³⁰ Carried out by the Max Planck Foundation for International Peace and the Rule of Law, this project

²³ GIZ, *The Promotion of Good Governance in Afghanistan – RCD* (2016), 28 [GIZ, Promotion of Good Governance].

²⁴ GIZ, *State-Building in a Fragile Environment*, *supra* note 19, 31–32.

²⁵ GIZ, *Promotion of Good Governance*, *supra* note 23, 12; GIZ, *Good Governance*, *supra* note 21, 19–26.

²⁶ GIZ, *State-Building in a Fragile Environment*, *supra* note 19, 30.

²⁷ *Ibid.*, 45.

²⁸ *Ibid.*, 41.

²⁹ *Ibid.*, 80.

³⁰ *Ibid.*, 31.

included the training of around 1,200 public officials in administrative law, as well as provision of legislative drafting support to the Afghan Ministry of Justice (MoJ), the Independent Administration Reform Civil Service Commission (IARCSC), and the Afghan Supreme Court (SC) in respect of an Administrative Procedures Law and an Administrative Court Procedure law.

The target audience of the above projects is as wide as the various activities. Two central groups emerge: public officials, notably employees in the public administration at the national and subnational level as well as judges and prosecutors, on the one hand; and civil society in general as those who shall both benefit and hold public officials to account, on the other hand.

IV. Challenges and Shortcomings in RoL Promotion

No recent empirical study on German-funded RoL projects in Afghanistan exists, and it would go beyond the scope of this paper to close this gap. However, reports provided by the AA, BMZ, and GIZ indicate some challenges, and reports exist about shortfalls in similar projects by other donors. Some of them are here summarized to illustrate potential pitfalls of RoL promotion activities.

One area where difficulties – and the need for clear legal frameworks to guide RoL promotion projects – are apparent is the embedding by donors of foreign and domestic nationals as experts and mentors in line ministries and other State institutions. They are a preferred means to foster long-term capacity building in the face of limited local capacities, lack of (legal) expertise, and corruption in partner institutions. In addition to the AA, the EU, the German Ministry of Interior, GIZ, USAID, and US contractors all have embedded advisors in justice and security institutions, usually at high authority levels – some even with direct access to the President.³¹ In 2010, the Afghan Ministry of Finance estimated that around 7,000 Afghan consultants worked in government institutions.³²

There have been reports that these advisors have taken over key tasks, such as preparing national development strategies and drafting entire laws.³³ The

³¹ See M. Hartmann, ‘Casualties of Myopia’, in Mason (ed.), *supra* note 18, 172, 188; BMZ, *Strategie Afghanistan*, *supra* note 15, 19.

³² F. de Weijer, ‘A Capable State in Afghanistan’, Harvard CID Working Papers No. 2013/059, 5.

³³ M. Tondini, ‘Justice Sector Reform in Afghanistan’, *supra* note 3, 664-665. Here, Tondini also mentions the 2004 Interim Criminal Procedure Code, the 2005 Juvenile Code, and the 2005 Law on Prisons and Detention Centers as being drafted with main inputs from the Italian Justice Project Office and that there was a push to “perform justice

Afghanistan National Development Strategy is said to have been almost fully prepared by foreign actors, including the World Bank, foreign embassies, and UNAMA.³⁴ Infamously, an Italian legal scholar was entrusted with drafting an interim criminal procedure code but failed to consult Afghan officials on the issue. Resenting their exclusion, the Afghan officials asked the President to refuse approving the draft. In support of their legal expert, the Italian Government threatened the withdrawal of funding for related projects unless the draft was approved.³⁵ The reasons for this development are complex. Partly, they are a consequence of lacking local capacities, partly they are due to donor politics and project strategies such as overly short project cycles focused on concrete results that leave little room for the building up of capacities within the government agencies.³⁶

A related recurring problem is that donor support often fails to take into account the Afghan local context, that laws are drafted based on, possibly, conflicting donor perspectives (supply-, not demand-driven), and that local laws, legal traditions and the context within which measures are to operate are not sufficiently researched.³⁷ GIZ has acknowledged shortcomings in needs-based projects planning concerning the programme RCDF, which it has sought to avoid in the follow-up programme RCD by creating a detailed bottom-up communication process for approval of specific projects.³⁸ The Germany-funded expert placement project is lauded by Afghan partners for its strong involvement of the target institution in the expert selection process.³⁹ Similarly, the GIZ-run Gov4Afg project was set up in 2015 to mitigate earlier planning and implementation shortcomings with regard to management and collection of local knowledge and priority setting. Further, projects increasingly are designed to include civil society input at both the planning and implementation stage.⁴⁰ However, still, foreign influence on legislative drafting and administration

reform by influencing the political will of local authorities³⁹; de Weijer, *supra* note 32, 11. She mentions the National Education Support Programme at the Ministry of Higher Education.

³⁴ S. M. Shah, 'Afghanistan National Development Strategy (ANDS) Formulation Process: Influencing Factors and Challenges', AREU 2009; de Weijer, *supra* note 32, 5–7; Tondini, 'Justice Sector Reform in Afghanistan', *supra* note 3, 669.

³⁵ de Weijer, *supra* note 32, 17.

³⁶ *Ibid.*, 16.

³⁷ *Ibid.*, 26.

³⁸ GIZ, *Promotion of Good Governance*, *supra* note 23, 9, 12.

³⁹ GIZ, *State-Building in a Fragile Environment*, *supra* note 19, 65.

⁴⁰ GIZ, *Promotion of Good Governance*, *supra* note 23, 28-29.

processes often result in legal and management reforms that are too complex and insufficiently tailored to the specific context to be effectively operationalized by local actors. Technical capacity-building trainings are often not able to close this gap.⁴¹

Finally, questions have been raised with regard to the legality of informal justice programs framed within legal pluralist approaches. Conceptualized by foreign donors, they aim at engaging existing local customary and Islamic legal structures or religious leaders, which are considered to be more legitimate than State authority outside of urban centres. Gaston and Jensen point to the frictions of this approach with human rights, particularly women's and minorities' rights.⁴² Ideas to establish mechanisms of State recognition of informal justice dispute settlement potentially violate the Afghan Constitution as well as Afghanistan's international human rights obligations. They might be also problematic under Western donors' international and domestic legal frameworks as well as policy strategies for Afghanistan, which often focus on human rights promotion. These problems are more pronounced in informal justice programming but also apply to some degree in state-institution building:

“There is no shortcut to justice. In the short term, this can put Western state-building practitioners in the uncomfortable position of supporting institutions or individuals that are still neglecting minority rights, increasing inequality, or committing or condoning rights abuses – critiques that could be lodged against both community-based *and* formal institutions. This is evident by the dilemma faced in continuing to work with an Afghan Government that punishes women from running away from abusive situations, sentences alleged blasphemers to death, or routinely tortures security detainees to coerce confessions.”⁴³

Are donors and implementing organizations legally free to plan and carry out such activities despite possibly violating their own or Afghanistan's domestic and international legal obligations? In the following, we consider the legal framework applicable to RoL actors, looking at the rules addressing the *if* and *how* of their RoL-related work.

⁴¹ de Weijer, *supra* note 32, 24.

⁴² Gaston & Jensen, *supra* note 1, 74-75.

⁴³ *Ibid.*, 76.

C. Legal Basis and Mandate for RoL Promotion by International Organizations and States

A web of international legal sources regulates the engagement of the international community in Afghanistan, including for RoL promotion. International organizations and States derive their RoL promotion mandates largely from two sources: First, States and international organizations have concluded multilateral framework agreements with the Afghan Government on the general post-conflict order of the nation and the State-building process. These agreements have been flanked and elaborated by bi- and multilateral agreements on specific areas of cooperation between the Afghan Government and foreign and international donors. Secondly, a number of UNSC Resolutions mandates the UN's presence in the country.

The following section traces the legal evolution and key legal characteristics of the approach to RoL promotion in Afghanistan, as reflected in the bi- and multilateral agreements and UNSC Resolutions.

I. Donor-Driven v. Local Owner- and Leadership

1. Light Footprint and Lead Nations (2001–2006)

RoL formed a part of the earliest state-building effort in post-2001 Afghanistan. The outcome document of the UN-administered talks between the various Afghan factions and facilitating foreign representatives, the so-called *Bonn Agreement (Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions)* of 5 December 2001 envisaged a number of RoL-based reforms in the process of power transition to the Afghan people. These included a process for the drafting and passing of a new constitution and the reconstruction of the defunct justice system and public administration.

These measures were needed. Three decades of civil unrest and war had destroyed Afghanistan's infrastructure, including the pre-war legal infrastructure as represented in a body of State, customary, and Islamic laws and a central State that had been built in urban areas during several periods of modernization in the 20th century. The RoL-based institutions, particularly the judiciary with its complex unification of State- and Islamic laws and practices, were in a desolate state.⁴⁴

⁴⁴ *Ibid.*, 70.

The mandates for RoL promotion have been embedded in the overall framework of civilian and military assistance to Afghanistan. For roughly the first five years after the fall of the Taliban regime, the reconstruction process can be denoted by two legal characteristics: a limitation of the UN to a coordinating role and strong control of foreign donor nations over the process irrespective of pledges to Afghan ownership.

In accordance with emerging international development law at the time, it was agreed that the international community's involvement in Afghanistan should be limited to military, technical and financial assistance. Sovereignty and responsibility for reconstruction was to rest in the hands of the Afghan people, represented by an Interim Authority until elections had been held.⁴⁵

The *Bonn Agreement* was endorsed by UNSC Resolution 1383, issued on 6 December 2001⁴⁶, which also issued a plea for reconstruction assistance to donors and envisaged only a coordinating role for the UN. This "light footprint" approach deviated from previous mission models, used in East Timor, Kosovo and Bosnia Herzegovina, where the UN had assumed civilian executive powers.⁴⁷ The Resolution further contained a "strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan"⁴⁸, a pledge that would be reiterated in many later Resolutions.

UNSC Resolution 1401 (2002)⁴⁹ established the UNAMA, with the mandate and structure of the mission laid out in a report of the UN Secretary-General, and furnished the Special Representative of the UN Secretary-General with authority over the planning and conduct of all UN activities in Afghanistan. The initial mandate was established for one year, and has since been renewed and reviewed annually, with structural changes to the mandate when considered necessary.⁵⁰

⁴⁵ Hartmann, *supra* note 31, 180.

⁴⁶ SC Res. 1383, UN Doc S/RES/1383 (2001), 6 December 2001.

