Promoting Law Beyond the State

Geoffrey Swenson
City, University of London, UK

In countries receiving foreign aid, non-state justice systems rooted in custom or religion generally handle most legal disputes. This dramatically influences the prospects of international efforts to promote the rule of law, yet scholars have paid little attention to foreign policy toward non-state justice. This paper explores how the nine largest rule-of-law-assistance providers engaged non-state justice between 2008 and 2018, illuminating the theory behind, and the reality of, donor-state policy. It proposes a new classificatory typology of donor approaches to non-state justice detailing five strategies (denial, acknowledgment, acceptance, transformation, and rejection) and four goals (judicial reform, symbolic recognition, state-building, and counterinsurgency). It then explores how the nine largest rule-of-law-assistance donor states addressed non-state justice through a structured comparison of policy documents as well as case studies of the five donors with the most comprehensive approaches. Donors strongly favored risk-averse approaches, even when this made success unlikely. Certain policy goals—such as state-building or counterinsurgency—sometimes prompted riskier choices, but only with a compelling justification and a reasonable prospect of success. Overall, major rule-of-law donors displayed risk-averse, superficial policy, minimal stakeholder engagement, a failure to grapple with the nuances of legal pluralism, and a lack of evidence to support existing policies.

En los países que reciben ayuda extranjera, son los sistemas de justicia no estatales, arraigados en la costumbre o en la religión, los que, generalmente, se encargan de la mayoría de las disputas legales. Esto influye drásticamente sobre las perspectivas de los esfuerzos internacionales para promover el Estado de derecho. Sin embargo, los académicos han prestado poca atención a las políticas exteriores en materia justicia no estatal. Este artículo estudia las maneras cómo los nueve mayores proveedores de asistencia del Estado de derecho se relacionaron con la justicia no estatal entre 2008 y 2018. Esto arroja luz sobre la teoría y sobre la realidad de la política entre donantes y Estados. El artículo propone una nueva tipología clasificatoria de los enfoques por parte de los donantes con relación a la justicia no estatal. Esta tipología detalla cinco estrategias (negación, reconocimiento, aceptación, transformación, rechazo) y cuatro objetivos (reforma judicial, reconocimiento simbólico, construcción del Estado, contrainsurgencia). A continuación, el artículo estudia cómo los nueve mayores Estados donantes de asistencia del Estado de derecho abordaron la justicia no estatal a través de una comparación estructurada de documentos políticos, así como a través de estudios de casos relativos a los cinco donantes con los enfoques más exhaustivos. Los donantes favorecieron fuertemente aquellos enfoques de aversión al riesgo, incluso cuando esto hacía que el éxito fuera poco probable. Ciertos objetivos políticos, como la construcción del Estado o la contrainsurgencia, a veces actuaban como impulsores de decisiones más arriesgadas, pero solo cuando estos tenían una justificación convincente y una perspectiva razonable de éxito. En general, los principales donantes del Estado de derecho mostraron una política superficial y reacia al riesgo, una participación mínima con las partes interesadas, una incapacidad para abordar los matices del pluralismo jurídico y una falta de pruebas que respaldaran las políticas existentes.

Dans les pays bénéficiaires de l'aide internationale, des systèmes judiciaires non étatiques ancrés dans la tradition ou la religion gèrent généralement la plupart des conflits juridiques. Cet état de fait entraîne des conséquences très importantes sur les perspectives des efforts internationaux visant à promouvoir l'État de droit. Pourtant, les chercheurs se sont encore peu intéressés à la politique étrangère relative à la justice non étatique. Cet article examine l'implication des neuf plus gros fournisseurs d'aide à l'État de droit dans la justice non étatique entre 2008 et 2018, mettant ainsi en lumière la théorie qui se cache derrière la politique des États donateurs et sa réalité. Il propose une nouvelle typologie de classification des approches de donateurs de la justice non étatique en détaillant cinq stratégies (déni, reconnaissance, acceptation, transformation, rejet) et quatre objectifs (réforme judiciaire, reconnaissance symbolique, création d'un État, lutte contre l'insurrection). Puis, il explore le traitement de la justice non étatique des neuf plus gros États donateurs d'assistance à l'État de droit par le biais d'une comparaison structurée de documents politiques ainsi que d'études de cas de cinq donateurs aux approches les plus complètes. Les donateurs ont largement préféré des approches réticentes aux risques, même lorsque cela compromettait leur réussite. Certains objectifs politiques, comme la création d'un État ou la lutte contre l'insurrection, ont parfois poussé à faire des choix plus risqués, mais seulement quand il existait une raison convaincante et une chance raisonnable de réussite. Dans l'ensemble, les plus gros donateurs en faveur de l'État de droit ont fait montre d'une implication politique frileuse, superficielle et minime, d'une absence de confrontation aux nuances du pluralisme juridique et d'un manque d'éléments probants pour soutenir les politiques existantes.

Geoffrey Swenson is a Reader in International Politics at City, University of London and a Senior Visiting Fellow in the Department of International Relations at the London School of Economics. He is the author of *Contending Orders: Legal Pluralism and the Rule of Law* (Oxford University Press, 2022), and his work has been published in several leading journals, including *International Security*, *International Studies Review*, and *World Development*.

Author's note: I appreciate the highly constructive feedback from the current and previous editorial teams of *International Studies Quarterly* and the two anonymous reviewers. I am also thankful for the helpful suggestions from Amnon Aran, Meghan Campbell, Erica Gaston, Moritz Schmoll, Koen Slootmaeckers, and Sashi Sundaram, as well as the excellent research assistance provided by Till Schöfer. I gratefully acknowledge funding support from a British Academy Mid-Career Fellowship [MCFSS23\230010].

Swenson, Geoffrey (2024) Promoting Law Beyond the State. *International Studies Quarterly*, https://doi.org/10.1093/isq/sqae102

Introduction

The rule of law is foundational for a just legal order, democracy, and good governance (Fukuyama 2014).[1] It is seen as fundamental to successful post-conflict state-building (Blair 2021) as well as counterterrorism and counterinsurgency efforts (Wimpelmann 2013). Major Western donors have elevated rule-of-law promotion to a foreign policy priority. The rule of law assumes a central legal system that can project binding regulations uniformly over its territory and monopolize legitimate violence. Most developed states meet these conditions; however, they are the exception globally (Börzel and Risse 2021). While all states feature legal pluralism, wherein "two or more legal systems coexist" (Merry 1988, 870), the importance of non-state justice varies dramatically.

In most countries that receive foreign aid, the vast majority of legal disputes are handled by non-state justice systems rooted in custom or religion (Kyed 2011, 5). Non-state justice refers to systematized, quasi-legal processes not involving the state's implementation of state laws. The prevalence of non-state justice dramatically influences the prospects of international efforts to promote the rule of law and related goals such as supporting access to justice, gender equality, human rights, and transitional justice (Stromseth, Wippman, and Brooks 2006; Kochanski 2020). Beyond their adjudicatory role, non-state justice authorities can help maintain stability or trigger violent conflicts (Mustasilta 2019). Engagement with non-state justice frequently underpins internationally backed counterinsurgency, stabilization, and state-building efforts (Ansorg and Gordon 2021).

Yet only in the mid-2000s, after decades of underperforming state-centric efforts, did non-state justice become a priority (Janse 2013, 181). It remains so and has even become a key consideration for the SDG16+ goals. Despite the prevalence of non-state justice, even relatively foundational understandings of this policy shift remain lacking. This article explores two important questions: (1) How have major rule-of-law donors approached non-state justice in their foreign policy? (2) How can those approaches be understood?

The paper contributes to understanding how major donor states approach foreign policy toward non-state justice in several ways. It develops a new classificatory typology of foreign policy approaches toward non-state justice drawing on an assessment of over 10 years of major donor policies. It proposes five main strategies: denial, acknowledgment, acceptance, transformation, and rejection. It also shows that non-state justice policies generally articulate at least one of four goals: judicial reform, symbolic recognition, state-building, and/or counterinsurgency.

This paper also analyzes the policy stances of the nine largest donor states that together contributed over 95 percent of all rule-of-law assistance, namely Australia, Canada, Germany, Japan, the Netherlands, Norway, New Zealand, the United Kingdom, and the United States.[2] These countries collectively spent $1,821.51 million US dollars on rule-of-law promotion out of a total of $1,905.754 million.

Three main arguments are presented. First, major foreign donors view non-state justice as distinct from state justice. Second, independent of their overarching risk profile, these donors favor approaches toward non-state justice with less risk, especially the risk of association with legal venues that violate human rights, even at the expense of policy inconsistency or policy coherence. *Acknowledgment* and *transformation* strategies are strongly preferred over *acceptance* and *rejection*. Third, foreign donors only approve riskier strategies when a goal exists that justifies taking additional risks. Such policies tend to be efforts to stabilize existing regimes and/or defeat insurgencies. Policy, however, returns to more risk-averse strategies when riskier approaches have not achieved the desired results and there is little prospect of future success. Overall, a review of major donors' policies shows the prevalence of risk-averse, superficial policy toward non-state justice, minimal stakeholder engagement, a failure to grapple with the nuances of legal pluralism, and a lack of evidence to support existing policies.

This article consists of seven main sections. Section "Understanding Law Beyond the State" provides an overview of non-state justice and the need for more scholarship on how international actors relate to it. Section "A Classificatory Typology of Engagement with Non-State Justice" proposes a new typology to better understand foreign policy toward non-state justice. Drawing upon the classifications provided by the typology and empirical analysis of donor policy documents from 2010 to 2020, Section "Understanding Donor Policy" argues that major donor policy reflects the prevalence of risk aversion. Section "Research Approach" describes the research approach. Sections "Major Donor State Approaches toward Non-State Justice" and "Case Studies" probe the plausibility of this claim and find that donor states displayed policy preferences consistent with that argument. Section "Major Donor State Approaches toward Non-State Justice" compares how the nine largest rule-of-law-assistance donor nations approached non-state justice from 2008 to 2018. Section "Case Studies" explores case studies from the donors that articulated a proactive approach, namely the United States, the United Kingdom, Australia, the Netherlands, and Germany. The "Conclusion" section examines the implications of the research.

