

ARE WE FIGHTING THE RIGHT WAR?

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If Afghanistan becomes . . . a narco mafia state, we will have lost the war against terrorism there. Even if we capture Osama bin Laden and his henchmen . . . we will still have failed in our mission. So long as Afghanistan's narco warlords are allowed to grow, process, and traffic heroin and opium millions upon millions of dollars will end up flowing into terrorist hands. We may have ended Afghanistan as a training ground for al-Qaeda and other global terrorist groups, but until we go after the drug labs, the open air drug markets, and the traffickers themselves, terrorism will still be nurtured.¹

I. INTRODUCTION

On September 11, 2001, the United States was attacked—the Twin Towers fell into heaps of debris, the Pentagon was hit and lives were lost—all in a matter of moments.² Al-Qaeda and Osama bin Laden were charged with orchestrating the tragic events,³ and subsequent to Afghanistan's Taliban government's refusal to produce bin Laden, the Bush administration went forth with military action in Afghanistan.⁴ Within months, the Taliban fell from power.⁵

Simultaneously, the U.S. government created the 9/11 Commission (the "Commission") to investigate the events of September 11 and to recommend courses of action for counterterrorism initiatives while maintaining safety within the United States' borders.⁶ Pursuant to the Commission's recommendations, Congress enacted

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¹ *Afghanistan Drugs and Terrorism and U.S. Security Policy: Hearing Before the H. Comm. on Int'l Relations*, 108th Cong. 6 (2004) (statement of Rep. Henry Hyde, Chairman, House Comm. on Int'l Relations).

² See NAT'L COMM. ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMM. REPORT at 285, 314 (2004), [hereinafter 9/11 COMM. REP.] http://www.9-11commission.gov/report/911Report_Exec.htm.

³ U.S. DEP'T OF STATE, BACKGROUND NOTE: AFGHANISTAN (Dec. 2007), <http://www.state.gov/r/pa/ei/bgn/5380.htm> [hereinafter BACKGROUND NOTE: AFGHANISTAN].

⁴ *Id.*

⁵ *Id.*

⁶ See 9/11 COMM. REP., *supra* note 2 at xv-xviii.

a Formulation of long-term strategy for Afghanistan (the “Long-Term Strategy”), which called on the Bush Administration to pursue stabilizing and reconstruction efforts in Afghanistan.⁷ Due to Afghanistan’s long history and reliance on opium cultivation and drug trafficking as a means of supporting terrorist groups, creating a secure Afghanistan also meant creating a drug-free Afghanistan.⁸ Consequently, the Long-Term Strategy required that the Bush Administration’s plan for securing Afghanistan include the consideration and execution of counter-narcotics initiatives.⁹ In addition, Afghanistan implemented its own Counter Narcotics Drug Law in 2005, which codified drug trafficking offenses and corresponding punishments.¹⁰

In its National Drug Control Strategy, the Bush Administration addressed the task of meeting the objectives set forth in the Long-Term Strategy.¹¹ Specifically, the National Drug Control Strategy includes a five-pillar plan (the “Five Pillar Plan”) for eliminating the corrupt drug cultivation and trafficking practices in Afghanistan.¹² The Five Pillar Plan includes: (1) the Public Information Pillar (to encourage Afghan citizens to cease cultivating opium); (2) the Alternative Livelihoods pillar (to provide “economic alternatives to opium cultivation”); (3) the Poppy Elimination pillar (to eradicate the Opium poppy crop itself); (4) the Interdiction pillar (to destroy poppy production equipment and to arrest those who violate the efforts to curb drug production and trade); and (5) the Law Enforcement/Justice Reform pillar (to create a system for trying and punishing drug offenders).¹³

⁷ Formulation of Long-Term Strategy for Afghanistan, 22 U.S.C.A. § 7555 (West 2004).

⁸ *International Drug Trafficking and Terrorism: Before the Senate Judiciary Committee* (2003) (testimony of Steven C. McCraw, Assistant Director, Office of Intelligence, FBI), available at http://judiciary.senate.gov/testimony.cfm?id=764&wit_id=2113.

⁹ 22 U.S.C.A. § 7555 (West 2004).

¹⁰ Dr. Abdul Jabbar Sabit, Islamic Republic of Afghanistan, Counter Narcotics Drug Law [hereinafter *Afg. Drug Law*] (2005) (On file with author).

¹¹ The White House, Nat’l Drug Control Strategy at 3, 38 [hereinafter *Nat’l Strategy*] (February 2006), available at <http://www.whitehousedrugpolicy.gov/publications/policy/ndcs06/ndcs06.pdf>.

¹² *Id.* at 38–39. See also *Afghanistan Progress Report: Counternarcotics Efforts*, 109th Cong. (2006) [hereinafter *Afghanistan Progress Report*] (testimony of Thomas Schweich, Principle Deputy Assistant Sec’y for Int’l and Narcotics & Law Enforcement Affairs), available at <http://www.state.gov/p/inl/rls/rm/63098.htm>.

¹³ *Nat’l Strategy*, *supra* note 11 at 36–39. See also *Afghanistan Progress Report*, *supra* note 12.