⁴⁷ This approach was controversial, see F. Vendrell, 'The International Community's Failures in Afghanistan', in Mason (ed.), *supra* note 18, 53, 54-55; L. Miller & R. Perito, 'Establishing the Rule of Law in Afghanistan', in United States Institute for Peace (USIP), *Special Report* (2004) 117, 4. See also E. de Brabandere, *Post-Conflict Administrations in International Law* (2009), 3.

⁴⁸ SC Res. 1383, *supra* note 46, 1.

⁴⁹ SC Res. 1401, UN Doc S/RES/1401 (2002), 28 March 2002.

⁵⁰ For previous renewals see SC Res. 1662 (2006), 1746 (2007), 1806 (2008), 1868 (2009), 1917 (2010), 1974 (2011), 2041 (2012), 2096 (2013), 2145 (2014), 2210 (2015), 2274 (2016).

In his Report outlining UNAMA's mandate, the UN Secretary-General warned UNAMA against meddling with Afghanistan's affairs to an undue degree – a mistake of earlier missions:

“98 (c) UNAMA should undertake close coordination and consultation with the Afghan Interim Authority and other Afghan actors to ensure that Afghan priorities lead the mission's assistance efforts;

(d) UNAMA should aim to bolster Afghan capacity (both official and non-governmental), relying on as limited an international presence and on as many Afghan staff as possible, and using common support services where possible, thereby leaving a *light expatriate 'footprint'*.”⁵¹

The role – and mandates – of foreign donor nations was developed at subsequent international conferences between the international community and the Afghan Interim Authority in Tokyo, Geneva and Kabul in 2002. International organizations and 60 governments pledged 4.5 billion US dollars in foreign aid to the reconstruction effort for the period 2002–2006.⁵² However, rather than channelling the foreign aid through reconstruction funds – the favoured Afghan approach and a state-of-the-art means to ensure national ownership over national reconstruction policy and spending – a strong donor-driven process was established.⁵³

Bilateral agreements between donors and Afghanistan characterized the process, a model that already then was considered difficult with regard to aid coordination and needs-based programming. To ensure donor coordination,

⁵¹ Emphasis by the authors.

⁵² M. Tondini, *Statebuilding and Justice Reform: Post-Conflict Reconstruction in Afghanistan* (2010), 46 [Tondini, Statebuilding and Justice Reform].

⁵³ Given the limited infrastructure, a typical budget support funding mechanism by the World Bank was not an option in view of the strict criteria governments must fulfil, see World Bank, *Principles for Development Policy Financing, Operational Procedure 8.60*, 13 July 2017, OPS5.02-POL.105; BMZ, *Leitlinien für die bilaterale Finanzielle und Technische Zusammenarbeit mit Kooperationspartnern der deutschen Entwicklungszusammenarbeit*, BMZ Konzepte 165 (2008), 12–14 [BMZ, Leitlinien]. Several trust funds managed by international organizations were set up. The multi-donor trust fund of the World Bank, the Afghanistan Reconstruction Trust Fund (ARTF), is the largest. See ‘The Afghanistan Reconstruction Trust Fund’, available at <http://www.artf.af/> (last visited 12 December 2018).

five countries assumed the role of *lead nations* over specific sectors in the *security and rule of law* portion of the interim government's reform agenda. The role of lead nation entailed the provision of financial assistance, the coordination of foreign commitments, and oversight of activities in the particular area assigned – thereby arguably undermining the local ownership narrative justifying the light footprint approach.⁵⁴ UNSC Resolutions between 2002 and 2006 mostly reiterated the coordination and assistance mandate and the objectives laid out in the *Bonn Agreement*.

Despite the pledges in the *Bonn Agreement*, RoL reform received limited attention in this period, with the largest share of aid routed into military and police reforms. RoL-related activities focused on the priorities listed in the *Bonn Agreement*. Drawing from liberal Western State systems, donors designed *top-down, state-centric* programs focused on rebuilding State institutions, modernizing the State legal system, and expanding their reach and capacities beyond urban centres.

2. Towards Local Ownership (2005–2009)

With the Bonn process coming to an end with the election of a President and a Parliament, 2005/2006 became a turning point for assistance efforts in Afghanistan. This also had effects on the mandates for RoL promotion. The new Afghan Government started to formulate their own RoL reform goals and sought to have more input in the process, as evidenced in the 2005 document *Justice for All: A Comprehensive Needs Analysis for Justice in Afghanistan*⁵⁵. The paper aimed to provide an analysis of what needed to be done over the next 12 years to build and maintain a minimally functional justice system in Afghanistan. It formulated a clear Afghan ownership vision in terms of decision-making and the content of judicial RoL reforms, while reducing the role of donors to one of assistance:

“The Government must lead on justice reform. [...] To the extent possible, decisions about justice reform should be made by the

⁵⁴ Tondini, *Statebuilding and Justice Reform*, *supra* note 52, 46; N. Stockton, ‘Strategic Coordination in Afghanistan’, *Afghanistan Research and Evaluation Unit Issues Paper Series* (2002), 25.

⁵⁵ Government of the Islamic Republic of Afghanistan, Ministry of Justice, ‘Justice for All: A Comprehensive Needs Analyse for Justice in Afghanistan’ (2005), available at <https://www.cmi.no/pdf/?file=/afghanistan/doc/Justice%20for%20all%20MOJ%20Afgh.pdf> (last visited 19 December 2018).

Government and implemented through the normal processes of Government.

[...]

Justice reform must be appropriate to Afghanistan. In its policy, it must reflect Afghan political circumstances, social and legal traditions and aspirations for the future.”⁵⁶

The paper displayed the Afghan Government’s dilemma: the State was dependent on donor money and technical expertise, yet the donors’ influence on policy decisions was increasingly perceived as encroaching on Afghan self-determination and pushing for RoL reforms that were incompatible with local traditions. At the same time, the international community, faced with limited progress, insurgencies and an increase in the narcotics trade, realized that a change in approach was needed.

Accordingly, the international assistance agreement Afghanistan Compact of the International Conference on Afghanistan (London, 2006) terminated the lead-nations approach, sought to strengthen local ownership, and formulated specific RoL reform goals concerning passing and publication of constitutionally required legislation, the judiciary, and the penal system with specific benchmarks.⁵⁷ The benchmarks mirrored reform plans laid out in the shortly before prepared ANDS by the Afghan Government, a (nominally) Afghan needs-based political framework for international cooperation. UNSC Resolution 1659 of 15 February 2006 endorsed the Afghanistan Compact and called on the Afghan Government and the international community to implement it in full.⁵⁸ It also welcomed the Afghan Government’s interim ANDS. The UNSC stressed the “inalienable right of the people of Afghanistan freely to determine their own future”.⁵⁹

After the *Afghanistan Compact*, RoL became an integral element of the Afghanistan documents. The *Rome Conference on Justice and Rule of Law in Afghanistan* (Rome, 2007), endorsed by UNSC Resolution 1746 of 23 March 2007, recognized “that without justice and the rule of law no sustainable security, stabilization, economic development and human rights can be achieved”.⁶⁰ The

⁵⁶ *Ibid.*, 4.

⁵⁷ *Afghanistan Compact*, Annex I ‘Benchmarks and Timelines’, 1 February 2006.

⁵⁸ SC Res. 1659, UN Doc S/RES/1659 (2006), 15 February 2006.

⁵⁹ *Ibid.*, 1.

⁶⁰ *Chairs’ Conclusions*, Rome Conference on Justice and Rule of Law in Afghanistan, 3 July 2007.

Conference also fully endorsed a stronger locally owned process. It endorsed the *Afghanistan Compact* but also the Government's paper *Justice for All* and the ANDS. RoL reform was to be implemented through a National Justice Program to be funded in significant part through the multi-donor trust fund ARTF. The document also envisaged an Afghan-led monitoring and evaluation system for the justice sector.

The goals of the *Afghanistan Compact* were at the focus of all further Resolutions, with the UNSC increasingly urging the observance of its benchmarks and timelines (e.g. Resolution 1868 of 23 March 2009⁶¹) and the implementation of the *National Justice Programme* "in view of accelerating the establishment of a fair and transparent justice system, eliminating impunity and contributing to the affirmation of the rule of law throughout the country" (Resolution 1917 of 20 March 2010⁶²).

At subsequent international conferences in London (2010) and Kabul (2010), stakeholders acknowledged shortcomings of the previous multi-donor-driven approach. Both the *London* and *Kabul Conference Communiqué* further streamlined the engagement of the international community, whilst moving towards greater ownership of the Afghan Government through agreement of specific areas of engagement with clear benchmarks. The *Kabul Communiqué* is remarkable in several ways: it for the first time addressed the issue of international legitimacy of the aid to Afghanistan by linking it to the UNSC Resolutions mandating UNAMA and the general stabilization process, but also democratic legitimacy of the steps undertaken by the Afghan Government such as noting that "it is also crucial that the Government, in pursuing its reforms, continue to consult with the people through their representative bodies, civil society, and other mechanisms".⁶³ The *Kabul Communiqué* also spelt out the importance of Afghan leadership and ownership and especially its "unique and irreplaceable knowledge of its own culture and people"⁶⁴ for the success of the aid efforts, whilst stating that the contribution of the international community should consist of lending of "resources and technical knowledge to the implementation

⁶¹ SC Res. 1868, UN Doc S/RES/1868 (2009), 23 March 2009.

⁶² SC Res. 1917, UN Doc S/RES/1917 (2010), 22 March 2010.

⁶³ Kabul Conference Communiqué, 'A Renewed Commitment by the Afghan Government to the Afghan People. A Renewed Commitment by the International Community to Afghanistan' (2010), 3, para. 9, available at https://www.unodc.org/documents/afghanistan/Kabul_Conference/FINAL_Kabul_Conference_Communique.pdf (last visited 12 December 2018).

⁶⁴ *Ibid.*, 2, para. 7.

of Afghan-defined programs”.⁶⁵ Subsequent agreements have confirmed this approach. For instance, the 2011 Bonn International Afghanistan Conference, celebrating the tenth anniversary of the *Bonn Agreement* and at the same time ringing in the “Transition to Transformation Decade of 2015–2024”⁶⁶ after the completion of the ISAF mission in 2014, affirmed that:

“This Transformation Decade will see the emergence of a new paradigm of partnership between Afghanistan and the International Community, whereby a sovereign Afghanistan engages with the International Community to secure its own future and continues to be a positive factor for peace and stability in the region.”⁶⁷

3. Mutual Accountability and Afghan Leadership (Since 2012)

Finally, through the *Tokyo Declaration*, entitled *Partnership for Self-Reliance in Afghanistan: From Transition to Transformation*⁶⁸ (Tokyo, 2012), the Afghan Government and the international community have aimed to transform their mutual commitments into a binding framework focused on the priorities of the Afghan Government as contained in its strategy papers. Afghanistan and the international community have established the *Tokyo Mutual Accountability Framework* (TMAF). It is the first time that mutual accountability was addressed in the multilateral negotiations on Afghanistan, in line with recent reforms of development law.