Understanding Law Beyond the State

Non-state justice systems can vary dramatically between states and even within states. Nevertheless, non-state justice falls into three main clusters: (1) religious, (2) customary, and (3) alternative dispute resolution (ADR). Religious legal systems are predicated on principles of conduct rooted in established structures of belief and worship, such as Islamic law. Customary law reflects expected behavior within a community. For example, among Pashtuns, the law code Pashtunwali holds great sway (Braithwaite and Wardak 2013). State law may be based on custom or religion. Still, fundamental differences exist depending on what concepts are codified in state law and whether state power is harnessed to regulate behavior. ADR consists of arbitration, mediation, and other third-party dispute resolution. US businesses, for instance, may require employees to resolve disputes in arbitration even though it deprives them of legal protections enshrined in state law (Rahman and Thelen 2019). Unlike religious or customary law,

[1] At minimum, the rule of law requires law to be general, clear, stable, prospective, public, and universal. It demands sufficient regulations and mechanisms to adjudicate legal disputes nationwide and a government bound by the law. Other understandings of the rule of law can include significant political, cultural, and economic requirements. Non-state justice systems often have meaningful judicial authority and autonomy and feature normative commitments that challenge the rule of law's core assumptions. For example, non-state justice frequently prioritizes communal harmony over personal justice, is not applied uniformly, or privileges certain groups, such as men over women.

[2] Based on 2016 OECD data, see the "Understanding Donor Policy" section for more details.

individuals do not need to be members of a religion or a particular community. Though not necessarily required to follow all state law, the state regulates ADR processes and may even enforce their decisions. While analytically distinct, they can overlap in practice. Custom, for instance, may reflect religious beliefs or ADR could incorporate customary practices.

Non-state justice poses major opportunities and risks for international actors. Non-state mechanisms may enjoy greater local legitimacy and effectiveness (Mcloughlin 2015). They tend to be less bureaucratically entrenched than state judicial institutions but difficult to reform without compromising their utility (Isser 2011). In countries with weak or heavily contested state institutions, non-state authorities can help preserve local stability or bolster insurgencies (Lazarev 2023). Successful non-state justice initiatives generally require extensive local knowledge that may make it difficult or less rewarding for donors seeking large-scale, demonstrable change (Ubink 2018). Non-state justice programs also raise serious implementation and monitoring challenges. Moreover, these systems may be deeply implicated in colonial rule and may still serve neocolonial purposes (Sesay 2021). They can also favor powerful actors, contravene human rights norms, or strengthen unaccountable, patriarchal authorities (Branch 2014).

While scholars have increasingly explored the various roles and forms of legal institutions beyond the state, they rarely examine the implications of legal pluralism on international assistance (Arjona, Kasfir, and Mampilly 2015; Börzel and Risse 2021; Provost 2021). There are notable exceptions that address legal pluralism and assistance to developing countries in general (Baker 2010; Janse 2013; Corradi 2014; Tamanaha 2021) and after conflict (Isser 2011; Barma 2017; Blair 2021). This article focuses on some important areas that remain underexplored by systematically examining and classifying donor approaches as well as showing that whatever their stated intentions, in practice, risk aversion is the defining feature of donor policy.

A Classificatory Typology of Engagement with Non-State Justice

Typologies have long been recognized as important tools in the study of international relations (Bennett and Elman 2007, 181–2) and the social sciences more generally (George and Bennett 2005, 232–62). Through inductive "theory building," this section proposes a new classificatory typology of donor policy strategies and goals toward non-state justice based on empirical observation of over 10 years of major donor policies. Classificatory typologies operate inductively. They start with data, and "seek to group observations on the basis of the similarities that they share" (Elman 2005, 298, n19).[3] These approaches are ideal for mapping and comparing. This particular typology categorizes policy approaches toward non-state justice to "determine[] to which 'type' a case can be characterized as belonging" (2005, 298). The validity, or lack thereof, of these classifications would be evidenced by whether these concepts are faithfully represented in the source data, which, in this case, are policy documents. A classificatory typology is distinct from an explanatory typology, which "is based on an explicitly stated preexisting theory" and "makes predictions based on combinations of different values of a theory's variables" (2005, 297–8).

[3]On induction in typologies more generally, see George and Bennett (2005, 240–44).

Donor states pursue five main strategies toward non-state justice: denial, acknowledgment, acceptance, transformation, and/or rejection (Table 1). While conceptually distinct, donors may pursue multiple, and even contradictory, strategies simultaneously. This section then discusses the main policy goals of these strategies: judicial reform, symbolic recognition, state-building, and/or counterinsurgency.

Strategies Toward Non-State Justice

Denial

Denial strategies do not recognize the existence of non-state justice and focus exclusively on state justice, thereby avoiding risk from association with non-state justice. These strategies may still note that people's behavior can be influenced more by culture, religion, or custom than by state law. Unlike acknowledgment, however, denial strategies do not even attempt to grapple with the empirical realities of non-state justice. Denial strategies may nevertheless impact non-state justice by influencing where and how people resolve disputes. For example, increasing access through legal aid or increasing quality through training or anti-corruption initiatives may bolster the relative appeal of state courts. Canada and Japan, for instance, do not address legal pluralism even as they fund efforts to promote the rule of law and strengthen state courts (JICA 2009; Global Affairs Canada 2017).

Acknowledgment

Acknowledgment strategies understand that non-state justice is important but, recognizing the risks it poses, do not meaningfully engage with it. Acknowledgment does not offer actionable policy guidance or explicitly seeks to change non-state justice systems. It simply notes its significance in official documents. Nevertheless, acknowledgment has a discernable policy logic. Acknowledging non-state justice allows foreign states to demonstrate a more nuanced understanding of the local environment and even extol non-state justice authorities' virtues without incurring the risks associated with serious engagement. Acknowledgment policies often emphasize the need for a case-by-case approach but without clear guidance or assessment criteria. For example, New Zealand's 2011 foreign aid strategy acknowledged that aid "can be provided for **legal systems** (including traditional systems …)," but offered no further details (MFAT 2011, 9, emphasis in original). Donor states also pursue acknowledgment by funding research about how non-state justice systems operate and what initiatives might be promising. As highlighted in the "Major Donor State Approaches toward Non-State Justice" section, however, donor-funded research had no discernable impact on policy despite ostensibly being designed to shape policy. Commissioning research allows donors to symbolically recognize non-state justice without incurring the risks of direct engagement.

Acceptance

Acceptance strategies do not require reforms of existing practices and work directly with non-state justice systems as currently constituted. The logic behind acceptance is straightforward: When non-state justice is more legitimate or effective than state courts, it may offer a promising way to increase access to justice, advance state-building initiatives, or even undermine insurgent challenges to the state (DOD and State Department 2009, 7–8; MFA 2017, 3). Acceptance strategies, however, generally carry the most risk.

Table 1. Foreign policy strategies toward non-state justice

Strategy	*Key features*	*States that have used this strategy*
Denial	Policy does not recognize the existence of non-state justice as a distinct foreign policy concern and focuses exclusively on state justice institutions. Nevertheless, policy may note that religious or customary practices, for example, pose challenges	Japan and Canada
Acknowledgment	Policy recognizes the benefits and risks of non-state justice but does not offer specific guidance or explicitly endorse interventions to change how non-state justice operates	The United States, the United Kingdom, Germany, Australia, the Netherlands, Norway, and New Zealand
Acceptance	Policy allows preexisting non-state justice authorities to operate without modification even if they violate human rights standards or engage in other problematic practices	United States (toward shuras and jirgas in Afghanistan only) and the Netherlands (conflict-prone states)
Transformation	Policy recognizes the importance of non-state justice but seeks to reform or remove unacceptable aspects—usually those deemed to violate human rights	United States, the United Kingdom, Germany, Australia, and the Netherlands
Rejection	Policy seeks to reduce the influence of, and ideally, eliminate non-state justice systems that operate without state authorization	The United States (toward the Taliban in Afghanistan only)

Acceptance clearly links international actors to existing non-state justice systems. If they contravene human rights ideals or raise other concerns, there is little space for plausible deniability. Donors may still accept non-state justice, even systems that violate human rights, to further a compelling policy objective such as maintaining order or bolstering regime stability. In conflict-prone settings, non-state justice authorities can be valuable partners in state-building and counterinsurgency efforts. For example, US policy in Afghanistan during the Islamic Republic attempted to harness the legitimacy and authority of tribal-based justice to defeat the Taliban and bolster the regime—goals deemed more important than preventing unsavory legal practices or risking reputational harm or programmatic failure (DOD 2012, 113). The logic of acceptance has deep historical roots. Colonial regimes, for instance, usually incorporated customary legal regimes as part of their governance strategies (Young 1994, 108).

Transformation

Transformation strategies recognize that non-state justice plays a vital role in maintaining order and resolving disputes while simultaneously asserting the need for change. Reforms generally seek to eliminate the rules, procedures, or punishments that violate fundamental human rights.[4] Transformation efforts can take various forms. Donors may only support non-state institutions that strengthen human rights protections or uphold procedural due process norms. Increased state or international monitoring could be introduced. Donors may sponsor educational initiatives that aim to modify behavior. New institutions could be established that seek to retain some key characteristics and legitimacy of non-state systems while shedding unwanted elements or transforming them into quasi-state or even officially state-sanctioned entities. The United States, the Netherlands, Germany, Australia, and the United Kingdom have all endorsed transformation (DFID 2008; USAID 2010; BMZ-GIZ 2012; DFAT 2016b; MFA 2017). Transformation through regulation may appear straightforward, but non-state justice is often difficult to reform, and any substantive changes may undercut its effectiveness (Isser 2011). Transformation efforts can spark a backlash especially if they appear to be a top-down or external imposition.