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Despite the efforts of the Bush Administration and Congress to curb opium growth, production, and trafficking in Afghanistan, the United Nations Office on Drugs and Crime announced in a 2007 Annual Opium Poppy Survey that “in 2007 Afghanistan produced an extraordinary 8,200 tons of opium (34% more than in 2006), becoming practically the exclusive supplier of the world’s deadliest drug (93% of the global opiates market).”¹⁴ The repercussions of the increase in opium cultivation are grave: “The more money the traffickers make, the more they can give to the Taliban, the more weapons the insurgents can buy and the more dangerous the insurgency becomes.”¹⁵

This Note examines the United States’ failure to curb opium cultivation by assisting Afghanistan in the implementation of its Counter Narcotics Drug Laws and provides recommendations for reversing this failure. Part II of this Note examines the long history of opium poppy cultivation and heroin trafficking in and from Afghanistan. Part III discusses the link between terrorism and drug trafficking in Afghanistan. Part IV discusses United States and Afghan legislative and executive efforts, including the Long-Term Strategy, the Five Pillar Plan, and Afghanistan’s own Counter Narcotics Drug Law. Part V examines Afghanistan’s current status, post-implementation of the above-mentioned legislation, with a focus on Afghanistan’s judicial system and the important roles that both the customary and formal systems play. Part VI argues that failure to effectively enforce the laws is attributable to a lack of attention paid to Afghanistan’s judicial system and argues that the U.S. plan to handle drug activity should shift to favor long-term solutions. The United States’ experience in addressing narcotics activity in Colombia will be highlighted to demonstrate that similar mistakes made in Colombia should be avoided in Afghanistan. Part VII offers solutions for reversing the failure of the U.S. to meet objectives set forth in the aforementioned legislation.

In conclusion, this analysis will demonstrate that in order to truly fight the “War on Terror,” it is necessary to reduce opium

¹⁴ U.N. Office on Drugs and Crime, *Afghanistan Opium Survey 2007 Executive Summary* at iv [hereinafter *Opium Survey 2007*], available at http://www.unodc.org/pdf/research/AFG07_ExSum_web.pdf; *The Afghan Opium Situation: Briefing to the H. Comm. on Int’l Relations*, 109th Cong. 2 (2006) (statement of Antonio Maria Costa, Executive Director of the U.N. Office on Drugs and Crime), available at <http://merln.ndu.edu/archive/Afghanistan/congress/20Sep06Costa.pdf>.

¹⁵ Bill Powell, *Warlord or Druglord?*, TIME, Feb. 19, 2007, available at <http://www.time.com/time/printout/0,8816,1587252,00.html>.

cultivation in Afghanistan. The United States must work with Afghanistan to create an effective judicial system—one that better balances the customary and formal legal systems in Afghanistan, so that the currently implemented and crucial legislation can most effectively be enforced to curb opium cultivation and all of its grave consequences.

II. THE HISTORY BEHIND OPIUM CULTIVATION

In 1979, the Soviet Union invaded Afghanistan to fight against Mujahadeen insurgents who opposed the Marxist People's Democratic Party of Afghanistan.¹⁶ The brutal fighting in the countryside had devastating consequences, including a ruined irrigation system and mined pastures.¹⁷ In response to the war-torn economy, desperate farmers, seeking means of supporting their families, turned to opium cultivation.¹⁸ Thus, during the period of Soviet occupation, opium cultivation readily increased, particularly in the rural mountainous region.¹⁹ Opium cultivation was an attractive alternative for many reasons: it promised secure profits; poppy, from which opium was cultivated, was a low maintenance crop that could survive even in drought; and, as a non-perishable crop, opium could easily be stored.²⁰ Moreover, opium is easily

¹⁶ Lester W. Grau, *The Soviet-Afghan War: A SuperPower Mired in the Mountains*, 17 J. SLAVIC MIL. STUD. 129, 133–45 (Mar. 2004), available at <http://leav-www.army.mil/fmsso/documents/miredinmount.htm>.

The United States, smarting from the support that the Soviet Union had provided North Vietnam and the Vietcong during the Vietnam War, looked on aid as a way of reciprocating and giving the Soviet Union “a bloody nose”. NATO allies Britain, France, Italy and West Germany provided varying aid in support of the United States effort.

Id. at 144.

¹⁷ ISLAMIC REPUBLIC OF AFGHANISTAN MINISTRY OF COUNTER-NARCOTICS, AN UPDATED FIVE-YEAR STRATEGY FOR TACKLING THE ILLICIT DRUG PROBLEM 32 (2006) [hereinafter *Afghanistan's Five-Year Strategy*], available at http://www.fco.gov.uk/resources/en/pdf/pdf18/fco_nationaldrugcontrolstrategy. (On file with author).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

The majority of opium produced in the country is converted into heroin or morphine prior to leaving the country . . . [s]eizures of opium in the period 2002-2004 suggest that 71.5% of the harvest is transformed into morphine and/or heroin in Afghanistan before being sold, while the rest is sold in the form of opium.

Id. at 35. Massive “quantities of opium . . . are [then] transformed into heroin” at one of the numerous processing plants before the final heroin product is shipped to its final destination in Western Europe, Turkey and Russia. *Id.* Afghanistan's heroin market has also

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transportable and in high demand throughout the year.²¹ In addition to providing livelihoods for poor rural farmers, opium cultivation was fundamental to the war effort throughout Soviet occupation and its aftermath.²² “Some anti-Soviet mujahidin commanders encouraged and taxed opium cultivation and drug shipments, and, in some instances, participated in the narcotics trade directly as a means of both economic survival and military financing.”²³