As regards RoL specifically, donors not only agreed on which areas to focus their RoL promotion efforts, such as access to justice, enforcement of the constitution and fundamental laws, equality of women, and anti-corruption, but they also agreed to modify their mode of implementation of projects, that is, to “move from service delivery to building capacity and providing support”. In exchange, the Afghan Government itself “promised to reinvigorate key development priorities such as anti-corruption and rule of law, honour its

⁶⁵ *Ibid.*

⁶⁶ International Afghanistan Conference, ‘Afghanistan and the International Community: From Transition to the Transformation Decade. Conference Conclusions’ (5 December 2011), available at https://peacemaker.un.org/sites/peacemaker.un.org/files/AF_111205_BonnConference.pdf (last visited 12 December 2018).

⁶⁷ *Ibid.*, 6, para. 30.

⁶⁸ *The Tokyo Declaration: Partnership for Self-Reliance in Afghanistan: From Transition to Transformation*, UN Doc A/66/867–S/2012/532, 12 July 2012.

obligations to international human and gender rights mechanisms, and to continue the fight against drug cultivation”.

This move of international actors from direct service delivery to support and capacity building for Afghan institutions, enabling the Government of Afghanistan to exercise its sovereign authority in all its functions, was also envisaged by UNSC Resolution 2096 of 19 March 2013⁶⁹, as well as Resolution 2145 of 17 March 2014⁷⁰. While the end of assistance efforts in Afghanistan has hardly been reached, the stance of the UNSC today is that aid has evolved into partnership and Afghanistan is, at least nominally, standing on its own feet as far as governance is concerned.

Mutual accountability and conditionality were further pursued in 2015 with the *Self-Reliance through Mutual Accountability Framework*⁷¹ (SMAF) which consolidates the TMAF and the Afghan Government’s policy paper for the London 2014 Conference *Realizing Self-Reliance: Commitments to Reforms and Renewed Partnerships*.⁷² It establishes ten “principles of mutual accountability”, including a commitment by the international community to support the development priorities identified by the Afghan Government in exchange for the “government’s delivery of the mutually agreed commitments”, an aim to include the “[l]essons learned from aid effectiveness” by all sides, and a reiteration of the importance of governance building.⁷³ RoL related indicators – developed to measure concrete progress – foresee the development and implementation of a Justice Sector Reform plan, laws to implement administration reform, and developments in the legal and policy framework for empowering women. These indicators are concretized into short term deliverables for 2016 in the SMAF. Notably, the donor community for the first time also committed to a set of deliverables concerning improving the partnership and aid effectiveness.

This push for RoL promotion and the detailing of the mandate is in line with the renewed emphasis given to RoL activities, particularly the justice sector which remains a key RoL concern.⁷⁴ There seems to be unanimity that the RoL

⁶⁹ SC Res. 2096, UN Doc S/RES/2096 (2013), 19 March 2013.

⁷⁰ SC Res. 2145, UN Doc S/RES/2145 (2014), 17 March 2014.

⁷¹ Islamic Republic of Afghanistan, ‘Self-Reliance through Mutual Accountability Framework’ (2015), available at http://ez-afghanistan.de/sites/default/files/SMAF-MAIN_with_annex_3_%20sep_2015.pdf (last visited 12 December 2015) [SMAF].

⁷² T. Ruder, ‘Lessons and Opportunities From the Tokyo Mutual Accountability Framework’, *United States Institute of Peace Special Report* (2015) 378, 2, 4, 17.

⁷³ SMAF, *supra* note 71, 1.

⁷⁴ Islamic Republic of Afghanistan, *Afghanistan National Peace and Development Framework 2017 to 2021* (2016) 40.

is indispensable to transfer legitimacy onto the power holders. Funding in RoL assistance has surged.⁷⁵ RoL assistance has continued with respect to classic forms of state-focused institution and capacity building.⁷⁶ In addition, RoL activities were widened to include civil society, subnational governance, and administration reform outside of Kabul.⁷⁷ Especially informal, often community-based justice systems, became the focus of RoL activities in an effort to establish a *bottom-up* RoL-based system accepted by society at large.⁷⁸

4. A Paradigm Change?

In its most recent Resolution 2344 of 17 March 2017⁷⁹ extending the UNAMA mission, the UNSC again emphasized Afghan leadership and ownership over security, governance, and development. However, the Resolution signals and prepares a paradigm change to the current RoL- and state-building approach. This is due to the deterioration of the security situation since 2015, the advent of parliamentary and presidential elections in 2018 and 2019, and the need for an inclusive and Afghan-led peace process to halt the widening insurgency. To this end, the UNSC has ordered a strategic review of the UNAMA mandate by the UN Secretary-General including its tasks, priorities, and resources to determine its efficiency and effectiveness.

The Resolution contains some substantive pointers for the UNAMA in regard of its RoL activities. It states that UNAMA is to lead the

“international civilian efforts aimed at reinforcing the role of Afghan institutions to perform their responsibilities, *with an increased focus on capacity building in key areas identified by the Afghan Government*, with a view, in all UN programmes and activities, to *move towards a national implementation model with a clear action-oriented strategy*

⁷⁵ Between 2009–2010 alone, USAID’s RoL budget doubled to 75 million US dollars. RoL assistance is also a main policy strategy for the EU, see Council of the European Union, 3288th Council Meeting Foreign Affairs, Press Release 5425/14, 20 January 2014, 12–13.

⁷⁶ E.g. BMZ, *Strategie Afghanistan*, *supra* note 15, 3, 4, 21.

⁷⁷ E.g. USAID’s *Afghan Civic Engagement Program and Initiative to Strengthen Local Administrations*; GIZ’s *Förderung der Rechtsstaatlichkeit, Regionale Kapazitätsentwicklungsfonds* (RCDF), *Stabilisierungsprogramm Nordafghanistan* (SPNA).

⁷⁸ So-called second-generation RoL concepts. See Gaston & Jensen, *supra* note 1, 73.

⁷⁹ SC Res. 2344, UN Doc S/RES/2344 (2017), 17 March 2017.

for mutually agreed condition-based transition to Afghan leadership and ownership".⁸⁰

The Resolution further stresses the need to accelerate

"the establishment of a fair and transparent justice system, eliminating impunity and strengthening the RoL throughout the country, anti-corruption measures, and progress in the reconstruction and reform of the prison sector in Afghanistan, in order to improve the respect of the RoL and human rights therein, [...] and calls for full respect for relevant international law including humanitarian law and human rights law".⁸¹

In his strategic review of the UNAMA, presented in autumn 2017, the UN Secretary-General endorses a significant strategic and policy remodelling of the UNAMA for its operations until 2020 which entails structural changes, based on interviews with Afghan and international stakeholders.⁸² The review has an impact on RoL activities. It is significantly informed by the UN's ongoing general redesigning of peace operations and development approach,⁸³ as well as the described fragile political and economic situation, and the difficult security situation. The UN Secretary-General advises to move from state- and institution-building towards focusing on sustainable peace and self-reliance of Afghanistan. Three strategic priorities are formulated: primacy of peace; strategic coordination of assistance through UNAMA to ensure, on the one hand, alignment with the Afghan Government's development priorities as set out in the *Afghanistan National Peace and Development Framework* and, on the other hand, reflection of the *2030 Agenda for Sustainable Development*; and human rights.

⁸⁰ *Ibid.*, 4, para. 9 (emphasis added).

⁸¹ *Ibid.*, 8, para. 28.

⁸² UN Secretary-General, *Special Report on the Strategic Review of the UNAMA*, UN Doc. A/72/312-S/2017/696, 10 August 2017 [UN Secretary-General, Strategic Review of UNAMA].

⁸³ *Report of the High-level Independent Panel on Peace Operations*, UN Doc A/70/95-S/2015/446, 17 June 2015 and UN Secretary-General, *The Future of United Nations Peace Operations*, UN Doc A/70/357-S/2015/682, 2 September 2015, requesting a unity of effort across the UN family; UN Secretary-General, *Repositioning the United Nations Development System to Deliver on the 2030 Agenda: Our Promise for Dignity, Prosperity and Peace on a Healthy Planet*, UN Doc A/72/684-E/2018/7, 21 December 2017.

RoL activities are relegated to a supporting role of the peace process. Possible RoL activities listed are constitutional reform, transitional justice, and reconciliation.⁸⁴ To this end, the separate Rule of Law Unit is to be abolished. It remains to be seen to what extent the UNSC endorses these suggestions, but they could signal a significant shift of UN-bound resources away from the current broad RoL promotion mandate.

To conclude, the UNSC Resolutions and the multilateral agreements have shaped the reconstruction process and imply a request by the Afghan Government for support from the international community. The request, and the overall relationship, has changed over the years, from dependence and delivery towards Afghan ownership and mutual commitments. Despite their abstract nature, the agreements thus convey a number of principles that guide the activities of RoL actors, namely ownership, mutual accountability, cooperation, and aid effectiveness. However, despite all the efforts to strengthen ownership and coherence, the key instrument remains bilateral assistance.

II. Bilateral Agreements

While the multilateral agreements of the international conferences set the tone regarding the engagement of the international community, many States, international organizations, and also NGOs have concretized their relationship with Afghanistan through bilateral agreements.⁸⁵ The structure of these bilateral agreements is twofold: general, long-term framework agreements address the general scope and structure of cooperation, mutual commitments, and the legal position of staff in the country assisted.⁸⁶ Subsequently, supplementary, (often) legally non-binding agreements on specific development measures are concluded. These concrete arrangements, at least as far as Germany is concerned, are not made public.⁸⁷ For this reason, this article can only review the current framework agreements between Afghanistan and Germany.

⁸⁴ *Ibid.*, para. 35.

⁸⁵ E.g. the UN special agencies have concluded “core agreements” with Afghan line ministries on their cooperation, see UN Secretary-General, *Special Report on the Strategic Review of the UN Assistance Mission in Afghanistan*, UN Doc A/72/312-S/2017/696, 10 August 2017, para. 38 [UN Secretary-General, UN Mission in Afghanistan].

⁸⁶ J. Neumann, *Die Förderung der Rule of Law in der Entwicklungszusammenarbeit* (2013), 191.

⁸⁷ BMZ, *Leitlinien*, *supra* note 53, 23, para. 35.