Rejection

Rejection strategies go beyond expressing neutrality or ignoring non-state justice systems. They explicitly reject non-state justice systems' claims to be legitimate dispute resolution forums. Rejection can take various forms. International actors could support the dissolution and/or criminalization of non-state justice forums (see, e.g., DFID 2008, 8). More extreme rejection efforts could use force against non-state justice sector personnel. While rejection strategies may seek to address human rights concerns, these policies most frequently occur when non-state justice presents an unacceptable challenge to the authority of a state that enjoys international donor support. When non-state authorities enjoy significant authority and autonomy, rejection strategies frequently generate strong opposition from those targeted and may even spark violence. Consequently, this strategy is rare outside of conflict-prone settings where non-state justice authorities appear particularly threatening. For example, in Afghanistan, US rule-of-law assistance was integrated into military-led counterinsurgency efforts and sought to "eliminate Taliban justice and defeat the insurgency" (Checchi and Company Consulting 2013, 3). While rejection is now uncommon, dating back to the 1960s international aid had emphasized "disempowering" or "erasing traditional or customary legal systems and institutions" to make way for "modern," state-backed legal systems (Heller 2003, 386). Likewise, European colonial regimes ruthlessly repressed non-state legal systems they deemed threatening (Young 1994).

Non-State Justice Policy Goals

A review of major donor policy documents shows that strategies toward non-state justice articulate at least one of four policy goals, specifically judicial reform, symbolic recognition, state-building, and/or counterinsurgency (Table 2). *Judicial reform* aims to change how non-state justice operates and/or its relationship to state courts. Reform efforts commonly aim to increase access to justice, promote human rights, strengthen the rule of law, and streamline judicial administration. Judicial reform is generally a goal of transformation strategies. *Symbolic recognition* is the practical policy application of acknowledgment strategies. All policies have

[4]While rarely articulated in detail, donor states generally use the term "human rights" to imply, at minimum, basic procedural fairness, legal equality, and protection for certain foundational rights.

Table 2. Foreign policy goals of engagement with non-state justice

Goal	*Rationale*	*Associated strategy/ies*
Judicial reform	Policy seeks to change how the non-state justice sector operates and/or its relationship to state justice forums. Common aims include increasing access to justice, promoting human rights, strengthening the rule of law, and streamlining judicial administration	Transformation
Symbolic recognition	Policy seeks to demonstrate that the donor understands the complex legal environment in the host country	Acknowledgment
State-building	Policy seeks to help the host state enhance its legitimacy and/or capacity through association with popular and respected non-state justice forums	Acceptance and/or transformation
Counterinsurgency	Policy seeks to aid counterinsurgency efforts by enlisting the support of non-state authorities and/or to undermine or eliminate non-state justice venues that challenge the authority of the state	Acceptance and/or rejection

symbolic elements, but acknowledgment strategies are distinct insofar as their primary purpose is symbolism rather than tangible change. Symbolic recognition allows donors to tangibly demonstrate their understanding of the complex legal environment in the host country. *State-building* seeks to bolster the recipient state's legitimacy and capacity through association with respected non-state justice forums. Likewise, after conflict or a regime change, state-building can motivate international engagement with non-state justice authorities as part of transitional justice efforts (Clarke 2009; Huyse and Salter 2008). These activities may include working with non-state legal actors to attempt to address serious human rights violations, restore communal harmony, and make a clear break from a violent past in order to help consolidate a new legal and political order (Shaw, Waldorf, and Hazan 2010; Kochanski 2020). State-building is commonly a goal of acceptance and transformation strategies. Finally, aid to non-state justice may support *counterinsurgency*. Counterinsurgency can envision partnerships with respected religious or customary legal authorities to bolster the state and undermine popular support for insurgents as part of acceptance strategies. Counterinsurgency can likewise underpin rejection strategies that seek to destroy a rival justice system.

Understanding Donor Policy

Drawing on the classifications discussed above, this section makes two main empirical arguments about major Western donor states' stances toward non-state justice. First, it argues that risk aversion with regard to non-state justice is the defining characteristic of policy toward non-state justice. While cognizant of risk in general, policy is particularly attuned to human rights-based risks.[5] Second, it argues that if donor policy is risk-averse rather than completely risk-avoidant, there must be goals that occasionally justify riskier strategies.

Scholars have long recognized the importance of risk, particularly the perception and appetite for risk in shaping policy (Clapton 2011). Risk refers to the probability of an unwanted event occurring. Such determinations are invariably subjective. What risks are worthy of consideration as well as how actors perceive and respond to risk can shift over time. How donors respond to perceived risk constitutes a policy choice. Approaches to risk are a particularly useful way to analyze policies across settings because this criterion is neutral regarding the content of non-state justice systems, which invariably differ, while still allowing a systemic examination of policy approaches.

Foreign donor states are highly attuned to risk and generally prefer avoiding risk rather than managing it when providing foreign assistance (Venugopal 2018). As an Organization for Cooperation and Development (OECD) report explained, "Development agencies are naturally aware of risks that foster skepticism of development assistance" and that "even small transgressions can become a major scandal if taken out of context" (2014, 13). At the same time, risk tolerances vary. Some donor agencies generally have notably higher risk tolerances (Honig 2018). The United States Agency for International Development (USAID) had a "conservative risk appetite" (2014, 16), while the UK's Department for International Development (DFID) possessed "a relatively high risk appetite" (2010, 6).[6] Non-state justice, however, is different. The nine largest rule-of-law donors all overwhelmingly favored risk-averse approaches to non-state justice that limited their exposure to potential criticism, specifically acknowledgment, denial, and transformation.[7]

As non-state justice operates extralegally or may even contravene the law of the host state, the perception of risk tends to be higher than comparable support to state justice institutions. These risks manifest in two main ways. First, there are program risks wherein the particular initiative aimed at non-state justice actors does not achieve the desired goals, such as "advancing the rule of law" or "supporting counterinsurgency." Programming may even be counterproductive. Non-state justice presents significant program design, staffing, and implementation issues that substantially increase risk. Monitoring and evaluation challenges are endemic as non-state justice often thrives in remote or contested areas, which increases the risk that program activities are undertaken improperly or that program results are inaccurate. These challenges present concerns about fiscal malfeasance or support for groups deemed unsavory. As authority in non-state systems may be opaque to outsiders, aid providers often support the most cooperative actors rather than the most influential.

Second, there are reputational risks that exist independently of program activities. Programmatic failure can damage reputations, but reputational risks abound even if the

[5]Incoherent or inconsistent policy poses risks, but no donor raised concerns about this prospect.

[6]DFID merged with the Foreign and Commonwealth Office (FCO) to create the Foreign, Commonwealth and Development Office in 2020.

[7]See the "Major Donor State Approaches towards Non-State Justice" and "Case Studies" sections for more detail.

Table 3. Nine largest foreign aid donors for legal and judicial development, OECD (2016)

Donor state	*Rule-of-law funding level (million US dollars)*
The United States	$1,194.497
Japan	$145.833
Germany	$145.281
Australia	$128.918
Norway	$67.010
Canada	$52.745
The Netherlands	$31.150
The United Kingdom	$29.181
New Zealand	$26.890
Total	$1,821.51

program performed its stipulated activities or met its stated goals. International engagement with non-state justice, particularly when not unambiguously focused on reforming those systems, may be seen as acquiescing to or even encouraging human rights violations. For example, if aid supports a customary justice forum that uses discriminatory procedures or cruel punishments, donors may face sharp criticism for tolerating such practices (Murdie and Peksen 2015). While these types of risk are analytically distant, in practice they overlap and tend to militate toward more risk-averse policies and programs.

Both program and reputational risk can generate unfavorable publicity, which can spur reallocation of funds, and increase legislative oversight or additional regulation (Carothers 2009). Programmatic failures and reputational harms risk the loss of funds for an organization, programming area, or even country (Honig 2018; Venugopal 2018). Donor agencies are highly attuned to these concerns. DFID's official risk guidance places risks such as "outputs not achieved" on equal footing with the risks that "failure would attract UK headlines" and "a scandal with a partner would attract UK headlines" (2013b, 2). Thus, when assessing donor non-state justice policy, risk should be examined holistically rather than attempting to disaggregate program and reputational risk.

Support to state justice institutions generally presents far less programmatic and reputational risk. Nearly all states have signed human rights treaties promising extensive procedural and substantive protections even if such protections frequently do not exist in practice (Powell and Staton 2009). Thus, even unsuccessful international support to state courts can be cast as laudable attempts to encourage compliance.

Research Approach

This section explains the research approach in relation to developing the typology and assessing claims about donor state policy. It also describes the logic assessing major rule-of-law donor states' policies toward non-state justice authorities from 2008 through 2018 and the five heuristic case studies as well as the data collection and analysis process.

Case Selection

This paper focuses on state actors, specifically the nine largest bilateral rule-of-law donors based on the OECD foreign aid category *15,130: Legal and judicial development* (Table 3).[8] Based on data from 2016, these countries are Australia, Canada, Germany, Japan, the Netherlands, Norway, New Zealand, the United Kingdom, and the United States. These donors contributed the vast majority of bilateral rule-of-law funding. A grand total of $1,905.754 million was spent promoting the rule of law in 2016, with the nine largest donors contributing 95.579 percent of this amount ($1,821.51 million). A further twenty-two bilateral rule-of-law donors contributed the remaining $84.224 million. The decision to limit case analysis to the nine largest donors was based on the significant difference in rule of law aid expenditure between the ninth and tenth largest donors. The ninth largest donor, New Zealand, allocated $26.890 million. This amount is similar to the seventh and eighth highest donors: the Netherlands allocated $31.150 million and the United Kingdom $29.181 million. In contrast, the tenth largest donor, Italy, allocated $16.929 million, approximately $10 million less than New Zealand.