All of the the Soviet troops were removed from Afghanistan by February of 1989.²⁴ The remaining circumstances, however, were anything but peaceful.²⁵ With U.S. funding gone, drug trafficking and other criminal activities increased,²⁶ and Afghanistan was left war-torn and without a strong centralized government or economy.²⁷ It was under these circumstances that the Taliban rose to power in the early 1990s.²⁸ Poppy production was fueled by Taliban rule during the mid-to-late 1990s and, unsurprisingly, it was

expanded into the United States. Garrett Therolf, *Afghan Heroin’s Surge Poses Danger in U.S.*, L.A. TIMES, Dec. 26, 2006, available at <http://www.rapiddetox.net/forums/viewtopic.php?f=7&t=16>. In fact, “supplies of highly potent Afghan heroin in the United States are growing so fast that the pure white powder is rapidly overtaking lower-quality Mexican heroin, prompting fears of increased addiction and overdoses.” *Id.*

²¹ John A. Glaze, *Opium and Afghanistan: Reassessing U.S. Counternarcotics Strategy*, STRATEGIC STUDIES INSTITUTE (Oct. 2007) at 5, available at <http://www.strategicstudiesinstitute.army.mil/pdf/files/pub804.pdf>. Further,

Opium poppy is also drought resistant, easy to transport and store, and, unlike many crops, requires no refrigeration and does not spoil. With Afghanistan’s limited irrigation, electricity, roads, and other infrastructure, growing traditional crops can be extremely difficult. In many cases, farmers are simply unable to support their families growing traditional crops; and because most rural farmers are uneducated and illiterate, they have few economically viable alternatives to growing opium poppy.

Id. The United Nations Office on Drugs and Crime also noted that Afghan farmers grew opium because “opium poppy is a profitable crop, produced with cheap labor (women, children and refugees)” and because Opium could be used as collateral for credit. U.N. Office on Drugs and Crime, *The Opium Economy in Afghanistan: An International Problem*, at 10, (2003) [hereinafter *The Opium Economy*], available at http://www.unodc.org/pdf/publications/afg_opium_economy_www.pdf.

²² CHRISTOPHER M. BLANCHARD, CRS REPORT FOR CONGRESS, *AFGHANISTAN: NARCOTICS AND U.S. POLICY*, at 6–7 (2004) [hereinafter *BLANCHARD 2004*].

²³ *Id.* at 7.

²⁴ Grau, *supra* note 16, at 141.

²⁵ BLANCHARD 2004, *supra* note 22, at 7–8.

²⁶ BLANCHARD 2004, *supra* note 22, at 7.

²⁷ BLANCHARD 2004, *supra* note 22, at 7.

²⁸ *Id.* *Afghanistan’s Five-Year Strategy*, *supra* note 17, at 33.

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the Taliban that benefited from this practice the most.²⁹ From 1992 to 1995, Afghanistan produced 2,200-2,400 metric tons of poppy each year, and all profits were taxed by the Taliban.³⁰ Tax revenues from poppy harvesting were used to pay for government and military necessities such as “arms, ammunition, soldiers’ salaries, fuel, [and] food.”³¹

In 1999 Afghanistan cultivated over 4,500 Metric Tons of opium, which the world market eagerly consumed.³² As a result, the international community, particularly those states most affected by heroin and opium drug trafficking, put pressure on the Taliban to encourage farmers to halt poppy growth in order to reverse the growing trend of opium and heroin production.³³ The Taliban eventually bowed to international pressures, declaring a ban on opium cultivation in late 2000.³⁴ Nonetheless, the Taliban permitted trading of the illegal drugs to continue, (and taxed the existing stocks of such drugs).³⁵ By allowing the drug trade and trafficking to persist, now with a decrease in supply and a contin-

²⁹ See *Afghanistan’s Five-Year Strategy*, *supra* note 17, at 33; BLANCHARD 2004, *supra* note 22, at 7.

³⁰ See *Afghanistan’s Five-Year Strategy*, *supra* note 17, at 33; *The Opium Economy*, *supra* note 21, at 92; BLANCHARD 2004, *supra* note 22, at 7. “The Taliban government collected an agricultural tax (approximately 10%, paid in kind), known as *ushr*, and a traditional Islamic tithe known as *zakat* (variable percentages). The Taliban also taxed opium traders and transport syndicates involved in the transportation of opiates.” *Id.* at 7, n.10.

³¹ *Afghanistan’s Five-Year Strategy*, *supra* note 17, at 33. “Over the 1994-2000 period, gross income from the opium was about \$150 million/year (\$750/family) These are extraordinary revenues in a country where the average wage does not exceed \$2 per day.” *The Opium Economy*, *supra* note 21, at 7. According to the Drug Enforcement Agency of the United States, by 2000, Afghanistan was responsible for more than seventy percent of the world’s supply of illicit Opium. *Status of Security and Stability in Afghanistan: Before the H. Comm. on Armed Services*, 108th Cong. 2 (2006) (statement of Karen P. Tandy, Admin’r, Drug Enforcement Admin.) [hereinafter *Status of Security and Stability in Afghanistan*], available at <http://www.usdoj.gov/dea/pubs/cngrtest/ct062806.html>.

³² BLANCHARD 2004, *supra* note 22, at 7.