In 2012, the German and Afghan Governments entered into an *Agreement on Bilateral Cooperation*.⁸⁸ Drafted to complement the *EU–Afghanistan Partnership Agreement*, the agreement addresses cooperation with regard to a wide range of areas excluding military cooperation, which is to be addressed separately. Art. 3 of the agreement covers “development, civilian reconstruction, cooperation on education”. Short-term assistance is agreed among others in the building of the justice sector. An Afghan–German Government Committee is created by Art. 7 to decide on a consensual basis on goals, priorities, and measures. Art. 8 regulates “foundations for cooperation”; but like the rest of the agreement, they are highly abstract and do not contain any concrete guidelines on how the cooperation is to be carried out.

On 18 February 2017, the Afghan Government, the EU, and its Member States signed the *Cooperation Agreement on Partnership and Development (CAPD)* to formalize their cooperation.⁸⁹ The CAPD is remarkable for a number of reasons: First, it is a mixed agreement, meaning that it addresses areas that fall under exclusive EU competence and areas within the Member States’ – thus, also Germany’s – competence. Pending the process of Member State ratifications, it is provisionally applicable with regard to the areas falling under EU competence, including development cooperation. Second, the scope of the agreement is very broad (and yet more detailed than any of the comparable bilateral agreements). It covers cooperation in political dialogue, security, economic and political issues, and specific sectors such as migration, natural resources, education, energy, transport, and home and justice affairs.

In addition to specific goals and rules, the agreement sets out general principles to guide cooperation, as well as specific principles for certain areas of cooperation.

⁸⁸ *Agreement between the Government of the Federal Republic of Germany and the Government of the Islamic Republic of Afghanistan Concerning Bilateral Cooperation*, 16 May 2012, Germany and Afghanistan, 2921 UNTS, I-50874.

⁸⁹ *Cooperation Agreement on Partnership and Development Between the European Union and its Member States, of the One Part, and the Islamic Republic of Afghanistan, of the Other Part*, 16 November 2016, 12966/16 [CAPD]. The CAPD complements the EU’s Strategy on Afghanistan. The Multiannual Indicative Programme for Afghanistan is valid for the period 2014–2020, available at https://eeas.europa.eu/sites/eeas/files/multi-annual-indicative-programme-2014-2020_en_0.pdf (last visited 12 December 2018). It identifies key priorities for development, such as application of RoL and State accountability through democratization, but also expresses the intention to ensure a stronger alignment with the ANPDF. In addition to this agreement, the EU and Afghanistan in 2016 entered into a *State Building Contract*.

Two of the general rules are notable. First, Art. 1(3) gives preference to a certain type of (RoL promotion) programmes by stipulating that “capacity building shall be given particular attention in order to support the development of Afghan institutions and ensure that Afghanistan can benefit fully from the opportunities offered [...] under this Agreement”. Second, Art. 2 in unprecedented detail establishes principles for cooperation, notably: a commitment to the values of the UN Charter; a recognition of Afghan people’s ownership and leadership; “[r]espect for democratic principles and human rights [...] and for the principle of the rule of law underpins the internal and international policies of the Parties and constitutes an essential element of this Agreement”; a “commitment to cooperating further towards the full achievement of internationally agreed development goals, including the Millennium Development Goals, as adopted by Afghanistan”; “attachment to the principles of good governance, including the independence of parliaments and the judiciary and the fight against corruption at all levels”; and, finally, an agreement that their cooperation under the CAPD “will be in accordance with their respective legislation, rules and regulations”.

As regards specific rules, reference is often made to existing international treaty law and standards as basis for cooperation, and programming is often mainstreamed to a certain substantive standard. This article will look at two specific, RoL-related issues: development cooperation (Art. 12) and Cooperation in matters of justice and home affairs (Title V) specifically on RoL, legal cooperation, and policing (Art. 24).

Development cooperation is subjected to a rigorous set of objectives and rules. Substantively, the *Millennium Development Goals* (MDGs), poverty eradication, sustainable development, and integration into the world economy are regarded as key objectives. Cooperation is to take into account Afghanistan’s development strategies and international agreements since 2010 including the TMAF and the SMAF. Noteworthy is the agreement in Art. 12(7) that some themes

“will be systematically mainstreamed in all areas of development cooperation, [namely] human rights, gender issues, democracy, good governance, environmental sustainability, climate change, health, institutional development and capacity building, anti-corruption measures, counter-narcotics and aid effectiveness”.⁹⁰

⁹⁰ CAPD, *supra* note 89, Art. 12(7).

The parties also subscribe to the *Paris Declaration on Aid Effectiveness*, the *Accra Agenda for Action*, and the *Busan Outcome Document*, and Art. 12(5) notes that:

“The Parties agree to promote cooperation activities in accordance with their respective regulations, procedures and resources and in full respect for international rules and norms. They agree that their development cooperation will be consistent with the requirements of their common commitment to aid effectiveness, implemented in a manner that respects Afghan ownership, aligned with Afghanistan’s national priorities, and conducive to tangible and sustainable development outcomes for the people of Afghanistan and to the long-term economic sustainability of the country, as agreed in the context of international conferences on Afghanistan.”⁹¹

Art. 24 on RoL, legal cooperation, and policing pursues a classic, thin RoL concept. The defined cooperation goal “on matters of justice and home affairs” is “the consolidation of the rule of law, the strengthening of institutions at all levels in the areas of law enforcement and administration of justice, including the penitentiary system”. Paragraphs 3 and 4 specify the cooperation by agreeing on further reforms, including of the judiciary and the justice system. Novel is the agreement in paragraph 2 that “[t]he parties shall exchange information on legal systems and legislation. They shall pay particular attention to the rights of women and other vulnerable groups and the protection and implementation of those rights”. Formulated as an obligation, this provision might be viewed as to impose a kind of due diligence on the parties to familiarize themselves with relevant legal contexts when cooperating in this sector.

The substantive framework is complemented by an institutional framework in Title VIII, built towards close coordination and mutual accountability. Art. 49 establishes a Joint Committee to oversee the functioning and implementation of the agreement. This Joint Committee is furnished with powers to request information, including from other bodies established under other agreements between the parties and – in a laudable effort towards RoL – it is to adopt rules of procedure. Noteworthy is also the establishment of detailed rules on cooperation to prevent, address, and investigate fraud within the assistance in Art. 51. Art. 53 clarifies that the Member States may continue to engage in

⁹¹ CAPD, *supra* noe 89, Art. 12(5).

bilateral cooperation with Afghanistan, thus repeating the basic principle of parallel competence expressed in Art. 4(4) TFEU.⁹²

In short, bilateral agreements between the Afghan Government and individual or several donors serve an important concretising function as long as donors avoid committing to specific cooperation in the broad framework agreements. Like the CAPD, these agreements can fulfil important normative functions. The CAPD particularly is noteworthy for its level of detailed rules for the cooperation partnership, as well as its conscious integration of existing international frameworks, such as the TMAF and the SMAF, the MDGs, and the rules on aid effectiveness.

D. Legal Basis and Mandate for RoL Promotion by Non-State Actors

This section focuses on the legal mandate for NGOs in Afghanistan, using German NGOs, especially the GIZ and Germany-based NGOs without State ownership, as an example. The GIZ is the German Government's development aid organization. It is organized as a limited liability company under German law, with the German Government as its sole shareholder. Its key task is technical assistance (meaning non-financial assistance given by experts).

The legal mandate for the implementation of RoL assistance projects usually derives from two sources: a contractual agreement or grant approval (possibly, in the form of an administrative decision) between the non-State actor and the donor. Second, the NGOs conclude a contract or a non-binding memorandum of understanding with Afghan partner institutions.

Where the German Government is the donor, the process has been somewhat formalized in the *Guidelines for Bilateral Financial and Technical Assistance with Cooperation Partners of German Development Cooperation (BMZ Leitlinien)*, which are internally binding administrative regulations (*Verwaltungsvorschriften*) issued by the German Federal Ministry for Economic Cooperation and Development, the Federal Foreign Office, the Federal Ministry of Finance, and the Federal Ministry for Economic Affairs and Energy and directed at the German Government, German implementing organizations, primarily GIZ and the KfW Banking Group, and other involved entities.⁹³

⁹² For a general overview of European Development Law, see L. Müller, 'Europäisches Entwicklungsrecht', in Dann, Kadelbach & Kaltenborn (eds), *supra* note 11, 677.

⁹³ BMZ, *Leitlinien*, *supra* note 53, 7 and 15, para. 16. Together with earmarking in the national budget, the BMZ Guidelines and the guidelines of other ministries, form the

The *BMZ Leitlinien* foresee that as far as BMZ funds are concerned, technical assistance predominantly is to be carried out through GIZ.⁹⁴

The *BMZ Leitlinien* regulate the process. In addition, BMZ and GIZ have concluded a framework treaty. These framework agreements, based on the information available, bind GIZ to the German Government's overall development strategy, but they do not contain any specific rules on the substantive implementation of a measure.⁹⁵ Based on the *BMZ Leitlinien*, GIZ implements the concrete project on the basis of a contract with an Afghan partner institution, usually the competent line ministry. The contract usually sets out goals and indicators to assess achievement of the goals, the respective parties' contributions, the timeline, organizational, and technical modalities and also consequences for breach of contract.⁹⁶ The *BMZ Leitlinien* do not seem to consider the influence of public international law to the validity and enforcement of the contract as demonstrated by the fact that they are silent on what would be the consequences of breach of human rights standards, RoL, or corruption. This is not surprising given the absence of such standards in the legal framework (including the government's agreement on development and the framework agreements which are often referenced).⁹⁷ GIZ is allowed to subcontract certain tasks (*Direktleistungen*) if appropriate and economically useful, including to international organizations.⁹⁸

The German Federal Foreign Office recently published additional *Guidelines for Project Funding*.⁹⁹ The guidelines provide details on the scope of activities that can be supported, as well as the legal, administrative, and financial and accountability framework for implementing organizations. The focus, however, is on financial accountability. The *Guidelines* do not establish

substantive policy framework for development (including RoL) support. See T. Groß, 'Deutsches Entwicklungsverwaltungsrecht', in Dann, Kadelbach & Kaltenborn (eds), *supra* note 11, 659.

⁹⁴ Groß, *supra* note 93, 661. Since 2010, the BMZ has implemented development projects through two main implementation organizations: the GIZ for technical assistance and the KfW Banking Group for financial assistance.

⁹⁵ For an in-depth analysis of this legal relationship, see P. Dann, *Entwicklungsverwaltungsrecht* (2012).