Once the largest donors were identified, their policy was examined from January 2008 to December 2018. The timeframe was selected for four main reasons. First, states do not necessarily publish policy related to the rule of law annually. Eleven years, however, is long enough that states will almost certainly have published a policy if they have determined that addressing non-state justice warrants specific guidance. Second, it is a sufficient period to assess if and, if so, how policy evolved. Third, as these are all democratic states, the timespan accounts for elections and the policy shifts that can occur under new governments. Finally, the time period ensures a full 10 years of policy is covered as donor agencies can have different annual aid cycles. The United States, the United Kingdom, Australia, the Netherlands, and Germany were selected as heuristic case studies because these states moved beyond acknowledgment or denial approaches and endorsed tangible policy action toward non-state justice. Thus, they are well suited for "inductively identify[ing] new variables, hypotheses, causal mechanisms, and causal pathways" associated with heuristic case studies (George and Bennett 2005, 75).

Only state-sponsored bilateral aid is examined. Studying state agencies intuitively makes sense when analyzing official foreign policy. Donor preferences are much clearer in bilateral assistance than in multilateral aid or aid funneled through an international organization, such as the United Nations. Bilateral aid policy can be subject to extensive negotiations, but the result is clearly the policy. In contrast, multilateral organizations have greater autonomy, distinct incentive structures, and logics of behavior. Under the widely used OECD definition, "A multilateral contribution … can be delivered only by an international institution conducting all or part of its activities … [and] the flow itself must lose its identity and become an integral part of the recipient institution's assets such that donors cannot track and pre-define its uses" (Gulrajani 2016, 7).

While rule-of-law aid remained overwhelmingly focused on state justice, the largest donors were the most likely to allocate some resources to non-state alternatives. Larger donors face greater pressure to produce policy justifying their expenditures and overarching goals. Together, these cases offer sufficient scale and range to produce generalizable insights about how to better understand international engagement with non-state justice across settings. Each state has its own foreign policy, geographic priorities, aid investment levels, and organizational structures for aid (Arel-Bundock, Atkinson, and Potter 2015).

[8] The 2016 data were the most recent OECD data available when the research project started.

Data Analysis and Collection

This article examines major donor policies toward non-state justice through a focused, structured comparison (George and Bennett 2005). It focuses on approved, codified policy statements rather than trying to infer their existence. Qualitative content analysis was used to determine what policy exists, its rationale, and any policy shifts. Relevant data for the nine largest rule-of-law-promoting states were collected through online archival research, most notably the relevant websites, and internet databases of governmental organizations. For all countries, data were collected from national development agencies, ministries of foreign affairs, and other relevant entities, external evaluations, and pan-governmental sources.[9] State agencies were also contacted to see if they had relevant documents that were not accessible online.[10] In sum, over 400 documents were reviewed.

While official state documents were prioritized, this research benefited from insights gained from working in Timor-Leste from 2010 to 2012 implementing US policy toward non-state justice, and professional work in Afghanistan, Nepal, and Namibia as well as research on legal pluralism initiatives conducted for a major European foreign affairs ministry. It also reflects academic fieldwork conducted in Timor-Leste in 2014, 2017, and 2019, Afghanistan in 2009 and 2014, and Namibia in 2008 and 2019, including semi-structured interviews with foreign and domestic government officials, non-state justice actors, local and international non-governmental organizations, and other stakeholders.[11] While this paper critically examines donor policy toward non-state justice, it does not independently assess whether specific programmatic interventions were successful. Rather, it aims to understand the policy approaches utilized, their stated concerns, and implications. This article also assesses the level of policy specificity, whether policies engage with the complexities of legal pluralism, and the evidentiary basis provided for policy.

Policy does not necessarily lead to action. Moreover, the fact that certain views become official policy does not guarantee that policy will deliver the intended results or even be consistently followed. While invariably a partial picture, understanding foreign policy still has immense value by showing how the state conceptualizes itself and what it is attempting to signal to others. Many policies are contemplated, but very few become official policies articulated in formally approved documents. Approved policies also convey important value judgments, provide baselines against which to measure actual behavior, and offer insights into how decision-makers see the world and what they hope to achieve.

Major Donor State Approaches toward Non-State Justice

The following section summarizes each major donor state's posture toward non-state justice between 2008 and 2018 (Table 4). Along with the major strategies and policy goals of each state, the table identifies the key implementing agencies. Rule-of-law donors are divided into states with a policy approach to non-state justice and those without. The United States, the United Kingdom, Australia, the Netherlands, and Germany had policy approaches that envisioned meaningful engagement with non-state justice, and they are discussed as case studies in the next section. Norway[12] and New Zealand[13] acknowledged non-state justice but offered little guidance about how non-state justice related to their overarching strategy. Japan and Canada did not have discernable approaches to non-state justice though both sought to promote the rule of law.

Australia, Germany, the Netherlands, New Zealand, Norway, the United Kingdom, and the United States, all explicitly viewed non-state justice as a distinct policy concern. Even Canada and Japan, which did not have discernable policies, recognized non-state justice as a distinct issue. Furthermore, Australia, Germany, the Netherlands, the United Kingdom and the United States all favored the risk-averse options of transformation and acknowledgment. Norway and New Zealand exclusively utilized acknowledgment, the most risk-averse option. Evidence from Japan and Canada lends further credence to the prevalence of risk aversion among donors as both countries highlighted challenges related to legal pluralism despite not engaging with non-state justice (see, e.g., JICA 2009, iv; Global Affairs Canada 2017, 35). While the United Kingdom and Australia pondered it, they never formally approved an acceptance strategy (Cox, Duituturaga, and Scheye 2012, viii; DFID 2013a, 3). The Netherlands articulated the riskier strategy of acceptance in fragile and conflict-prone settings and even then, only briefly. The United States pursued acceptance and rejection in Afghanistan during an active counterinsurgency campaign. But when acceptance and rejection strategies did not quickly deliver their desired results, policy reverted to the less risky strategies of transformation and acknowledgment.

Case Studies

United States of America

The United States was the largest international funder of rule-of-law assistance between 2008 and 2018. During the presidential administrations of Republican George W. Bush (2008–2009), Democrat Barack Obama (2009–2017), and Republican Donald Trump (2017–2018),[14] the US funded rule-of-law programs worldwide through three main agencies: USAID, the State Department Bureau of International Narcotics and Law Enforcement Affairs (INL), and the Department of Defense (DOD). In addition to a general examination of US policy, policy in Afghanistan is addressed separately because it was at "the forefront of public attention" (US Army 2010, i) and profoundly important to US non-state justice policy. During the period examined, Afghanistan received by far the most rule-of-law support (Government Accountability Office 2020, 37) and is the only state where the United States crafted an independent, government-wide non-state justice policy. Afghanistan is also repeatedly referenced, and cited as a key example, in general US rule-of-law policy documents (USAID 2010, 32; State Department 2013, 7–10, 19, 33–33).

[9]This included reading all documents for discussions related to law, justice, and legal pluralism. As these documents were all electronic, I also conducted in-document searches for relevant terms related to law, the rule of law, legal pluralism, and non-state justice as well as traditional, customary, tribal, and informal law, in English or in the local language used.

[10]Responses were received from USAID, DFID, and JICA.

[11]Interviews provided important context, but policy descriptions are based exclusively on approved, official, and independently verifiable documentation.

[12]While never developing a detailed policy, Norway acknowledged non-state justice (Norwegian MFA 2016, 8).

[13]New Zealand's MFAT acknowledged "traditional systems" can help protect human rights and property and mitigate conflict (2011, 11). While symbolically recognizing non-state justice, no practical guidance was offered. MFAT's strategic plan for 2015–2019 omitted non-state justice entirely (2015, 13).

[14]Years in parentheses refer to the time during the case study period of 2008–2018 that the individual held office, not overall tenure.

Table 4. Foreign policy approaches toward non-state justice

State	*Implementing agency*	*Foreign policy toward non-state justice*	*Strategy/ies*	*Goal/s*
The United States	USAID	Yes	Acceptance (toward shuras and jirgas in Afghanistan only), transformation, acknowledgment, and rejection (toward the Taliban in Afghanistan only)	Judicial reform, symbolic recognition, state-building, and counterinsurgency (toward the Taliban in Afghanistan)
The United States	State Department	Yes	Acknowledgment and transformation	Judicial reform, symbolic recognition, and state-building
The United States	Department of Defense	Yes	Acknowledgment	Symbolic recognition
The United States	US Mission to Afghanistan	Yes	Acceptance (toward shuras and jirgas), transformation, acknowledgment, and rejection (toward the Taliban)	Judicial reform, symbolic recognition, state-building, and counterinsurgency (against the Taliban)
The United Kingdom	DFID	Yes	Transformation and acknowledgment	Judicial reform, symbolic recognition, and state-building
Australia	AusAID (merged into the Department of Foreign Affairs and Trade in 2013)	Yes	Acknowledgment and transformation	Judicial reform and symbolic recognition
The Netherlands	Ministry of Foreign Affairs	Yes	Acceptance (conflict-prone settings), transformation, and acknowledgment	Judicial reform, symbolic recognition, and state-building
Germany	BMZ/GIZ (GIZ was established in 2011 through a merger of three agencies)	Yes	Transformation and acknowledgment	Judicial reform, symbolic recognition, and state-building
Germany	German Federal Government	Yes	Transformation and acknowledgment	Judicial reform, symbolic recognition, and state-building
Norway	Ministry of Foreign Affairs	Yes	Acknowledgment	Judicial reform
New Zealand	Ministry of Foreign Affairs and Trade	Yes	Acknowledgment	Judicial reform
Japan		No	Denial	N/A
Canada		No	Denial	N/A

General US Policy

For USAID, the main US overseas development agency, promoting the rule of law was a core development goal. During the Bush Administration in 2008 and the Obama Administration in 2010, USAID endorsed both *transformation* and *acknowledgment*. USAID's programmatic framework took an acknowledgment approach that symbolically recognized non-state justice by highlighting its legitimacy, popularity, and "impact on the rule of law may make them worthwhile to engage" (2008, 15; 2010, 19–20). The official approaches from 2008 and 2010 were functionally identical though the latter framework added some examples of representative programming.