³³ *Id.*

³⁴ *Id.* See *Afghanistan Drugs and Terrorism and U.S. Security: Before the H. Comm. on Int’l Relations*, 108th Cong. 17 (2004), [hereinafter *Afghanistan Drugs and Terrorism and U.S. Security*] (statement of Karen P. Tandy, Admin’r, Drug Enforcement Admin.), available at http://www.ahrn.net/library_upload/uploadfile/file2217.pdf. As a result of the Taliban’s efforts, Opium production dropped from an estimated 3,656 metric tons in 2000 to 74 metric tons in 2001. *Id.*

³⁵ *Afghanistan Drugs and Terrorism and U.S. Security*, *supra* note 34, at 35. There is speculation that the Taliban’s ban on opium production was simply a way to raise the price of opium. *Id.* Prior to the Taliban government’s “ban” on poppy cultivation, there was an abundant supply of the drug flowing from Afghanistan, and consequently a low price. *Id.* By banning the drug, the Taliban could ensure a rise in the price. *Id.*

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ued demand, the Taliban's ban "increased prices in 2001 and revalued stocks by a factor of 10; more liquidity in the hands of traders thus created further incentive for the opium economy."³⁶

With the fall of the Taliban after September 11, the cultivation of opium quickly rose.³⁷ The increase in cultivation has been attributed to the economic needs of impoverished rural farmers, who were financially ruined by the Taliban's ban on opium poppy harvesting and motivated by an increase in opium and heroin prices.³⁸ On January 17, 2002, the Afghan Interim Administration prohibited opium production, but the ban proved unsuccessful.³⁹ By the end of 2002, 3,400 metric tons of poppy opium was cultivated, putting Afghanistan on the map as the global leader in illegitimate poppy cultivation.⁴⁰

III. LINKING TERRORISM AND NARCOTICS

In the aftermath of September 11, the U.S. government vowed to bring "[its] enemies to justice, or bring justice to [its] enemies,"⁴¹ thus declaring the "War on Terror." In doing so, the Bush Administration vowed to continue its efforts "until every terrorist group of global reach [had] been found, stopped and defeated."⁴² For the U.S. government, fighting the "War on Terror" entails, among other efforts, ridding Afghanistan of terrorist groups (including Al-Qaeda), dismantling training camps, and disabling support net-

³⁶ *The Opium Economy*, *supra* note 21, at 10.

³⁷ BLANCHARD 2004, *supra* note 22, at 8.

³⁸ *Afghanistan's Five-Year Strategy*, *supra* note 17, at 33. The Islamic Republic of Afghanistan Ministry of Counter-Narcotics also noted that:

[C]ultivation was expedited because the fall of the Taliban regime coincided with the planting season. In the absence of any Government authority from October 2001 until the establishment of the Transitional Authority in 2002, farmers could plant their fields uninhibitedly and traffickers could ply their trade openly. In the first year following the collapse of the Taliban, large-scale opium cultivation resumed in the south (Helmand), east (Nangarhar) and north (Badakhshan).

Id. at 33–34.

³⁹ BLANCHARD 2004, *supra* note 22, at 8. By 2002, opium poppy cultivation returned to substantial levels, with an estimated 1,278 metric tons cultivated (as opposed to the estimated 74 tons cultivated in 2001). See *Afghanistan Drugs and Terrorism and U.S. Security* (statement of Karen P. Tandy, Admin'r, Drug Enforcement Admin.), *supra* note 34, at 18.

⁴⁰ BLANCHARD 2004, *supra* note 22, at 8.

⁴¹ President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

⁴² *Id.*

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works.⁴³ However, such initiatives are undermined by the growth and trade of narcotics in Afghanistan.⁴⁴ To this end, “Afghan authorities and international observers have identified negative trends associated with the narcotics trade as barriers to the reestablishment of security, the rule of law, and a legitimate economy throughout Afghanistan—goals which [sic] U.S. and Afghan authorities have characterized as essential for the country’s long term stability.”⁴⁵

The relationship between extremist groups and the narcotics trade is a strong one that fosters a destructive cycle. The destructive cycle is generally as follows: first, extremist groups and warlords undermine an emerging democratic government in Afghanistan. As a result, the government is weakened by the warlords, and cannot provide appropriate security to citizens. Without the appropriate authority and security, farmers are free to cultivate opium, and it is this opium that feeds the narco-state and economy.⁴⁶ The reestablished drug-economy provides warlords and terrorist groups with necessary funding, which only strengthens these groups, leading to further corruption and weakening of the Afghan government.⁴⁷ Thus, the growth of opium products is not merely a drug problem but an *Afghanistan* problem, one that threatens the very stability that the United States, Afghanistan, and the international community vowed to create in the aftermath of September 11.⁴⁸

⁴³ *Id.*

⁴⁴ BLANCHARD 2004, *supra* note 22, at 11.

⁴⁵ *Id.* at 12.

⁴⁶ See *Afghanistan Drugs and Terrorism and U.S. Security* (statement of Thomas W. O’Connell, Assistant Sec’y of Defense for Special Operations and Low-Intensity Conflict, U.S. Dep’t of Defense), *supra* note 34, at 22 (“The infrastructure of smuggling that supports narcotics trafficking also services transportation and logistics needs. Local leaders and commanders can use profits from narcotics to oppose a unified Afghan government that hopes to provide full security to its citizens”).

⁴⁷ See BLANCHARD 2004, *supra* note 22, at 13. “Some observers fear that as the Afghan government develops stronger counternarcotics policies and capabilities, groups that are involved with the opium trade will join others in seeking to corrupt or subvert Afghanistan’s democratic process” *Id.* at 14.