⁹⁶ BMZ, *Leitlinien*, *supra* note 53, 23, para. 36.

⁹⁷ Neumann, *supra* note 86, 194.

⁹⁸ BMZ, *Leitlinien*, *supra* note 53, 16, para. 19.

⁹⁹ German Foreign Office, *Förderkonzept des AA von Projekten zur Unterstützung von internationalen Maßnahmen auf den Gebieten der Krisenprävention, Konfliktbewältigung, Stabilisierung und Friedensförderung durch das AA (Referat S 03) in Afghanistan*, 1 July 2017.

substantive criteria for programming of tasks or criteria to be observed by the NGO. Upon conclusion of a project, the NGO needs to report to the German Federal Foreign Office as a funding agency, providing details on the achievements *vis-à-vis* the defined goals and indicators. But only the necessity and adequacy of the work carried out need to be elaborated – an indication for emphasis on cost effectiveness as required by § 7 of the Federal Budget Code.¹⁰⁰ Recipients must report to the Foreign Office if the intended use or any other relevant circumstances for the grant of the donation change, or if it becomes apparent that the goal will not be achieved with the grant. This could be a means to address significant shortcomings or project violations by a partner institution in Afghanistan.¹⁰¹

The *BMZ Leitlinien* contain few, rather vague substantive pointers, but none that are directly applicable to NGOs other than the state-owned implementing organizations. These rules will be addressed below.

Thus, where the German Government acts as the donor, the mandate for RoL activities by German organizations are derived from the bilateral agreements concluded by Germany with Afghanistan (or its respective other partner country) mediated through a contract or administrative decision between the disbursing ministry and the implementing organization, and the specifics of the concrete measure are elaborated on a contractual basis between the non-State actor and the donor recipient. The latter might engage private international law questions in case of conflict.

In addition, private actors are bound by national law limitations arising out of their domestic law as well as Afghan law – to the extent RoL activities are carried out on the ground. As will be shown below, apart from the Afghan Constitution, the laws do not establish significant limitations.

¹⁰⁰ German Federal Office of Administration, *Allgemeine Nebenbestimmungen für Zuwendungen zur Projektförderung*, as of 4 November 2016, para. 6.2 [BVA, ANBest-P]. For a detailed analysis of the evaluation process, see Groß, *supra* note 93, 674. Other project evaluations also consider sustainability, see BMZ, *Leitlinien*, *supra* note 53, para. 44.

¹⁰¹ BVA, *ANBest-P*, *supra* note 101, para. 5.

E. Rules Guiding the Programming and Implementation of RoL Assistance

As shown above, foreign experts participate actively in RoL promotion. What are the limits to the legal contents conveyed by foreign experts in the implementation of RoL activities?

The implementation of RoL promotion measures finds its boundaries, first, in the above-mentioned UNSC Resolutions and the consent given by Afghanistan in multi- and bilateral agreements and policy accords. Yet there are other principles and standards that become relevant for an assessment of the activities of the different actors.

I. International Legal Standards

International legal standards limiting the RoL activities can derive from treaty law, customary international law, UNSC Resolutions, and from non-binding but persuasive international instruments.

The UN Secretary-General in the 2008 *Guidance Note on UN Approach to Rule of Law Assistance* outlines guiding principles for the RoL activities of the UN in all its operations. The *Guidance Note* lists the following guiding principles:

1. Base assistance on international norms and standards
2. Take account of the political context
3. Base assistance on the unique country context
4. Advance human rights and gender justice
5. Ensure national ownership
6. Support national reform constituencies
7. Ensure a coherent and comprehensive strategic approach
8. Engage in effective coordination and partnerships.”¹⁰²

The *Guidance Note* translates to “base assistance on international norms and standards” as the normative basis for the UN’s RoL work. This is derived primarily from the *UN Charter*, but also from “international human rights law, international humanitarian law, international criminal law and international refugee law”,¹⁰³ as well as UN treaties, declarations, guidelines, and principles.

¹⁰² UN Secretary-General, *RoL Assistance*, *supra* note 18, 1.

¹⁰³ *Ibid.*, 2.

The following considers the extent to which these sources, as well as the principles established in the normative framework for the reconstruction of Afghanistan, mandate the programming and content of RoL assistance.

1. Accordance with the UN Charter Principles

The extent of involvement of the international community with Afghanistan's governance rebuilding is unprecedented. How does this fit in with the *Charter* principles? Art. 2(7) of the *UN Charter* says:

“Nothing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

One might ask what meaning (if any) the domestic jurisdiction clause has today, in an age of globalization and ever-increasing interdependence between States. In practice, however States and the UN regularly emphasize the continued existence and importance of the principle of sovereignty¹⁰⁴, even though it is agreed that sovereignty cannot mean complete independence in internal matters. According to the 1970 *Friendly Relations Declaration*,¹⁰⁵ “all States enjoy the rights that are inherent in full sovereignty,” and “each State has the right freely to choose and to develop its political, social, economic and cultural systems”. The 2001 *Bonn Agreement* on Afghanistan itself started by

“*Reaffirming* the independence, national sovereignty and territorial integrity of Afghanistan,

¹⁰⁴ See e.g. SC Res. 2032, UN Doc S/RES/2032 (2011), 22 December 2011; SC Res. 1271, UN Doc S/RES/1271 (1999), 22 October 1999; SC Res. 1101, UN Doc S/RES/1101 (1997), 28 March 1997; GA Res. 65/222, UN Doc A/RES/65/222, 21 December 2010; GA Res. 65/203, UN Doc A/RES/65/203, 21 December 2010; UNHRC, UN Doc A/HRC/RES/18/6, 13 October 2011.

¹⁰⁵ GA Res. 2625 (XXV), UN Doc A/RES/25/2625, 24 October 1970.

Acknowledging the right of the people of Afghanistan to freely determine their own political future in accordance with the principles of Islam, democracy, pluralism and social justice”.¹⁰⁶

According to its text, Art. 2(7) of the *UN Charter* protects only against acts of the UN and not against acts of other States. While it has sometimes been applied to States as well, it seems more accurate to say that the extent of protection against acts of the UN and acts of individual States was not meant to be identical, and that Art. 2(7) is thus *lex specialis* to the general principle of non-intervention enshrined in Art. 2(1), (4) of the *UN Charter*.¹⁰⁷

Art. 2(7) applies to all organs of the UN and all their activities; this does not, however, include legally separate specialized or related agencies.¹⁰⁸

The debate concerning the meaning of Art. 2(7) has not abated although its focus has shifted. The interpretation of the term “to intervene” has broadened over time; the *Friendly Relations Declaration* stated that intervention comprises not only armed intervention, but also “all other forms of interference or attempted threats against the personality of the State or against its political, cultural and economic elements”.¹⁰⁹ At the same time, the sphere of *domestic jurisdiction* has constantly been reduced as more and more areas that used to be regulated by internal law are coming under the remit of international law. As the PCIJ in the *Case of Nationality Decrees in Tunis and Morocco* famously argued: “The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question: it depends on the development of international relations.”¹¹⁰

In the words of Hans Kelsen, the idea that there are “matters which, by their very nature, are solely within the domestic jurisdiction of a State, is erroneous. There is no matter that cannot be regulated by a rule of customary or contractual international law; and if a matter is regulated by a rule of international law it is

¹⁰⁶ UNSC, *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions*, UN Doc S/2001/1154, 5 December 2001, Preamble [UNSC, *Provisional Arrangements in Afghanistan*].

¹⁰⁷ See G. Nolte, ‘Article 2 (7)’, in B. Simma *et al.* (eds), *The Charter of the UN: A Commentary*, Vol. I, 3rd ed. (2012), 284.

¹⁰⁸ *Ibid.*, 285.

¹⁰⁹ While the Declaration only concerns relations between States and not between the UN and its member States, it is regarded as giving ‘expression to a consensus about an enlarged concept of intervention under general international law’, *ibid.*, 288.

¹¹⁰ *Nationality Decrees Issued in Tunis and Morocco on November 8th 1921*, PCIJ Series B, No. 4 (1923), 24.

no longer ‘solely within the domestic jurisdiction’ of the State concerned.”¹¹¹ So while respect for sovereignty and domestic jurisdiction is still regularly expressed in Resolutions by the UN General Assembly and other UN organs, the precise meaning and significance of these concepts is increasingly unclear.

It also comes to mind that RoL assistance, seen as political interference, might violate the principle of non-intervention enshrined in Art. 2(1), (4) of the *UN Charter*:

“The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

(1) The Organization is based on the principle of the sovereign equality of all its Members. [...]

(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the UN.”

Today it is agreed that the principle of non-intervention in the internal affairs of States is not limited to the prohibition of the threat or use of force, but also signifies that a State should not otherwise intervene in a dictatorial way in the internal affairs of other States.¹¹² The ICJ in the *Nicaragua Case* referred to an “element of coercion, which defines, and indeed forms the very essence of, prohibited intervention”.¹¹³ According to Oppenheim, “the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the State intervened against of control over the matter in question. Interference pure and simple is not intervention.”¹¹⁴ Also, intervention (even military intervention) with the proper consent of the government of a State is not precluded.¹¹⁵

¹¹¹ H. Kelsen, *The Law of the UN: A Critical Analysis of Its Fundamental Problems* (1950), 771.

¹¹² The provision is also applied to the UN, compare A. Randelzhofer and O. Dörr, ‘Article 2 (4)’, in B. Simma *et al.* (eds), *supra* note 107, 213.

¹¹³ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, 14, 108, para. 205.

¹¹⁴ L. Oppenheim, *Oppenheim’s International Law*, Vol. I: Introduction and Part 1, 9th ed. (1992), 432.

¹¹⁵ M. Wood, ‘Non-Intervention (Non-Interference in Domestic Affairs)’, in *Encyclopedia Princetoniensis: The Princeton Encyclopedia of Self-Determination*, available at <https://pesd>.

Afghanistan has long been in a State of rebuilding, aggravated by inner turmoil and the threat of terrorism. Its economic and military dependence on the international community, and the influence this has given foreign actors over Afghanistan for many decades, cannot be denied. There is a fine line between political influence and coercion where economic conditions between international partners are as unequal as in the case of Afghanistan. Yet insofar as activities are based on agreements with the Afghan Government and UNSC Resolutions, these override the applicability of the general principle of non-intervention.

2. Human Rights Law

In how far is a State like Germany bound to observe international human rights standards when, for example, assisting in the drafting of Afghan legislation?