USAID endorsed transformative judicial reform and state-building while remaining fixated on risk. Policy sought to "build on the strengths of non-state systems to improve access to justice, while seeking to minimize the potential for unfairness and abuse" (2008, 38). First, USAID supported programming to make non-state justice forums democratically accountable and "expand access to justice and human rights protections" (2010, 32). Elected representatives, for instance, could incorporate elements from non-state justice into "state-based law" (2010, 32). USAID likewise supported transformation by "introducing international human rights standards" (2010, 32). Under this approach, "revised systems might allow religious courts to have jurisdiction in certain cases" while ensuring they comply with human rights standards (2010, 32). Finally, foreign assistance could support improved legal protections and "appeal rights from the non-state customary or religious system" (2010, 32). Representative programs included offering "information about human rights and justice issues, supporting paralegals and NGOs to bridge state and non-state justice institutions, establishing linkages between state and non-state institutions, and improving oversight of non-state justice" (2010, 38).

USAID's 2008 and 2010 rule-of-law promotion frameworks declared, "USAID is developing technical guidance on engaging with non-state justice institutions" and listed *Improving Access to Justice through Non-State Justice Institutions: Issues to Consider* as "forthcoming" (2008, 15, 51; 2010, 20, 59). While completed in 2009, it was never published and did not guide subsequent USAID policy. A review of the unpublished draft guidance, however, shows that even if it had been published and approved, policy would have remained ambiguous. The draft guidance surveys previous donor interventions and the complexities of engaging non-state justice without stipulating what USAID should do (USAID 2009).[15] This unpublished material, however, spoke frankly to policy realities, explaining that "USAID and other donors have failed to engage with the non state justice system in a systematic manner" and the prevalence of risk aversion, "In shying away from greater engagement with the non-state sector, donors have cited the complex, archaic and

[15]For an overview, see Mcloughlin (2009).

informal nature of non-state justice systems and a perceived lack of respect for women's and other human rights" (2009, 2). USAID's rule-of-law promotion frameworks were the high-water mark of organizational interest. USAID never issued the long-promised guidance or articulated a new comprehensive approach to non-state justice. The subsequent USAID strategy (2013) on democracy, human rights, and governance discussed judicial reform and the rule of law extensively, but lacked any guidance on non-state justice.

While USAID was stepping back from non-state justice after 2010, the State Department became more engaged. In 2013, the State Department's INL bureau endorsed symbolic recognition focused on *acknowledgment* and judicial reform-oriented *transformation*. INL policy recognized that non-state forums could be cost-effective, speedy, and "necessary and legitimate alternatives to formal courts and dispute resolution mechanisms, which can be plagued by corruption and inefficiency or simply inaccessible or nonexistent" (State Department 2013, 11). INL acknowledged that non-state justice authorities can provide justice and security, but they risked perpetuating discrimination (2013, 7). Consequently, "INL assistance must be calibrated to improve the rights and well-being of all members of society, especially women and girls" (2013, 7). INL simultaneously sought to transform non-state justice. It envisioned programming to "Ensure customary and informal mechanisms comply with basic human rights standards, including due process and non-discrimination" and to strengthen coordination between state and non-state justice (2013, 11). INL recognized the risks and rewards posed by non-state justice but did not specify how to balance them, and no further guidance was issued.

DOD rule-of-law assistance routinely confronted non-state justice systems. In response, the DOD adopted an *acknowledgment* approach that symbolically recognized the vital role of non-state justice in fluid security environments. The Army's Rule of Law Handbook (2010, 115–6) explained that non-state authorities "can be particularly effective in restoring the rule of law," may enjoy greater local legitimacy, and avoid the complications of "establish[ing] a novel legal system." Yet, even for a military organization working primarily in conflict-prone settings, risk aversion remained. The handbook stressed any efforts required "particular caution and a very strong awareness of the social and cultural context," and that non-state justice can be "arbitrary or even discriminatory" (US Army 2010, 116). Consequently, while "Judge Advocates are wise to consider traditional dispute resolution methods," their opaque and highly variable nature renders "any systematic approach to it impossible" (2010, 116).[16]

The DOD *Handbook for Military Support to Rule of Law and Security Reform* likewise embraced *acknowledgment*. It symbolically recognized the importance of non-state justice for stabilization, governance, and access to justice, particularly in post-conflict settings (2016, D29). These justice systems, however, may be discriminatory, hinder development, and undercut state authority (2016, D30). The handbook advocated for a case-by-case approach. Other policy options were discussed, but none were explicitly endorsed.

Trump administration policymakers took minimal interest in non-state justice. The joint State Department, USAID, and DOD stabilization assistance review (2018) included *acknowledgment* that non-state justice matters symbolically in conflict-prone settings. Risk was again a prominent consideration. Rather than specific guidance, the review called for further research and "a balanced approach in our reaction to and willingness to work with informal and formal systems" though what that entailed was not specified (2018, 15). The 2018–2022 State Department and USAID Joint Strategic Plan (2018) prioritized promoting the rule of law but ignored non-state justice entirely.

US Mission in Afghanistan

While rule-of-law policy initially focused on state justice institutions, the Obama administration increasingly emphasized engagement with non-state justice. It pursued *acknowledgment* and *transformation* alongside the riskier approaches of *acceptance* for traditional jirgas and shruas and *rejection* of Taliban justice.

Policy acknowledged that "Traditional dispute resolution mechanisms are integral to Afghan society" in a symbolic recognition of customary justice (DOD and State Department 2009, 7). Beyond that, US policy accepted justice forums rooted in tribal culture and Islam to promote state-building, facilitate dispute resolution, and bolster counterinsurgency by stabilizing the state against the resurgent Taliban (2009, 7–8). US policy simultaneously aimed to transform customary justice to promote judicial reform and state-building. The unified US government approach to Afghanistan (2011–2015) sought to link "the informal and state systems" and ensure non-state systems protect human rights (US Mission Afghanistan 2010, Annex 1, 5). Finally, the United States supported transformative regulations, proposed by the Afghan government, which envisioned bolstering state courts while putting tribal dispute resolution under state control (2010, Annex 1, 5). None of these attempts came to fruition.[17]

To advance counterinsurgency efforts, the United States attempted to destroy the Taliban's parallel justice system (DOD and State Department 2009, 1–2, 7). In partnership with the Afghan government, the United States strove "to facilitate access to justice, restricting insurgency efforts to offer illegitimate substitute systems" (2009, 17). Likewise, the "Afghanistan and Pakistan Regional Strategy" proclaimed that US "justice and rule of law programs will focus on creating predictable and fair dispute resolution mechanisms to eliminate the vacuum that the Taliban have exploited" (Office of the Special Representative for Afghanistan and Pakistan 2010, ii).

Acceptance and *rejection* approaches failed to produce the desired results for counterinsurgency or state-building, and generated substantial criticism (Wimpelmann 2013). US policymakers also determined that outright military victory was unlikely. By 2014, non-state justice was no longer a major policy focus, and policy approaches became more risk-averse (Swenson 2017). Subsequent USAID policy in Afghanistan (2015–2018) still *acknowledged* non-state justice, but no longer endorsed *rejection* and *acceptance* (USAID 2016, 21–2). Nevertheless, a *transformation* agenda continued with a focus on judicial reform to improve administrative procedures, linkages between justice systems, and state-building through enhanced "process[es] to receive, review and register traditional dispute cases" (2016, 21). Substantively, it sought to transform non-state justice by "training to local leaders on Afghan law and basic human rights" to increase legal certainty and better protect legal rights (2016, 21). Support for *acknowledgment* and *transformation* was briefly reiterated in USAID's strategy for 2019–2023 (USAID 2018, 53). Policy symbolically recognized the popularity of

[16]This handbook was updated regularly but the non-state justice content was only revised slightly and consistently emphasized *acknowledgment*.

[17]See the "Conclusion" section for more details.

non-state justice. Transformation sought to advance both judicial reform and state-building by "aligning formal and non-formal systems" to promote access to justice and build an effective, high-capacity legal system (2018, 15). These transformative changes remained aspirational. The quality of state justice continued to deteriorate, while the Taliban's rival justice system grew more influential.

United Kingdom

Promoting the rule of law was a UK foreign policy priority between 2008 and 2018. Under DFID's leadership, aid was closely linked to security goals in fragile and conflict-prone states. During the Labour government of Gordon Brown (2008–2010), DFID's rule-of-law policy guidance symbolically recognized non-state justice through a relatively candid *acknowledgment* of its advantages and disadvantages. Policy also endorsed *transformation* to support state-building and judicial reform through government regulation of non-state actors, sponsoring trainings, promoting equitable outcomes, increasing sensitivity to disadvantaged groups, and even "establish[ing] alternative NSJS [non-state justice and security] systems to which cases can be appealed" (DFID 2008, 8). At the same time, DFID was keenly aware of the risks. It stressed "Where NSJS systems violate basic human rights, donor engagement is both inappropriate and unlikely to achieve reform" (2008, 8). DFID considered, but did not explicitly endorse *rejection*, noting that it "may be preferable not to engage with NSJS, or even see them dissolved" (2008, 8).

In 2011, the new Conservative-Liberal Democrat government coalition (2010–2015), headed by David Cameron, issued the joint DFID, FCO, and Ministry of Defence (MOD) stabilization strategy. It included an *acknowledgment* that symbolically recognized the prominence of non-state justice in local dispute resolution but did not endorse any specific initiatives, and transformation was no longer endorsed (DFID, FCO, and MOD 2011, 12). In 2013, the coalition government published DFID's *Policy Approach to the Rule of Law*. Policy toward non-state justice remained murky. There was an *acknowledgment* that non-state justice forums may offer faster, cheaper, and more legitimate local justice (DFID 2013a, 6). However, policy once again equivocated, stressing the risks that non-state justice may "perpetuate abuses, such as unequal treatment of women and minority groups" and may "be discriminatory, corrupt and coercive" (2013a, 6). It argued for context-based engagement. Assistance could be worthwhile "when it expands access to dispute resolution mechanisms," but "harm[ful] if it increases inequality or leads to violence" (2013a, 3). Coalition policy diagnosed the tensions inherent in engaging non-state justice but not how to reconcile them.