⁴⁸ *Id.* at 11–18 (emphasis added). See also *Afghanistan Drugs and Terrorism and U.S. Security* (statement of Thomas W. O’Connell, Assistant Sec’y of Defense for Special Operations and Low-Intensity Conflict, U.S. Dep’t of Defense), *supra* note 34, at 22. Further, if the drug trade continues to dominate Afghanistan’s economy as it does now, the democratically elected Afghan Government will not be able to develop into a functioning democracy. See also *U.S. Counternarcotics Programs: Hearing Before the H. Appropriations Comm., Subcomm. on Foreign Operations, Export Financing and Related Programs*, 109th Cong. (2005) [hereinafter *U.S. Counternarcotics Efforts in Afghanistan*] (testimony of

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To understand and address Afghanistan's current instability, it is necessary to examine the "double threat" of terrorist action and the narcotics trade⁴⁹ as the "the opium problem cannot be contained solely by counter-narcotic measures, nor can counter-insurgency disregard the threat posed by drug-related funding to terrorists."⁵⁰ Indeed, cultivation provides insurgent terrorist groups as well as the Taliban with necessary funding to survive and gain resources and momentum to carry out terrorist acts.⁵¹ A study has shown, for example, that the Taliban most likely receives money from the drug trafficking trade and that drug traffickers most likely support the Taliban with people, equipment and money.⁵² Even Osama bin Laden himself benefits from opium cultivation—paying off warlords and financing his team of bodyguards with drug money.⁵³ According to United States Congressman Mark Kirk of Illinois, Bin Laden has "reaped \$28 million a year in illicit heroin sales."⁵⁴ Thus, Kirk suggests that in order to curb the growth of terrorist groups in Afghanistan, it is necessary to cut off the hand, in this case the drug money, that feeds them.⁵⁵

IV. U.S. AND AFGHANISTAN LEGISLATION AND INITIATIVES

A. *The Long-Term Strategy and Afghanistan's Counter Narcotics Drug Law*

In the aftermath of September 11, 2001, Congress enacted the Long-Term Strategy, which required the Bush Administration to formulate a strategy for addressing development and security

Nancy J. Powell, Acting Assistant Sec'y for Int'l and Narcotics & Law Enforcement Affairs), available at <http://www.state.gov/p/inl/rls/rm/53967.htm>.

⁴⁹ *UN Drug Agency Seeks NATO Help in Eradicating Afghan Opium Trade*, ONLINE INTERNATIONAL NEW NETWORK, (2004) available at <http://www.onlinenews.com.pk/details.php?id=120751>.

⁵⁰ *Opium Survey 2007*, *supra* note 14, at v.

⁵¹ See BLANCHARD 2004, *supra* note 22, at 15.

Of the \$3 billion earned last year by Afghan narco-traffickers, roughly \$800 million trickles down to the Afghan farmer who grows the crop. According to a senior Western official in Kabul, a small portion of that sum is 'more than enough to finance' the insurgency—and the Taliban gets more than a small portion.

Powell, *supra* note 15.

⁵² BLANCHARD 2004, *supra* note 22, at 16. It is also probable that the Taliban is telling farmers to grow opium poppy. *Id.*

⁵³ Rowan Scarborough, *Heroin Traffic Finances bin Laden.*, WASH. TIMES, Dec. 6, 2004, available at http://www.house.gov/list/hearing/il10_kirk/afghanistandec6.html.

⁵⁴ *Id.*

⁵⁵ *Id.*

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needs in Afghanistan.⁵⁶ Addressing counter narcotics activity in Afghanistan was one of the many initiatives addressed in the legislation, commanding that “no later than 180 days after December 17, 2004, the President shall formulate a 5-year strategy for Afghanistan” The Act also requires such

strategy . . . [to] include specific and measurable goals for addressing the long-term development and security needs of Afghanistan, including sectors such as agriculture and irrigation, parliamentary and democratic development, the judicial system and rule of law . . . counternarcotics, police, border security, anti-corruption, and other law enforcement activities⁵⁷

Afghanistan has also enacted legislation targeted at addressing opium cultivation and trafficking, and in line with U.S. thinking, Afghanistan adopted a new Constitution in 2004.⁵⁸ Article 7 of Afghanistan’s Constitution provides, in part, that “the state prevents all types of terrorist activities, production and consumption of intoxicants, production and smuggling of narcotics.”⁵⁹ Pursuant to Article 7 of the Constitution, Afghanistan enacted a comprehensive Counter Narcotics Drug Law in December 2005.⁶⁰ Article 1 of the Counter Narcotics Drug Law states that its purpose is “to prevent the cultivation of . . . narcotic drugs, and to control psychotropic substances, chemical precursors, and equipment used in manufacturing, producing, or processing of narcotic drugs and psychotropic substances.”⁶¹

Furthermore, Chapter IV of the Law establishes penalties for drug trafficking, cultivation and manufacturing offenses.⁶² The Law provides that anyone who takes part in the unauthorized or unlicensed “production, manufacture, distribution, possession, extraction, preparation, processing, offering for sale, purchasing, selling, delivery, [and] brokerage” of drugs is in violation of a drug trafficking offense.⁶³ Designated sentences for drug trafficking offenses are clearly outlined in the Law, reserving more harsh fines

⁵⁶ 22 U.S.C.A § 7555(a)(1) (West 2004).

⁵⁷ *Id.* § 7555(a)(2).

⁵⁸ Afg. Const. art. 7, available at <http://arabic.cnn.com/afghanistan/ConstitutionAfghanistan.pdf>; BACKGROUND NOTE: AFGHANISTAN, *supra* note 3. See *Afghanistan’s Five-Year Strategy*, *supra* note 17, at 43.

⁵⁹ *Id.*

⁶⁰ Afg. Drug Law, *supra* note 10.

⁶¹ *Id.* at art. 1.

⁶² *Id.* at art. 15, 16, 19, 25, 26.

⁶³ *Id.* at art. 15(1)(a).