In dualist countries such as Germany, international agreements are transformed into domestic law through a legislative act. The question, then, is the extent of extraterritorial applicability of domestic law, especially constitutional rights and constraints on the exercise of executive powers, and the obligations that Germany has versus the citizens of foreign countries in the context of development aid.¹¹⁶ The answer depends, in part, on the scope of the international agreement in question. For example, Art. 2(1) of the *International Covenant on Civil and Political Rights*¹¹⁷ (ICCPR) provides that:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The wording allows for extraterritorial application within the jurisdiction of Germany. This would not seem to apply to countries receiving development aid.

princeton.edu/?q=node/258 (last visited 12 December 2018).

¹¹⁶ This issue is comprehensively discussed in Dann, *supra* note 95, 238–259. Concerning the extraterritorial application of basic rights enshrined in the German Constitution, see below II. 2.

¹¹⁷ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171.

Art. 2 of the *International Covenant on Economic, Social and Cultural Rights*¹¹⁸ (ICESCR), on the other hand, would seem to allow more leeway for extraterritorial application:

- “1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

The scope of obligations deriving from Art. 2 ICESCR has been debated. Some have argued that the *travaux préparatoires* of the ICESCR do not imply that the drafters intended to create extraterritorial obligations for the parties. Others contend that the Covenant emphasizes international assistance and co-operation, which may entail obligations beyond the domestic realm.¹¹⁹ Regarding the limits of the international dimension of the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR) in its *Concluding Observations of 1998 on Israel* confirmed that the ICESCR “applies to all areas where Israel maintains geographical, functional or personal jurisdiction” and that “the State’s obligations under the Covenant apply to all territories and populations under

¹¹⁸ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 991 UNTS 3.

¹¹⁹ *Ibid.*, 239–240.

its effective control”.¹²⁰ The Committee’s interpretation of the extraterritorial application of the ICESCR is thus concurrent with the ICCPR; both depend on effective control of the populace. The international donors, however, do not possess effective control over the Afghan people. Therefore, we cannot assume the extraterritorial applicability of the Covenants.

Dann sidesteps this problem by arguing that a donor country may become complicit in the human rights violations of a recipient country towards its citizens if both countries are party to an international treaty and the donor is aware of the rights violation. According to Art. 16 of the 2001 *Draft Articles on State Responsibility*¹²¹,

“[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.”

Such a constellation is possible since Afghanistan is party to most of the major human rights treaties, including the *Covenants*. Considering the far-reaching influence that donor countries have on Afghan affairs, and the active role they play in the regulation of the relationship between citizens and State, it seems adequate to assume a correspondent responsibility. Making the donor country *complicit* in the recipient’s human rights violations allows us to leave open the issue of extraterritoriality: Rather than imposing the donor country’s international obligations on the recipient, we only look at the recipient’s own obligations, thus safeguarding its sovereignty.

3. Development of Law Standards

Standards derived from development law feature prominently in the network of legal bases described above as well as the Afghan national development strategies. These standards originate largely from the OECD’s frameworks for official development aid (ODA) and from the World Bank.¹²²

¹²⁰ CESCR, *Concluding Observations: Israel*, UN Doc E/C.12/1/Add.27, 4 December 1998, 6, 8.

¹²¹ *ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), Vol. II Part 2, 26.

¹²² Dann & Riegner, *supra* note 11, 723.

Two concepts have been adopted over the years of assistance.¹²³ First, the aid effectiveness principles as laid down in the *Paris Declaration on Aid Effectiveness*¹²⁴ and its implementation and successor regimes, a soft law standard drafted by the OECD Development Assistance Committee to which a large number of States, international organizations, and civil society organizations have subscribed,¹²⁵ and which have been expressly adopted in the international agreements since 2007.¹²⁶ And, second, the principle of conditionality.

a. Aid Effectiveness

The *Paris Declaration on Aid Effectiveness* and its successor agreements stipulate five principles to increase aid effectiveness, known as partnership commitments: ownership, alignment, harmonization, managing for results, and mutual accountability; and they include indicators to measure progress in achieving the principles. All principles are prominent in the above-mentioned documents on state-building and RoL promotion in Afghanistan.¹²⁷ However,

¹²³ Tondini notes that there was a real-time implementation of novel IFI policies to Afghan state-building. See Tondini, 'Justice Sector Reform in Afghanistan', *supra* note 3, 663. See for instance the reference in the shared principles of the *Rome Communiqué* (2007).

¹²⁴ OECD, *Paris Declaration on Aid Effectiveness* (2005), available at <http://www.oecd.org/dac/effectiveness/34428351.pdf> (last visited 12 December 2018).

¹²⁵ For a discussion of the legal nature of the *Paris Declaration*, see P. Dann & L. Vierck, 'Paris Declaration on Aid Effectiveness/Accra Agenda for Action (2008)', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2011), paras. 14-16, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2097> (last visited 12 December 2018).

¹²⁶ For example, TMAF Section 14 where international community commits "to taking concrete steps to improve aid delivery consistent with partnership and global aid effectiveness principles, and adhering to the Afghan Government's Aid Management Policy upon completion and endorsement by the JCMB by December 2012".

¹²⁷ For harmonization, see the commitment by donors in the SMAF. In addition to the request to increase on-budget aid and align donor strategies to NPPs, indicators to measure progress towards increased aid effectiveness include that donors "ensure timely, accurate and complete aid information" and "work towards a single mechanism for provision of Technical Assistance [...] to the government", to "complement Development Framework Agreements [...] for improving harmonization and aid predictability" and to "complete Financing Agreements [...] with the government for all off-budget projects, in line with the agreed Aid Management Policy as well as to carrying out annual portfolio performance reviews". Regarding mutual accountability, the SMAF aims at a unified approach to performance evaluation, namely that a "[t]ransparent, citizen-based monitoring of development and governance benchmarks provides accountability to the

their outcome-oriented focus on economically measurable results¹²⁸ – as embedded in the principle of *managing for results* – distracts from the goal of ensuring a sustainable and legally sound outcome. Especially as regards RoL promotion, which needs to accommodate the larger socio-legal context, quantitative evaluation tools risk undermining the holistic and long-term approaches necessary to foster lasting reconstruction. The focus on measuring also risks turning the implementation of RoL promotion into a black box.

The ownership principle in regard of OAD standards requires that “[p]artner countries exercise effective leadership over their development policies and strategies and coordinate development actions.”¹²⁹ This principle will be addressed jointly with considerations on local ownership below.

Closely connected is the principle of alignment, which requires donors to “base their overall support on the partner countries’ national development strategies, institutions and support.”¹³⁰ This principle has lately been taken more seriously by donors in RoL assistance and other programming, although donors have not committed to it in a legally binding manner, likely because they still seek to match aid assistance to their own priorities. Donor policies and programs are increasingly aligned with the ANPDF and the priorities set out in the National Priority Plans, and the presentation of development strategies at international donor conferences since the 2006 presentation of the *Afghanistan Compact* has served to give prominence to the Afghan Government’s development strategies.¹³¹ The SMAF, in a notable deviation from the TMAF, contains an explicit commitment to support the development priorities identified by the Afghan Government. For the first time, donors submitted to binding commitments, in the Annex to the SMAF – mostly regarding performance review and information exchange, but they also agreed that a joint working group was to produce a roadmap for sector-wide approaches.¹³² Shortcomings continue in particular with regard to the Afghan Government’s wish that

Afghan people, and reinforces the reciprocal commitments of donors and the government to improved development performance.”

¹²⁸ Re measuring of results, see Dann & Riegner, *supra* note 11, 746.

¹²⁹ *Paris Declaration on Aid Effectiveness*, *supra* note 124, 3.

¹³⁰ *Ibid.*

¹³¹ See for example Germany’s commitment to align development cooperation to Afghan national development priorities, BMZ, *Strategie Afghanistan*, *supra* note 15, 15.

¹³² These include joint performance reviews of their projects if they achieve or exceed 60 per cent on-budget target, and to provide all aid information, including spending, both on and off budget in Afghanistan, to be recorded in the Development Assistance Database.

foreign aid be disbursed as financial aid into the national budget or as on-budget support. The latter has become a key tool for conditionality, as discussed below.

Full alignment to government priorities is also problematic from a conceptual perspective. In Afghanistan, the government has an institutional interest in state-building and power centralization which both directly benefit it. International pressure was necessary to extend development assistance to neglected issues, including RoL promotion in provincial areas.

b. Conditionality

Conditionality is the second tenet of development standards in the current legal framework for Afghan reconstruction. Used by the World Bank since the 1970s and core component of the EU's development approach, it describes

“the practice of international organizations and States of making aid and cooperation agreements with recipient States conditional upon the observance of various requirements, such as financial stability, good governance, respect for human rights, democracy, peace and security. Diverse consequences are also attached to the disrespect of the condition by the recipient State.”¹³³

The TMAF and SMAF framework tie international aid to the achievement of concrete reforms.¹³⁴ The tangible goals Afghanistan has committed to include RoL reforms in the justice sector, including overall measures to combat corruption. They are not formulated as conditional, but the conditionality is clearly implied.¹³⁵ Foreign governments, including Germany, state to expressly condition aid to specific achievements by the donor recipient, most notably related to gender equality and the overall situation of women and children.¹³⁶ The

¹³³ C. Pinelli, ‘Conditionality’, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2013), para. 1, available at <http://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e1383?rskey=GmY0vX&result=1&prd=E> PIL (last visited 12 December 2018). See also L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (2005).

¹³⁴ See also BMZ, *Strategie Afghanistan*, *supra* note 15, 13.

¹³⁵ Ruder, *supra* note 72, 3.

¹³⁶ BMZ, *Strategie Afghanistan*, *supra* note 15, 27 (“Die Bundesregierung hält an der Überzeugung fest, dass eine maßvolle Konditionalisierung der in Tokio zugesagten Mittel der richtige Weg ist, um den notwendigen Reformdruck auf die afghanische Regierung aufrechtzuerhalten”). See also BMZ, *Leitlinien*, *supra* note 53, para. 25.

German Government has noted its successful efforts to include human rights-based hard deliverables (i.e. measurable targets) in the TMAF.¹³⁷ In Afghanistan, the donors' willingness to increase on-budget support for Afghanistan through the ARTF or other development funds comes with conditions. Germany, in response to limited success in implementation of the deliverables agreed within the TMAF, in 2013, paid only 20 of the pledged 40 million Euros into the ARTF.¹³⁸

Conditionality is not unproblematic with regard to the principle of sovereignty – including as expressed in the concept of local ownership.