After the 2015 general election, the Conservatives could govern independently, but under Cameron and Theresa May (who became Prime Minister in July 2016), this tentative approach continued. The 2016 Stability Framework *acknowledged* that non-state justice can help maintain order and prevent conflict but again did not stipulate how to approach it (DFID 2016, 5, 12). May's government took a strikingly similar tact. In 2018, the *UK Government's Approach to Stabilization* reiterated an *acknowledgment* approach (Stabilisation Unit 2019, 66). It proclaimed that non-state justice institutions were "often more accessible and have greater legitimacy" than state institutions, and that these systems could potentially work together constructively (2019, 67). Engaging non-state systems could be risky, however, as they may violate human rights and "reinforce discriminatory norms which enable impunity and undermine the transition away from violence" (2019, 67).

For conflict-prone settings, the guidance considered *acceptance* and *rejection* but stopped short of endorsing them. The logic of acceptance underpinned the claims that "Security and justice interventions will inevitably involve engagement with institutions who are parties to the conflict and who may have a poor human rights record," to support efforts "to establish basic security and promote political processes" (2019, 61). It is not clear when, or how, justice systems that violate human rights should be engaged. *Rejection* was considered but not explicitly endorsed, noting that "Organised crime and terrorist groups may also provide valuable functions to the local population, including … security and justice" (2019, 149). Any attempt to "undermine these groups must be aware of the costs" to civilians and reduce these harms or risk "a lack of support or resistance from local communities" (2019, 149). While UK policy consistently outlined the risks and opportunities posed by non-state justice from 2008 to 2018, it never clarified how these should be reconciled.

Australia

During both Labour (2008–2013) and Liberal governments (2013–2018), Australian foreign policy strove to promote the rule of law. Under Labour Prime Ministers Kevin Rudd (2008–2010, 2013) and Julia Gillard (2010–2013), the Australian Agency for International Development (AusAID) *acknowledged* non-state justice. AusAID symbolically recognized that non-state justice has major implications for the rule of law, access to justice, and reducing violence against women as well as international security and development (2009, 2010, 2011). Australian aid primarily targeted South-East Asia and the Pacific where legal pluralism abounds, and Australia had a compelling national security interest in stability and conflict prevention. Yet, policy guidance toward non-state justice was decidedly lacking.

In 2012, AusAID undertook a comprehensive review. While recognizing the risks, the review advocated for a more robust approach:

> [T]he main providers of justice for the majority of the population are often informal institutions. However, like other donors in the law and justice arena, Australia has very little engagement with them. The reasons for this include their inherent complexity, the difficulty of finding appropriate entry points for assistance and fear of associating Australia with local practices that may not meet international human rights standards … Australia is justifiably cautious about engaging with informal actors in the justice system, but that this caution should not prohibit experimentation and innovation. While informal justice has only limited capacity to absorb financial or technical support, Australia could do more to support these informal systems and their linkages with the formal justice system, and to support intermediaries … to raise awareness among local justice providers about constitutional principles, human rights and gender equality. (Cox, Duituturaga, and Scheye 2012, viii)

Implementing the policy vision articulated by the comprehensive review would require buy-in from high-level policymakers and an increased tolerance for risk. Neither occurred. After the election of Liberal Prime Minister Tony Abbott in 2013, AusAID was subsumed into the Department of Foreign Affairs and Trade (DFAT). Australia reversed

decades of increasing aid expenditure and imposed major budget cuts. Australian ambitions toward justice programming, and by extension non-state justice, were scaled back dramatically. No policy toward non-state justice was promulgated under Abbott's premiership (2013–2015).

Malcolm Turnbull's government (2015–2018) eventually articulated minimalist *acknowledgment* and *transformation* policies in 2016 via a short overview on DFAT's website (2016b). These policies continued when Scott Morrison became Prime Minister in August 2018. Policy symbolically recognized that non-state justice was important and supported, albeit rather vaguely, a *transformation* of non-state justice through judicial reform to "empower poor and marginalised communities in the Indo-Pacific region to resolve disputes effectively through increased access to formal, quasi-formal and informal justice systems" (DFAT 2016b; see also DFAT 2016a, 11). Australia ultimately embraced a broad but shallow vision that provided little actionable policy guidance.

The Netherlands

Promoting the rule of law remained a priority during the Christian Democratic Appeal government of Jan Pieter "Jan Peter" Balkenende (2008–2010) and during the People's Party for Freedom and Democracy-led governments of Mark Rutte from 2010 onward. Only in 2015 did non-state justice emerge as a significant policy concern as Dutch aid prioritized fragile and conflict-prone states. The Ministry of Foreign Affairs (MFA) was the primary bureaucratic actor. Within the MFA, the Stabilisation and Humanitarian Department (DSH) unit articulated the most developed policy supporting *acknowledgment* and *transformation*. It symbolically recognized that non-state authorities may underpin stability and legal order (MFA DSH 2015). The DSH argued that insufficient access to justice may spark conflict and that "the role and function of informal justice" deserves more attention (2015, 5). Transformation-oriented policy aimed to support state-building and judicial reform by guaranteeing that people know "their basic rights and fundamental freedoms" and can "access formal and informal justice" (2015, 6). Aid could help state and non-state justice function with greater coordination, effectiveness, and accountability, and "address legacies of human rights violations and serious crimes" along with the underlying causes of conflict (2015, 6).

The overarching 2017 MFA rule-of-law strategy reiterated support for *acknowledgment* and *transformation*. Non-state authorities were symbolically recognized as contributors to stability and access to justice in fragile and conflict-prone states (2017, 3–4). MFA policy supported judicial reform initiatives to bolster "fairness, effectiveness, [and] accountability" within non-state justice institutions (2017, 4). Moving beyond the earlier guidance, the MFA embraced a state-building focused *acceptance* strategy that "supports the access of people to justice through formal or informal justice systems" and program evaluation indicators made no distinction based on which system people accessed (2017, 3).

Increased risk tolerance went alongside an attempt to craft a comprehensive non-state justice policy. In 2016, the MFA sought to operationalize principles for engaging non-state justice, so it "developed a study and policy paper on the policy implications of supporting informal justice systems" to mitigate risk and "help guide Dutch policy … by ensuring that all our interventions protect human rights, including women's rights" (MFA DSH 2017, 9). The research was completed. The tensions, however, between competing goals proved irreconcilable as the inherent risks and challenges of engagement became apparent. Consequently, operational policy was never clarified. While the 2018 comprehensive foreign aid strategy still prioritized the rule of law in conflict-prone and fragile states, discussion of non-state justice had been removed entirely (MFA 2018, 41–3).

Germany

Christian Democrat Angela Merkel was the Chancellor during the entire period examined and promoting the rule of law was a consistent foreign policy goal. The Federal Ministry of Economic Cooperation and Development (BMZ) was the major rule-of-law funder, while the German Corporation for International Cooperation (GIZ) was the largest implementing agency.[18] There was an *acknowledgment* by BMZ in 2009 that symbolically recognized the importance of non-state justice for dispute resolution and supported *transformation* through judicial reform to ensure respect for human rights and gender equality (2009, 14). In 2012, the more detailed joint BMZ-GIZ policy (2012) supported *acknowledgment* and *transformation* to improve judicial administration. Policy was notably risk-averse and subject to extensive preconditions. While systems based on custom, tradition, or religion were recognized as often legitimate and effective, policy stressed the need for reform to ensure non-state justice systems comported with national and international law (2012, 16). Changes to existing non-state justice institutions were not to be imposed unliterally. Instead, GIZ and BMZ sought to transform non-state justice by harmonizing law among multiple legal systems, including traditional, customary elements in national legislation (when consistent with human rights norms), and promoting respect for human rights, especially women's rights.

In 2017, the German Federal Government (GFG) reiterated support for *acknowledgment* by symbolically recognizing that non-state justice may contribute to access to justice and to the rule of law (2017, 92–6). It also continued to support *transformation* in service of judicial reform and state-building, albeit in a deeply cautious and risk-averse manner (2017, 92–6). GFG stressed that all engagement must be consistent with human rights norms. Moreover, transformation should occur through ongoing dialogue with non-state partners to promote gradual integration between state and non-state justice based on a mutual commitment to human rights. German policy consistently recognized the importance of, and risk posed by, non-state justice. Germany supported major changes but did not want to be seen as imposing them. Policy emphasized consensual, transformative dialogue, but provided no guidance on how this could work in practice or what, if anything, should be done if non-state actors did not want to change.

Implications

Most major rule-of-law donor states had a foreign policy toward non-state justice (albeit often a limited one). These states consistently displayed risk aversion as evidenced by the overwhelming preference for acknowledgment and, to a lesser extent, transformation strategies that emphasized caution and reduced the scope for criticism. When less risk-averse policies were occasionally contemplated, and sometimes even adopted, these focused on fragile and conflict-prone states in service of state-building and counterinsurgency. Such efforts invariably proved temporary. As the case

[18] GIZ was established in 2011 by merging the German Technical Cooperation Agency and two other agencies.

studies highlight, even among the donors most interested in non-state justice, there were minimal efforts to develop actionable policy guidance, limited interest in engaging with non-state authorities, little attempt to grapple with legal pluralism in practical policy terms, and sparse evidentiary basis for policy.

Risk-Averse, Superficial Policy

Risk aversion, especially concerning human rights practices, defines donor-state policies toward non-state justice. In general, risk tolerance varies among states and even among aid-implementing agencies within donor states (Honig 2018). As non-state justice was widely recognized as crucial to advancing several key policy goals, it would be logical that different donors would approach the risks associated with non-state justice differently. In reality, remarkable uniformity existed. Risk aversion was the dominant feature of donor policy toward non-state justice. Moreover, in all instances where riskier approaches were endorsed, these were abandoned relatively quickly. By 2018, not a single donor state endorsed either acceptance or rejection.