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and longer jail sentences for those who cultivate, manufacture, or traffic larger quantities of illegal substances.⁶⁴

B. *The Five Pillar Plan*

Subsequent to enacting the Long-Term Strategy to curb the growth, production and trafficking of opium in Afghanistan, the United States implemented a Five Pillar Plan to address the drug situation in Afghanistan. The “pillars” of the plan include: public information, alternative livelihoods, poppy eliminations/eradication program, interdiction and justice reform.⁶⁵

The public information pillar was implemented to change the Afghan peoples’ attitudes towards the cultivation of poppy.⁶⁶ The public information pillar includes a media campaign to send anti-drug messages through a variety of media including radio, television, posters and advertisements.⁶⁷ The messages convey the idea that cultivating poppy negatively affects Afghanistan and that it is contrary to Islamic principles.⁶⁸ For example, one of the more popular advertisements depicted “a prosperous farmer surrounded by vegetables and a depiction of a miserable one in an eradicated, mowed-down poppy field.”⁶⁹

The alternative livelihoods pillar consists of four parts: 1) the immediate needs element, which provides former poppy farmers with cash for work as a substitute source of income from opium; 2) the comprehensive development element, which includes projects

⁶⁴ *Id.* at art. 16. For example, those who commit a drug trafficking offense that involves less than ten grams of opium receive a fine of “between 5000 [sic] Afs and 10,000 Afs” and up to three months imprisonment, whereas someone who commits the same crime but is trafficking over fifty kilograms of opium receives “life imprisonment and a fine of between 1,500,000 Afs and 5,000,000 Afs.” *Id.* at art. 16(2).

⁶⁵ See Nat’l Strategy, *supra* note 11, at 36–39; *Afghanistan Progress Report*, *supra* note 12. U.S. Dep’t of State, NATO Supreme Commander Praises Progress of Afghan Army (Sept. 21, 2006), available at <http://www.america.gov/st/washfile-english/2006/September/20060921183416adynned0.1906855.html>.

⁶⁶ *U.S. Counternarcotics Efforts in Afghanistan*, *supra* note 48.

⁶⁷ *Id.* See also BLANCHARD 2004, *supra* note 22, at 27; Nat’l Strategy, *supra* note 11, at 36–39; *Afghanistan Progress Report*, *supra* note 12.

⁶⁸ *Afghanistan Progress Report*, *supra* note 12. In 2005, Islamic religious leaders met to discuss the importance of prohibiting the growth of poppy and how the practice of doing so was contrary to Islamic principles. *Id.* Following the meeting “local religious leaders have been delivering anti-poppy messages to congregations, and counternarcotics messages have been delivered via loudspeakers at mosques.” *Id.*

⁶⁹ *Id.* (stating that information efforts are timed according to the planting season so that between August and November, when poppy is planted, there are increased efforts to deliver anti-drug messages to the public).

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that will promote long-term economic growth and permanent economic alternatives for poppy production; 3) high visibility projects to target groups that are not covered by the comprehensive development plan; and 4) good performance funds that include “sustainable economic development initiatives in provinces where leadership and communities are committed to discourage poppy production”⁷⁰

The objective of the eradication pillar of the Five Pillar Plan is to eliminate the poppy crop.⁷¹ To carry out this objective, the following programs have been created: (1) The Poppy Elimination Program, to support Afghan authorities in urging poppy farmers to refrain from planting the crop; (2) The Afghan Eradication Force, to manually spray the crop; and (3) an aerial support component, to supplement aerial spraying.⁷² According to some experts, eradication efforts are critical for providing a vital deterrence effect for cultivation.⁷³ The eradication efforts have widely been supported

⁷⁰ Nat'l Strategy, *supra* note 11, at 39.

⁷¹ U.S. Counternarcotics Efforts in Afghanistan, *supra* note 48; See also BLANCHARD 2004, *supra* note 22, at 32; Nat'l Strategy, *supra* note 11, at 38; *Afghanistan Progress Report*, *supra* note 12.

⁷² U.S. Dep't of State, International Narcotics and Law Enforcement: FY 2007 Budget Justification (Apr. 2006) [hereinafter 2007 Budget Justification], *available at* <http://www.state.gov/p/inl/rls/rpt/cbj/fy2007/71876.htm> (last visited Mar. 13, 2008).

⁷³ *Afghanistan Progress Report*, *supra* note 12. In light of this belief, the Poppy Elimination Programs (PEP), made up of Afghan, U.S. and international experts, was created to handle poppy harvesting in poppy producing provinces. *Id.* The “major poppy producing provinces” in Afghanistan are Kandahar, Nangarhar, Uruzgan, Farah, Badakhshan, Helmand, and Balkh. *Id.* Specifically, the PEPS are “responsible for coordinating public information campaigns and alternative livelihoods programs, monitoring cultivation and compliance, reporting significant developments to senior levels of the Afghan Government, verifying provincial eradication efforts, and, when necessary, requesting eradication by national authorities.” *Id.* In addition to the PEPs, the Afghan Eradication Force (AEF), composed of approximately 600 eradicators and security personnel, was developed to be deployed by the Afghan government for supplementing provincial efforts to meet established objectives of eliminating the crop itself. *Id.* The U.S. also supported the creation of the Central Poppy Eradication Force (CPEF), which eradicates the poppy itself based on statistics and data provided by the Central Eradication Planning Cell (CPEC). CHRISTOPHER M. BLANCHARD, CRS REPORT FOR CONGRESS, AFGHANISTAN: NARCOTICS AND U.S. POLICY, at 26 (2006) [hereinafter BLANCHARD 2006], *available at* <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-8650:1>. The CPEC is a British intelligence center whose primary responsibility it is to survey, target, and monitor the success or failure of the eradication efforts. *Id.* There were plans to train 3,000 additional CPEF personnel by the end of 2005, “but after the CPEF failed to reach its goals and targets for 2005,” the U.S. and Afghanistan began to favor locally managed eradication efforts. *Id.* at 26–27. See also Senlis Council, *Afghanistan Five Years Later: The Return of the Taliban, From 2001, Failed Counter-Narcotics Policy 7*, (2006), http://www.senliscouncil.net/modules/publications/Afghanistan_Five_Years_Later (critics of eradication asserting that “the inter-