4. Local Ownership

Few terms have been used throughout the above legal documents as often as local ownership. The concept is referred to both in the state-building and in the development law context, with differing nuances. According to the *Paris Declaration on Aid Effectiveness*, donor recipients are required to exercise effective leadership over their development policies and strategies and coordinate development measures. The term takes on a broader meaning within the UN's State and peacebuilding activities, where it is seen as generally requiring *bottom-up* localized processes.¹³⁹ Processes must be "demand-driven", that is, based on the needs and preferences of local communities, as opposed to supply-driven, that is mandated by the political strategic agendas of foreign governments.¹⁴⁰ According to the UN Secretary-General:

"We must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation and national needs and aspirations. Effective strategies will seek to support both technical capacity for reform and political will for reform. The UN must therefore support domestic reform constituencies, help build the capacity of national justice sector institutions, facilitate national

¹³⁷ German Federal Government, *Fortschrittsbericht Afghanistan 2014*, *supra* note 13, 16.

¹³⁸ *Ibid.*, 11–13.

¹³⁹ For a conceptual analysis of the concept, see H. Reich, 'Local Ownership in Conflict Transformation Projects—Partnership, Participation or Patronage?', *Berghof Occasional Paper* No. 27 (2006).

¹⁴⁰ Cf. Tondini, 'Justice Sector Reform in Afghanistan', *supra* note 3, 667.

consultations on justice reform and transitional justice and help fill the rule of law vacuum evident in so many post-conflict societies.”¹⁴¹

Ownership features prominently in the Guidance Note of the UN Secretary-General on the UN Approach to Rule of Law Assistance. Ensuring “national ownership” according to the UN Secretary-General entails:

“No rule of law programme can be successful in the long term if imposed from the outside. Process leadership and decision-making must be in the hands of national stakeholders. Rule of law development requires the full and meaningful participation and support of national stakeholders, inter alia, government officials, justice and other rule of law officials, national legal professionals, traditional leaders, women, children, minorities, refugees and displaced persons, other marginalized groups and civil society. Experience indicates that the rule of law is strengthened if reform efforts are focused on assisting the State to apply its international legal obligations, and are credible and adhere to the principles of inclusion, participation and transparency, facilitating increased legitimacy and national ownership. Meaningful ownership requires the legal empowerment of all segments of society.”¹⁴²

In short, the principle of local ownership straddles the gap between sovereignty and interdependence because it allows the receiving State, while not retaining its complete political independence, to at least dominate and control the transformative process. This covers both the development of overall strategies as well as the programming and implementation of specific RoL projects. Dann and Riegner argue that local ownership entails a duty of donors to adhere to nationally-formulated strategies and projects, even if they clash with their own political priorities.¹⁴³

What is the status of local ownership under international law? While it cannot be said to amount to a general principle of international law (yet), it can

¹⁴¹ UNSC, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc S/2004/616, 23 August 2004 [UNSC, Rule of Law].

¹⁴² UN Secretary-General, *RoL Assistance*, *supra* note 18, para 5.

¹⁴³ Dann & Riegner, *supra* note 11, 740–741.

be identified both in the Preamble and in Art. 2(3) of the UN Charter, and references to it are frequent and becoming more numerous.¹⁴⁴

There is a conceptual tension between local ownership and the output-focused development law principle of managing for results.¹⁴⁵ This tension is further aggravated by an increasing push to align development strategies with the *2030 Agenda for Sustainable Development* with its output-related imprint and focus on economically measurable achievements. There is an even stronger clash with conditionality.

Has local ownership been adequately realized in Afghanistan? Many Afghans and outside observers are doubtful.¹⁴⁶

Significant efforts have been undertaken to increase local ownership since the end of the transition process, as reflected in the 2006 *Afghanistan Compact* and all subsequent national development strategies and international agreements. Noteworthy is the inclusion in the *Rome Communiqué* of the intention to strengthen local ownership through consideration of the particular Afghan context, especially the Islamic influences on the justice system, and the aim to “strive towards international standards and [a] strengthen[ing] [of] respect for human rights as provided for in the Afghan Constitution”.¹⁴⁷ There is also a clear preference for capacity-building over service-delivery. However, serious shortcomings remain.

The understanding of what local ownership entails is strongly influenced by the development context. The drafting of national development strategies is seen as proof of local ownership – ownership in program implementation, on the other hand, does not appear to be a central issue, though some donors, especially the UN but also Germany, try to incorporate ownership also at this level.

Further, real local ownership is hampered by limited local capacities. International actors have sought to fill the gaps. In accordance with the preference for capacity-building, in an attempt to increase local ownership for the future, numerous experts have been seconded (i.e. assigned for a limited period) to work in ministries and other government offices, at times replacing national officials. Section B. III. and IV. of this paper lists examples of such

¹⁴⁴ Some consider it a structural principle, see *ibid.* See also GA Res. 41/128, UN Doc A/RES/41/128, 4 December 1986; BMZ, *Leitlinien*, *supra* note 53, para. 12.

¹⁴⁵ See also Dann & Vierck, *supra* note 125, para. 18.

¹⁴⁶ See Section B. IV.

¹⁴⁷ Rome Conference on the Rule of Law in Afghanistan, *Joint Recommendations*, 2–3 July 2007, 1–2. Also, a novel institution, the Provincial Justice Coordination Mechanism, was to be set up to improve coordination of assistance to the justice sector and RoL reform in the provinces.

secondments. In some cases, serious doubts have been raised as to whether the work carried out can still be attributed to the Afghan Government. Replacement instead of on-the-job training, which is more burdensome and time-consuming, is but a reallocation of service delivery and there is a risk that the seconded staff will, even inadvertently, pursue their employer's preferences rather than those of the recipient government.¹⁴⁸ In addition, the process of preparing national development strategies is pre-regulated through the World Bank's and other guidelines, thereby limiting national policy space.¹⁴⁹

RoL activities in Afghanistan, as overall state-building, are still highly internationalized. As Suhrke notes, "major donors exercise control over funding and related policy agendas by channelling their assistance through international organizations or national subcontractors rather than through the Afghan Government or the multilateral [ARTF]."¹⁵⁰ The Afghan people have been relegated to a stakeholder in the process – the novel approach in the CAPD to anchor ownership with the Afghan people and not the government, as typically done, still has to be tested on the ground.¹⁵¹ At best, the current model can be described as a mixed ownership regime.

5. The International Rule of Law

As shown, the UN early on endorsed a thick, comprehensive understanding of RoL; and while it sought to promote the RoL globally, it acknowledged that it felt itself bound by the principle: "The rule of law applies to the United Nations and should guide all of its activities."¹⁵² What the UN requires of its members would then become applicable to itself; in the assistance context, notably the requirements of accountability, fairness, participation in decision-making, and transparency.¹⁵³ The principle of the international rule of law as a control standard for UN activities is as yet unexplored but offers interesting avenues for further research.¹⁵⁴

¹⁴⁸ See also the critical self-assessment by Germany, German Federal Government, *Fortschrittsbericht Afghanistan 2014*, *supra* note 13, 57.

¹⁴⁹ Dann & Riegner, *supra* note 11, 752.

¹⁵⁰ Suhrke, *supra* note 18, 226, 237–238.

¹⁵¹ *Ibid.*, 225, 242.

¹⁵² GA Res. 67/1, UN Doc A/RES/67/1, 30 November 2012.

¹⁵³ *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616, 23 August 2004, para. 6.

¹⁵⁴ On the international RoL see comprehensively C. A. Feinäugle (ed.), *The Rule of Law and its Application to the United Nations* (2016); S. Chesterman, 'Rule of Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2007), available

II. National Legal Standards

In addition to international law, RoL assistance may be also guided by the respective State's national laws. Violations of these standards will generally incur responsibility under national law. Given the particularity of each legal system, this section will focus on the laws applying to German actors in RoL assistance in Afghanistan.

1. Afghan Laws

Laws guiding the activity of the international community in general are contained in the Afghan Constitution¹⁵⁵, which various international actors have affirmed as binding on them, as shown above. The relevant human rights obligations are binding on the Afghan State. However, in their commitment to support the Afghan Government in fulfilling its obligations, States and intergovernmental organizations should strive to design programs and their implementation to meet the standards of the Constitution. This includes, for instance, Art. 6 which defines State principles and obliges the government "to create a prosperous and progressive society based on social justice, preservation of human dignity, protection of human rights, realization of democracy, attainment of national unity as well as equality between all peoples and tribes and balance development of all areas of the country." Further, Art. 22 prohibits all forms of discrimination between citizens including on the basis of gender. In addition, when carrying out RoL assistance, foreign actors need to take constitutionally established procedure into account, such as the ordinary legislation procedure in Art. 97 of the Afghan Constitution.

Several Afghan laws regulate the activities of NGOs.¹⁵⁶ With the exception of the 2005 NGO Law, these laws do not contain any provisions on how to carry out development cooperation. The NGO law's scope of application is

at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1676?prd=EPIL> (last visited 12 December 2018).

¹⁵⁵ Islamic Republic of Afghanistan, 'The Constitution of Afghanistan' (2004), available in an unofficial English Translation at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN015879.pdf> (last visited 12 December 2018).

¹⁵⁶ Most importantly: Law on Associations, as published in the Official Gazette No. 1114; Law on Non-Governmental Organization, Official Gazette No. 857/2005; Regulation on Procedure of Establishment and Registration of Associations, Official Gazette No. 1138; Income Tax Law, Official Gazette No. 976/2009; Customs Law, Official Gazette No. 847/2005; and Labour Law, Official Gazette No. 966/2008.

broad, in that it covers both domestic, foreign, and international NGOs, if they are “non-political” and “not-for-profit” (Art. 5(5)). NGOs are obliged to observe the Constitution and applicable legislation in the implementation of activities (Art. 3), but are otherwise generally free to carry out lawful activities. Substantive limitations are set out in Art. 8 entitled “illegal activities”, most notably with regard to “[p]articipation in political activities and campaigns” (Art. 8(1)) and “[t]he use of financial resources against the national interest, religious rights and religious proselytizing.”(Art. 8(7)) These prohibitions are vague. It would be advisable to provide further elaboration to clarify that public advocacy and legal advice are not included. The law is being revised as of writing.

2. Domestic Law of the Donor Country

Domestic regulations vary among the donor countries. German law establishes substantive legal restraints – both for the State and for non-State actors. Concrete substantive limitations are imposed by a number of administrative executive regulations (*Verwaltungsvorschriften*) that generally have no external effect.¹⁵⁷ External effect can be created through inclusion of specific rules in the donor agreements.