For all major donor states, official policy consisted mostly of platitudes and abstract formulations with little depth or sophistication. Even states that expressed a desire to construct more comprehensive guidance ultimately did not. Australian policymakers ignored evaluators' call for more robust, well-defined engagement with non-state justice in 2012. After 2010, USAID jettisoned efforts to craft actionable guidance. No other US agency even attempted to do so. UK and Dutch policymakers understood the advantages and disadvantages of non-state justice initiatives, but never articulated a clear path forward. Germany required all activities to be consistent with international human rights norms and that change must occur through voluntary dialogue—preconditions that, in practice, precluded any meaningful policy engagement. This ambivalence raises uncomfortable, but important questions. When, if ever, should non-state justice be engaged? And if it is only possible to engage non-state justice institutions that fully uphold human rights norms, which very few, if any, do, what is the point of engagement? (After all, most, if not all, state justice systems would fail to uphold that standard.) Policy largely eschewed these debates.

Inconsistent Policy with Minimal Engagement of Key Non-State Justice Stakeholders

Foreign assistance is invariably filtered through the recipient state's priorities and institutions. Initiatives focused on non-state actors generally rely on host state support or at least tolerance. Even where external donors have the most leverage, such as in Afghanistan, which had a weak state and a significant international troop presence, domestic actors invariably had significant influence over international initiatives.

Existing policy largely ignored these challenges. The US experience in Afghanistan provides a stark illustration. Customary justice remained the dominant and most legitimate form of dispute resolution (Weigand 2022). Under President Obama, US policy pursued an ambitious transformative agenda toward customary justice (US Mission Afghanistan 2010). It sought to ensure that non-state justice was incorporated into state structures, consistently upheld human rights, and only handled matters that state legislation explicitly authorized (Ministry of Justice 2009). Moreover, the US-backed policy mandated that non-state legal judgments must comport with Sharia, Afghan law, and international human rights standards even though these sources of law could themselves be in tension. At the same time, the US sought to capitalize on existing customary authorities to bolster state-building and counterinsurgency efforts. US policy, however, failed to address practical constraints stemming from a weak, highly corrupt state justice sector, and opposition from powerful non-state authorities and key Afghan state officials.

The subsequent 2010 draft legislation incorporated customary justice into the state legal system by restricting non-state authorities' jurisdiction to civil disputes and petty juvenile crimes upon referral from state officials (Ministry of Justice 2010). Customary leaders faced criminal liability for breaking the law. Nevertheless, key Afghan government agencies still strongly opposed the law because they believed it legitimized jirgas and shuras (Coburn 2013). The draft law was subsequently abandoned.

US efforts in Afghanistan highlight the challenges of partnering with a host government to regulate non-state justice. The Afghan government was divided, and its priorities did not fully align with US aims. US policy reflected an unrealistic vision of how the non-state justice sector should operate and the ease with which it could be transformed. This emphasis on change contradicted other US-backed initiatives that accepted customary actors as they were. Finally, even though customary actors often enjoyed greater legitimacy and authority, internationally backed reforms failed to meaningfully engage them. Instead, the United States supported imposing a legal framework, even though non-state authorities retained the autonomy necessary to resist it.

Failure to Engage with the Nuances of Legal Pluralism

Non-state justice authorities can adopt very different postures toward the state that are more or less conducive to constructive engagement. Major donor state policies have not addressed how different types of legal pluralism influence policy options and outcomes. Legal pluralism can be combative, competitive, cooperative, or complementary (Swenson 2018). Under combative legal pluralism, state and non-state systems are overtly hostile as often occurs in fragile and conflict-prone states. Donor policies predicated on a constructive relationship with non-state justice hold little promise. The most common dynamic in states that receive significant foreign aid is competitive legal pluralism. Here, non-state actors can and do operate with autonomy from the state even if they do not formally or violently contest its overarching legal authority. As most non-state legal systems reflect religious or cultural beliefs, they do not necessarily share the state legal system's values. Scope for constructive programming exists, but non-state actors may be unwilling to work with foreign donors, especially when initiatives challenge entrenched beliefs or practices. Under cooperative legal pluralism, "non-state justice authorities still retain significant autonomy and authority" but accept the state legal system's authority and right to determine public policy, and thus are open to collaboration (2018, 445). While policy disagreements can arise (e.g., over women's rights), these are the most promising settings to work with non-state justice authorities that retain significant autonomy. Finally, under complementary legal pluralism, state legal authority is undisputed. In these circumstances, foreign states rarely support programs aimed at non-state justice systems because domestic authorities already effectively regulate them. Policymakers should move beyond stressing the need for *case-by-case* analysis and instead articulate what should be done under specific *conditions* as well as the potential costs and benefits of different approaches.

Little Evidence Supports Existing Policies

This research focused on conceptualizing and understanding foreign policies toward non-state justice, rather than their practical consequences. It is worth noting, however, the evidentiary basis for policy toward non-state justice is limited and opaque. Policy documents and related primary sources make few detailed or empirically grounded claims of how international efforts achieved or advanced their strategic objectives. Donors and implementors are quick to publicize successes no matter how modest. They have strong incentives to highlight the value of their work. The almost complete absence of claims of policy success for their non-state justice efforts is striking. Moreover, any evidence generally focused on individual program deliverables, such as trainings conducted or materials drafted, rather than demonstrating that the policy itself achieved its larger objectives.

When donor policies embraced specific interventions, they overwhelmingly favored transformation. Yet, existing research raises serious doubts about the feasibility and effectiveness of internationally led non-state justice reform. It suggests these initiatives can sometimes be counterproductive or destabilizing (Isser 2011; Coburn 2013; Swenson 2022). As Tamanaha observed, "To impose the due process requirements of formal court systems on customary tribunals not only would distort how they function, but it is not actually achievable" (2021, 85). Donor state policy almost invariably assumes more state control is both possible and preferable. In reality, the enduring popularity of non-state justice usually reflects distrust of state courts. Moreover, non-state justice may sometimes provide better outcomes for women and other vulnerable populations. Conversely, the potential negative externalities of transformation, the risks of empowering state courts, or pursuing inconsistent or poorly conceptualized policy were not discussed.

More research is critical on the consequences of specific international efforts to engage non-state justice as well as more detailed research on the causes and consequences of risk aversion. Likewise, it is important to better understand how international endeavors function alongside domestic efforts and the empirical consequences of failing to engage with non-state justice or doing so only superficially. While it is impossible to say for certain that no successes have occurred, the silence is telling. Donors, program implementers, and the researchers they commission, all documented few signs of strategic success.

Conclusion

Globally, non-state justice remains the dominant form of legal order. To better understand how donor states conceptualize and approach non-state justice and to what ends, this paper offered a new classificatory typology. It also showed that while most major rule-of-law donors acknowledge that non-state justice matters within their policy, they often eschew these forums as presently constituted because they rarely meet international human rights standards. Donors displayed a strong preference for risk-averse acknowledgment strategies that symbolically recognize the value of non-state justice while avoiding difficult choices and detailed policy guidance. Even donor states that supported meaningful engagement strongly favored transformation strategies to reform non-state justice or strengthen the state. These efforts, however, were vague or unrealistic about how changes could be realized. Policy guidance that sought to change how non-state justice operated ignored the weak empirical basis for such efforts and the potentially serious negative externalities. Certain goals, such as counterinsurgency or state-building, sometimes justified riskier strategies, but they endured only when they had a compelling justification and a reasonable prospect of success. As of 2018, no major donor state pursued acceptance or rejection strategies.

Waning interest in non-state justice over time, the shallowness of policy discourse, and tolerance of policy inconsistency and even incoherence, raises serious questions about donors' commitment to promoting the rule of law, access to justice, state-building, and other goals. While perhaps understandable, the prevalence of policy that fails to meaningfully engage with non-state authorities comes at the serious cost of eschewing the dominant form of legal order in most countries that receive aid.

Funder Information

This research received support from a British Academy Mid-Career Fellowship (MCFSS23\230010).

References

Ansorg, Nadine, and Eleanor Gordon, eds. 2021. *Co-Operation, Contestation and Complexity in Post-Conflict Security Sector Reform*. London: Routledge.

Arel-Bundock, Vincent, James Atkinson, and Rachel Augustine Potter. 2015. "The Limits of Foreign Aid Diplomacy: How Bureaucratic Design Shapes Aid Distribution." *International Studies Quarterly* 59 (3): 544–56.

Arjona, Ana, Nelson Kasfir, and Zachariah Mampilly Z, eds. 2015. *Rebel Governance in Civil War*. Cambridge: Cambridge University Press.

AusAID. 2009. *Responding to Violence Against Women in Melanesia and East Timor*.

———. 2010. *Annual Thematic Performance Report: Law and Justice 2008-09*.

———. 2011. *Effective Governance: Thematic Strategy*.

Baker, Bruce. 2010. "Linking State and Non-State Security and Justice." *Development Policy Review* 28 (5): 597–616.

Barma, Naazneen H. 2017. *The Peacebuilding Puzzle: Political Order in Post-Conflict States*. Cambridge: Cambridge University Press.

Bennett, Andrew, and Colin Elman. 2007. "Case Study Methods in the International Relations Subfield." *Comparative Political Studies* 40 (2): 170–95.

Blair, Robert A. 2021. *Peacekeeping, Policing, and the Rule of Law after Civil War*. Cambridge: Cambridge University Press.

BMZ. 2009. *Promotion of Good Governance in German Development Policy*.

BMZ and GIZ. 2012. *Die Förderung von Rechtsstaatlichkeit in der Entwicklungszusammenarbeit*.

Börzel, Tanja A., and Thomas Risse. 2021. *Effective Governance under Anarchy: Institutions, Legitimacy, and Social Trust in Areas of Limited Statehood*. Cambridge: Cambridge University Press.

Braithwaite, John, and Ali Wardak. 2013. "Crime and War in Afghanistan: Part I: The Hobbesian Solution." *British Journal of Criminology* 53 (2): 179–96.

Branch, Adam. 2014. "The Violence of Peace: Ethnojustice in Northern Uganda." *Development and Change* 45 (3): 608–30.

Carothers, Thomas. 2009. *Revitalizing Democracy Assistance: The Challenge of USAID*. Washington, DC: Carnegie Endowment for International Peace.

Checchi and Company Consulting. 2013. *Performance Monitoring Plan 14 October 2012–13 January 2014 (Revised Version)*.