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by the U.S. government.⁷⁴

The interdiction pillar was implemented to “build Afghan capacity to disrupt and dismantle the most significant drug trafficking organizations operating in Afghanistan through the arrest and prosecution of the command and control elements of these organizations.”⁷⁵ To that end, the Drug Enforcement Agency (DEA) has helped train officers in Afghanistan to identify and disrupt drug trafficking organizations.⁷⁶ DEA Foreign Advisory and Support Teams (FAST) have been deployed to Afghanistan “to provide guidance and conduct . . . investigations . . . [of] illicit drug trafficking organizations.”⁷⁷ Currently, the U.S. military has a limited role in targeting drug production facilities.⁷⁸

The final pillar of the Plan is the law enforcement and justice reform pillar, which was established to provide “a framework of laws and processes that will support counternarcotics law enforcement in Afghanistan.”⁷⁹ The pillar’s objective is in line with the goal of prosecuting and punishing drug traffickers as established in Afghanistan’s Counter Narcotics Drug Law.⁸⁰ Afghanistan’s Counter Narcotics Drug Law outlines the process for adjudicating

national community must stop attacks on the livelihoods of poor rural communities: all poppy eradication operations must stop. Aggressive crop eradication operations accelerate the deterioration of security.”).

⁷⁴ See *U.S. Counternarcotics Efforts in Afghanistan*, *supra* note 48; See also BLANCHARD 2004, *supra* note 22, at 32; Nat’l Strategy, *supra* note 11, at 39; *Afghanistan Progress Report*, *supra* note 12.

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⁷⁵ *Afghanistan Progress Report*, *supra* note 12. “The primary U.S.-led effort, known as ‘Operation Containment’ was designed to ‘implement a joint strategy to deprive drug trafficking organizations of their market access and international terrorist groups of financial support from drugs, precursor chemicals, weapons, ammunition and currency.’” BLANCHARD 2004 *supra* note 22, at 24. The DEA reports that Operation Containment was responsible for seizing “2.4 metric tons of heroin, 985 kilograms of morphine base, three metric tons of opium gum, 152.9 metric tons of cannabis, and 195 arrests’ in the first quarter of 2005.” BLANCHARD 2006, *supra* note 73, at 31.

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⁷⁶ BLANCHARD 2004, *supra* note 22, at 25.

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⁷⁷ *Id.* at 29.

⁷⁸ *Id.* at 28. Current U.S. Department of Defense directives do not allow for the U.S. military to target drug production facilities; however, the military is allowed to destroy these facilities and drug infrastructure in the course of sanctioned counterterrorism efforts. *Id.* at 28. Congressman Henry Hyde, Chairman of the Committee on International Relations, stated, “Let me make clear that I do not want our military forces already tasked with the vital counter-terrorism and stability operations to become Afghanistan’s anti-narcotics police.” *Afghanistan Drugs and Terrorism and U.S. Security: Before the Committee on International Relations House of Representatives*, *supra* note 1, at 2.

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⁷⁹ *U.S. Counternarcotics Efforts in Afghanistan*, *supra* note 48.

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⁸⁰ See *Afg. Drug Law*, *supra* note 10.

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drug-related offenses.⁸¹ Article 34(1) establishes Narcotics Tribunals within Kabul's Primary Provincial Court and Appellate Provincial Court.⁸² The Narcotics Tribunals have "exclusive jurisdiction throughout Afghanistan over drug trafficking offenses" where the trafficked substance meets specified weight requirements.⁸³ In cases where the trafficked substance does not meet the specified weight requirements, Public Security Tribunals of Provincial Courts have jurisdiction.⁸⁴ The judicial reform program supports this newly formed judicial structure and aims to strengthen the formal court system.⁸⁵

The judicial reform pillar aims to professionalize Afghanistan's formal justice system in order to improve the criminal justice system in Afghanistan.⁸⁶ Professionalizing the formal justice system is also important to the new Afghan government, as evidenced by Article 118 of the Afghanistan Constitution, which provides that judges "[s]hall have a higher education in law or in Islamic jurisprudence, . . . sufficient expertise and experience in the judicial system of Afghanistan . . . [,] high ethical standards[,] and a reputation of good deeds."⁸⁷ In furtherance of this objective, the U.S. has dispatched advisors, including senior prosecutors from the Department of Justice, to Kabul to provide guidance for building the Vertical Prosecution Task Force (VPTF).⁸⁸ The goal is to comprise the VPTF with "judges, prosecutors, investigators and support personnel, who will be organized, trained and mentored by the [U.S. Department of Justice] prosecutors."⁸⁹ The second prong of the

⁸¹ See *id.* at art. 34.