The *BMZ Leitlinien* establish rules for seconded experts. First, experts shall only be seconded if the cooperation partner lacks the human and financial resources.¹⁵⁸ Second, the *BMZ Leitlinien* formulate duties for the experts. Apart from technical duties, which are determined by the concrete task assigned, experts shall comply with the laws of the land and respect its traditions and customs. They shall refrain from intervening in the internal affairs of the cooperation partner outside their professional duties in connection with their cooperation measure. In addition, they are expected to engage in trusting cooperation with the public agencies.¹⁵⁹

The *BMZ Leitlinien* further define the focal thematic areas of development cooperation for the German Government. These include democracy, civil society, and public administration, including human rights specifically those of women and children, justice reform, decentralization, and subnational governance. However, it does not seem that non-compliance with one of these themes in

¹⁵⁷ For rules on development cooperation with global development partners, see BMZ, *Entwicklungspolitische Zusammenarbeit mit globalen Entwicklungspartnern*, BMZ Strategiepapier No. 4/2015 (2015) [BMZ, *Entwicklungspolitische Zusammenarbeit*].

¹⁵⁸ BMZ, *Leitlinien*, *supra* note 53, para. 81.

¹⁵⁹ *Ibid.*, para. 85.

programming or program implementation is grounds for rejection of a proposal or blacklisting.

German ministries have issued further administrative guidelines and policy papers, which affect how German officials may programme and implement RoL measures. The most relevant of these is the *BMZ Strategy Paper on Human Rights in Development Cooperation* in which the German Government commits to the human rights approach in development assistance.¹⁶⁰ The document contains binding rules for the German government ministries dealing with development cooperation and the implementing organizations including GIZ when planning and implementing development measures – including RoL assistance on behalf of the BMZ. It serves as a non-binding guideline for civil society organizations. Human rights are to be considered in programming and implementation, including through human rights impact assessments in bilateral development agreements.¹⁶¹ This is further elaborated in a detailed *Manual for the Recognition of Human Rights Standards and Principles, Including Gender, in the Preparation of Project Proposals in German Government Technical and Financial Cooperation* of 2013. The manual details possible risks for human rights in specific cooperation areas, including judicial reform, and outlines how these risks can be mitigated. However, it does not seem that the strategy paper or the manual contain rules on how to address violations within project implementation. In addition, the strategy strongly emphasizes policy dialogue over conditionality and thus pursues a less proactive approach than the EU.¹⁶²

These concretized duties supplement the constitutional duties of German State officials, especially those imposed by fundamental rights guarantees enshrined in the German Basic Law. They are applicable through Art. 1(3) of the Basic Law for activities regarding development cooperation and state-building

¹⁶⁰ BMZ, *Menschenrechte in der deutschen Entwicklungspolitik*, BMZ-Strategiepaper 4/2011 (2011) [BMZ, Menschenrechte]. For further analysis of the paper, see Dann, *supra* note 95, 233–242.

¹⁶¹ BMZ, *Menschenrechte*, *supra* note 160, 1, 15.

¹⁶² *Ibid.*, 13. This is not surprising in light of the EU's strong human rights duties in external action enshrined in Art. 208 TEU and Art. 21 TEU, as well as the *New European Consensus on Development – 'Our World, Our Dignity, Our Future'*, *Joint Statement by the Council and the Representatives of the Member States Meeting Within the Council, the European Parliament and the European Commission*, Strategic Document (7 June 2017), and Regulation (EU) No. 235/2014 of the European Parliament and of the Council of 11 March 2014, OJ 2014 L 77/85, a thematic funding instrument for EU external action aimed at supporting projects in human rights, fundamental freedoms, and democracy in non-EU countries. It is also contained in the CAPD, as noted above. For an overview of European Development Law, see Müller, *supra* note 92, 677.

that are carried out on German territory, such as programming and grant selection. These obligations are seen to continue to apply to a limited degree when activities are carried out extraterritorially,¹⁶³ including to GIZ because of its fulfilment of public functions.¹⁶⁴

Meinecke argues that it is rather unlikely that RoL programs cause human rights violations given that RoL assistance is of a predominantly advisory nature with overall decision-making power resting with the cooperation partner. However, the secondment of experts to carry out ministerial work might be one case where such violations are possible – although no such example from practice was found. Also, these obligations prohibit support for discriminatory projects – an issue that arose with regard to legal pluralist approaches to RoL assistance in Afghanistan. Further, the *de minimis* obligations – such as those enshrined in Art. 1(2) of the Basic Law – and the State principles listed in Art. 20 of the Basic Law might require the State, under its duty to protect, to withdraw funding where it realizes that human rights guarantees are not met. The strategy paper shows that Germany has embraced the positive human rights obligations – known as *duty to fulfil* – by requiring that the Afghan State adopt measures to build the institutional and legal framework to comply with human rights, especially the rights of women and children, as exemplified in its negotiations to include improvements in this area as indicators under the TMAF and in its development policy strategy for Afghanistan 2014–2017.¹⁶⁵ The latter contains a clear policy shift towards conditionality. Further support is conditioned on “substantial advances in RoL and anti-corruption”.¹⁶⁶

In addition, most non-governmental actors and GIZ have issued their own guidelines or acceded to codes of conduct. GIZ, surprisingly, has not issued best practice rules for RoL assistance. The *Code of Conduct*, which applies to all

¹⁶³ The extent to which basic rights continue to apply abroad is disputed. German Federal Constitutional Court, Case No. 1BvL 22/95, Order of the First Senate of 28 April 1999, BVerfGE 100, 313, 363; M. Yousif, *Zur Anwendbarkeit der Grundrechte bei Sachverhalten mit Auslandsbezug* (2007), 32; O. Meinecke, *Rechtsprojekte in der Entwicklungszusammenarbeit* (2007), 121. Basic rights are seen as fully applicable to actions involving German nationals. A minimal standard of rights is seen to be owed towards foreign nationals abroad which is to be determined in accordance with Art. 25 of the German Basic Law.

¹⁶⁴ Meinecke, *supra* note 163, 127. GIZ in addition has acceded to the *Global Compact* and applies the *UN Guiding Principles on Business and Human Rights*, available at https://www.giz.de/de/ueber_die_giz/37500.html (last visited 12 December 2018).

¹⁶⁵ Regarding the duty to fulfil in development cooperation, see Dann & Riegner, *supra* note 11, 745–746.

¹⁶⁶ BMZ, *Strategie Afghanistan*, *supra* note 15, 5, 26.

staff members as well as to integrated experts, *inter alia* requires compliance with contractual agreements and German and cooperation partner laws, as well as sets out clear rules on bribery and corruption. Notably, a rule is included on conflicts of interests. It acknowledges the risk of such conflicts and requires strict transparency on conflicts as well as exclusion from involvement in decisions with financial implications where such conflicts exist.¹⁶⁷ GIZ has, however, acceded to several sustainability instruments and to the above-mentioned human rights instruments. It further considers as guiding, among other, the *UN Human Rights Treaties*, the *European Convention on Human Rights*, the *BMZ Human Rights Strategy*, the *UN Women's Empowerment Principles*, the *International Labour Organization Declaration on Fundamental Principles and Rights at Work*, and the *BMZ Anti-Corruption Strategy*. Unfortunately, the information on quality and evaluation does not suffice to deduce the existence of a concrete evaluation standard on the qualitative success of a measure.

F. Conclusion

RoL reforms in a post-conflict society may be mandated by a peace agreement; they may be required as the result of the findings of a truth commission; they may become necessary so that legislation complies with the provisions of a newly drafted constitution; or they may be needed because the existing legal framework was destroyed, abused, or replaced by an authoritative regime.¹⁶⁸ Very often in such cases, the assistance of the international community is enlisted.

Afghanistan is no exception. The international community was called on immediately after the overthrow of the Taliban regime to assist in the reconstruction of the State, including extensive RoL assistance. This contribution has considered the mandate and the laws regulating this process. It has shown that the process did not occur in a law-free zone. Afghanistan welcomed the international community through conclusion of international and bilateral agreements, which were endorsed by the Security Council, and complemented by international communiqués, policy guidelines of international organizations and donors and implementing organizations, and national laws, regulations, and policy strategies of donor States.

¹⁶⁷ GIZ, 'Code of Conduct 2017', available at <https://www.giz.de/de/downloads/giz2017-en-GIV.pdf> (last visited 12 December 2018) [GIZ, Code of Conduct].

¹⁶⁸ UN Office on Drugs and Crime, *Guide for Practitioners on Criminal Justice Reform in Post-Conflict States* (2011), 59.

Despite the many different agreements binding actors in RoL assistance, only few general standards could be extracted from them with regard to the content of RoL programs and especially their implementation: international human rights law, effectiveness, conditionality, and local ownership. While acknowledged and emphasized repeatedly, normatively, these standards have remained abstract.

A more detailed normative framework seems necessary to ensure the success – and sustainability – of RoL promotion in Afghanistan. Although the situation has strongly improved as compared to 2001, serious shortcomings in RoL persist, including an inability to curb largescale corruption, loss of legitimacy of the government, and mounting insurgency and destabilization.¹⁶⁹ The justice sector remains one of the key reform challenges.¹⁷⁰

The RoL activities described are ultimately compatible with the legal principles distilled: Even though one may find that Afghanistan's political self-determination has often fallen to the wayside in the onslaught of foreign donors and experts, RoL promotion is firmly grounded in freely entered-into agreements between sovereign States and corresponding UNSC Resolutions.

Still, doubts remain as to the *legitimacy* of the process. While the dogmatic status of concepts such as local ownership and aid effectiveness in international law remains unclear, they have gained a firm foothold in international documents. Yet the analysis above has sought to show that the constant evocation of sovereignty, Afghan independence and ownership has not prevented the international community from overriding Afghan priorities, ignoring existing legal, cultural and institutional frameworks, drafting laws modelled on standard blueprints, and replacing in-house staff with external consultants rather than teaching staff the skills needed.

A code of conduct for RoL advisors, for example, might help to give effect to the principles that have been established over the years, particularly to ensure that local ownership is taken seriously – and not overridden by aid efficiency considerations. As shown, the latter have become the central international legal framework binding RoL promotion. However, their focus on quantifiable success may actually impede lasting progress on RoL, which often escapes short- and mid-term measuring and, if taken seriously, is highly time- and resource-consuming.

¹⁶⁹ Difficult for any development initiatives to develop where “the gun, corruption, and short-term survival [are] the prevailing logic”, Gaston & Jensen, *supra* note 1, 74.

¹⁷⁰ Hartmann, *supra* note 31, 178; Ruder, *supra* note 72, 1, 7.

What would be useful are detailed and coordinated instructions to the personnel implementing RoL assistance on the ground as to the goals and limits of their work. Such rules could not be found for any of the researched German governmental and non-governmental entities engaged in RoL promotion activities in Afghanistan.