Clarke, Kamari Maxine. 2009. *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*. Cambridge: Cambridge University Press.

Clapton, William. 2011. "Risk in International Relations." *International Relations* 25 (3): 280–95.

Coburn, Noah. 2013. *Informal Justice and the International Community in Afghanistan*. Washington, DC: US Institute of Peace.

Corradi, Giselle. 2014. "Can Legal Pluralism Advance Human Rights? How International Development Actors Can Contribute." *The European Journal of Development Research* 26 (5): 783–97.

Cox, Marcus, Emele Duituturaga, and Eric Scheye. 2012. *Building on Local Strengths: Evaluation of Australian Law and Justice Assistance.*
DFAT. 2016a. *Gender Equality and Women's Empowerment Strategy.*
———. 2016b. "Overview of Australia's Assistance for Anti-Corruption and Justice." Accessed March 3, 2019. https://dfat.gov.au/aid/topics/investment-priorities/effective-governance/law-and-justice/Pages/law-and-justice.aspx.
DFID. 2008. *Justice and Accountability.*
———. 2010. *Working Effectively in Conflict-Affected and Fragile Situations (Briefing Paper H: Risk Management).*
———. 2013a. *Policy Approach to the Rule of Law.*
———. 2013b. *Risk Management in DFID.*
———. 2016. *Building Stability Framework.*
DFID, FCO, and MOD. 2011. *Building Stability Overseas Strategy.*
DOD. 2012. *Report on Progress toward Security and Stability in Afghanistan.*
———. 2016. *Handbook for Military Support to Rule of Law and Security Sector Reform: Unified Action Handbook Series Book Four.* Washington, DC: DOD.
DOD and State Department. 2009. *US Government Integrated Civilian-Military Campaign Plan for Support to Afghanistan.*
Elman, Colin. 2005. "Explanatory Typologies in Qualitative Studies of International Politics." *International Organization* 59 (2): 293–326.
Fukuyama, Francis. 2014. *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy.* London: Profile.
George, Alexander, and Andrew Bennett. 2005. *Case Studies and Theory Development in The Social Sciences.* Cambridge, MA: MIT Press.
GFG. 2017. *Krisen verhindern, Konflikte bewältigen, Frieden fördern: Leitlinien der Bundesregierung.*
Global Affairs Canada. 2017. *Canada's Feminist International Assistance Policy.*
Government Accountability Office. 2020. *Rule of Law Assistance: Agency Efforts are Guided by Various Strategies, and Overseas Missions Should Ensure that Programming is Fully Coordinated.*
Gulrajani, Nilima. 2016. *Bilateral Versus Multilateral Aid Channels: Strategic Choices for Donors.* London: Overseas Development Institute.
Heller, Thomas C. 2003. "An Immodest Postscript." In *Beyond Common Knowledge: Empirical Approaches to the Rule of Law,* edited by Erik G. Jensen and Thomas C. Heller, 382–417. Stanford: Stanford University Press.
Honig, Dan. 2018. *Navigation by Judgment: Why and When Top-down Management of Foreign Aid Doesn't Work.* New York: Oxford University Press.
Huyse, Luc, and Mark Salter, eds. 2008. *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences.* Stockholm: International Institute for Democracy and Electoral Assistance.
Isser, Deborah, ed. 2011. *Customary Justice and the Rule of Law in War-Torn Societies.* Washington, DC: US Institute of Peace.
Janse, Ronald. 2013. "A Turn to Legal Pluralism in Rule of Law Promotion?" *Erasmus Law Review* 6 (3–4): 181–90.
JICA. 2009. "Capacity Development for Legal and Judicial Sectors in Developing Countries: JICA's Cooperation for 'Rule of Law' Promotion."
Kochanski, Adam. 2020. "The 'Local Turn' in Transitional Justice: Curb the Enthusiasm." *International Studies Review* 22 (1): 26–50.
Kyed, Helene Maria. 2011. "Legal Pluralism and International Development Interventions." *Journal of Legal Pluralism & Unofficial Law* 63: 1–23.
Lazarev, Egor. 2023. *State-Building as Lawfare: Custom, Sharia, and State Law in Postwar Chechnya.* Cambridge: Cambridge University Press.
Mcloughlin, Claire. 2009. "Donor Support to Non-State Providers of Security and Justice. Birmingham: Governance and Social Development Resource Centre."
——— 2015. "When Does Service Delivery Improve the Legitimacy of a Fragile or Conflict-Affected State?" *Governance* 28 (3): 341–56.
Merry, Sally Engle. 1988. "Legal Pluralism." *Law & Society Review* 22 (5): 869–96.
MFA. 2017. *Dutch Development Results 2016: Security & Rule of Law.*
———. 2018. *Investing in Global Prospects: For the World, for the Netherlands.*
MFA DSH. 2015. *Theory of Change for the Security and Rule of Law Policy Priority in Fragile Situations.*
———. 2017. *Security and Rule of Law.*
MFAT. 2011. *International Development Policy Statement: Supporting Sustainable Development.*
———. 2015. *New Zealand Aid Programme Strategic Plan 2015–2019.*
Ministry of Justice. 2009. *Draft National Policy on Relations between the Formal Justice System and Dispute Resolution Councils.*
———. 2010. *Draft Law on Dispute Resolution Shuras and Jirgas.*
Murdie, Amanda, and Dursun Peksen. 2015. "Women's Rights INGO Shaming and the Government Respect for Women's Rights." *The Review of International Organizations* 10 (1): 1–22.
Mustasilta, Katariina. 2019. "Including Chiefs, Maintaining Peace? Examining the Effects of State-Traditional Governance Interaction on Civil Peace in Sub-Saharan Africa." *Journal of Peace Research* 56 (2): 203–19.
Norwegian MFA. 2016. *Freedom, Empowerment and Opportunities.*
OECD. 2014. *Development Assistance and Approaches to Risk in Fragile and Conflict Affected States.*
———. 2016. *OECD Statistics, 15130: Legal and Judicial Development.* Accessed August 18, 2021. https://stats.oecd.org/.
Office of the Special Representative for Afghanistan and Pakistan. 2010. *Afghanistan and Pakistan Regional Stabilization Strategy.*
Powell, Emilia Justyna, and Jeffrey K. Staton. 2009. "Domestic Judicial Institutions and Human Rights Treaty Violation." *International Studies Quarterly* 53 (1): 149–74.
Provost, René. 2021. *Rebel Courts: The Administration of Justice by Armed Insurgents.* New York: Oxford University Press.
Rahman, K. Sabeel, and Kathleen Thelen. 2019. "The Rise of the Platform Business Model and the Transformation of Twenty-First-Century Capitalism." *Politics & Society* 47 (2): 177–204.
Sesay, Mohamed. 2021. *Domination Through Law: The Internationalization of Legal Norms in Postcolonial Africa.* Lanham, MD: Rowman & Littlefield.
Shaw, Rosalind, Lars Waldorf, and Pierre Hazan, eds. 2010. *Localizing Transitional Justice: Interventions and Priorities after Mass Violence.* Stanford: Stanford University Press.
Stabilisation, Unit. 2019. *The UK Government's Approach to Stabilisation: a Guide for Policy Makers and Practitioners.*
State Department. 2013. *INL Guide to Justice Sector Assistance.*
———. 2018. *Joint Strategic Plan FY 2018–2022.*
State Department, USAID, and DOD. 2018. "Stabilization Assistance Review: Framework for Maximizing the Effectiveness of U.S. Government Efforts to Stabilize Conflict-Affected Areas."
Stromseth, Jane, David Wippman, and Rosa Brooks. 2006. *Can Might Make Rights?: Building the Rule of Law after Military Interventions.* Cambridge: Cambridge University Press.
Swenson, Geoffrey. 2017. "Why U.S. Efforts to Promote the Rule of Law in Afghanistan Failed." *International Security* 42 (1): 114–51.
———. 2018. "Legal Pluralism in Theory and Practice." *International Studies Review* 20 (3): 438–62.
———. 2022. *Contending Orders: Legal Pluralism and the Rule of Law.* New York: Oxford University Press.
Tamanaha, Brian Z. 2021. *Legal Pluralism Explained: History, Theory, Consequences.* New York: Oxford University Press.
Ubink, Janine. 2018. "Customary Legal Empowerment in Namibia and Ghana? Lessons about Access, Power and Participation in Non-State Justice Systems." *Development and Change* 49 (4): 930–50.
US Army. 2010. *Rule of Law Handbook: A Practitioner's Guide for Judge Advocates.* Charlottesville, VA: US Army.
US Mission Afghanistan. 2010. *U.S. Foreign Assistance for Afghanistan: Post Performance Management Plan 2011–2015.*
USAID. 2008. *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework.* Washington, DC: USAID.
———. 2009. *Improving the Rule of Law through Non-State Justice Institutions: Issues to Consider.* (Unpublished report).
———. 2010. *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework.* Washington, DC: USAID.
———. 2013. *USAID Strategy on Democracy, Human Rights and Governance.*
———. 2014. *Public Financial Management Risk Assessment Framework (PFMRAF) Manual: A Mandatory Reference for ADS Chapter 220.*
———. 2016. *The USAID/Afghanistan Plan for Transition.*
———. 2018. *Afghanistan Country Development Cooperation Strategy FY2019–2023.*
Venugopal, Rajesh. 2018. "Ineptitude, Ignorance, or Intent: the Social Construction of Failure in Development." *World Development* 106: 238–47.
Weigand, Florian. 2022. *Waiting for Dignity: Legitimacy and Authority in Afghanistan.* New York: Columbia University Press.
Wimpelmann, Torunn. 2013. "Nexuses of Knowledge and Power in Afghanistan: The Rise and Fall of the Informal Justice Assemblage." *Central Asian Survey* 32 (3): 406–22.
Young, Crawford. 1994. *The African Colonial State in Comparative Perspective.* New Haven, CT: Yale University Press.

Swenson, Geoffrey (2024) Promoting Law Beyond the State. *International Studies Quarterly,* https://doi.org/10.1093/isq/sqae102