⁸² *Id.* at art. 34(1). The formal court structure in Afghanistan is such that The Supreme Court has the highest authority, followed by the Court of Appeals which is established in each province. And, in each province where there is a Court of Appeals, there are primary Courts which include the central provincial primary court as well as the District Primary Court. *Id.*

⁸³ See Afg. Drug Law, *supra* note 10, at art. 34(1)–(4). **R**

⁸⁴ *Id.* at art. 34(1)–(5).

⁸⁵ See BLANCHARD 2004, *supra* note 22, at 27. **R**

⁸⁶ *Id.*

⁸⁷ Afg. Const. art. 118.

⁸⁸ U.S. *Counternarcotics Efforts in Afghanistan*, *supra* note 48. **R**

⁸⁹ *Id.* In addition to the VPTF, the Counter Narcotics Justice Center (CNJC) (designed to temporarily handle the trials and detentions of drug traffickers), the U.S.-Afghanistan Master of Law Program, and the National Legal Training Center were established. *Id.* The Five Pillar Plan aimed for the CNJC to "hold mid-to-high-level narcotics offenders who are awaiting or are on trial by the Vertical Prosecution Task Force, [and to] . . .incarcerate convicted offenders in a separate wing until the permanent counternarcotics prison is complete." *Id.*

Justice Reform program is fostered by the Corrections System Support Program (CSSP), which provides direction to help establish Afghanistan's corrections program.⁹⁰ The program also aims to assist in operating prisons and correctional facilities with great attention to drug trafficking areas.⁹¹

Thus, in 2004, the Long-Term Strategy, Afghanistan's Constitution, and Afghanistan's Counter Narcotics Drug Law each addressed and attempted to lay out plans for correcting the dire state of Afghanistan's opium cultivation and trafficking trends.⁹² The legislation is in agreement that the current situation in Afghanistan requires serious attention and clearly provides guidelines within the parameters of Afghanistan's formal legislative and judicial systems for addressing counter narcotics objectives.⁹³ The solution for the opium cultivation problem, then, is not additional legislation, but rather finding the most effective way to enforce currently enacted laws.

V. POST-IMPLEMENTATION: WHERE AFGHANISTAN STANDS TODAY

A. Afghanistan's Current Opium Cultivation Statistics

Despite efforts to implement the Five Pillar Plan, the U.S. and the international community have failed in their efforts to curb the growth and production of opium in Afghanistan.⁹⁴ In a briefing before the Committee on International Relations, Antonio Maria Costa, Executive Director for the United Nations Office on Drugs and Crime, stated that "now Afghanistan is in danger of becoming

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See generally Afg. Const. *supra* note 58; Afg. Drug Law *supra* note 10; BLANCHARD 2004 *supra* note 22, at 26–29.

⁹³ See generally BLANCHARD 2004 *supra* note 22, at 26–29; Nat'l Strategy, *supra* note 11; 22 U.S.C.A. § 7555 (West 2004).

⁹⁴ Philip Shishkin & David Crawford, *In Afghanistan, Heroin Trade Soars Despite U.S. Aid*, PITTSBURGH POST-GAZETTE, Jan. 18, 2006, available at <http://www.post-gazette.com/pg/06018/640103.stm>. See also *Still Ours to Lose: Afghanistan on the Brink: Hearing Before the S. Foreign Relations Comm.* (Sept. 21, 2006) [hereinafter *Ours to Lose*] (written statement of Barnett R. Rubin, author of the Council on Foreign Relations Special Report), available at <http://www.senate.gov/~foreign/testimony/2006/RubinTestimony060921.pdf>; *Progress in Efforts to Control Afghan Poppy Cultivation: Briefing Before Foreign Press Ctr.* (Aug. 31, 2006) [hereinafter *Progress in Efforts to Control Afghan Poppy Cultivation*] (statement of Tom Schweich, Deputy Assistant Sec'y of State for Bureau of Int'l Narcotics & Law Enforcement Affairs), available at <http://fpc.state.gov/fpc/71736.htm>.

a narco-state, where drugs determine power, rot society and fund terrorism.”⁹⁵

In August 2007, the United Nations Office on Drugs and Crime released reports showing that in 2007 the opium cultivation in Afghanistan had risen by 17% to 193,000 hectares (compared to 165,000 hectares in 2006 and 104,000 hectares in 2005)⁹⁶ and that Afghanistan was responsible for producing 93% of the world’s opiates (the major ingredient in heroin).⁹⁷ To put these numbers in perspective, the sheer amount of Afghan land currently used for cultivating and producing opium is now larger than the total land mass under coca cultivation in Latin America—Colombia, Peru, and Bolivia combined.⁹⁸ In the history of the world, no other country has produced narcotics in such a perilous proportions since China in the 19th century, which incidentally had a population fifteen times greater than Afghanistan’s is currently.⁹⁹

Clearly, these findings—that poppy cultivation has increased, despite U.S. efforts to eliminate such cultivation by meeting objectives established in the Afghanistan Freedom Support Act and the Five Pillar Plan—contradict the United States’ ultimate goal of creating a free and secure Afghanistan. The natural questions to ask, therefore, are why, despite U.S. efforts, did the plan so dramatically fail and what can be done to reverse this failure? This Note examines these questions.

B. *Where the Enforcement of the Legislation Went Wrong: Afghanistan’s Judiciary*

Although Afghanistan has enacted a comprehensive Counter Narcotics Law,¹⁰⁰ Afghanistan’s judicial system is too weak to assist in implementing this legislation, resulting in an unprecedented in-

⁹⁵ *The Afghan Opium Situation: Briefing to the H. Comm. on Int’l Relations, supra* note 14.

⁹⁶ *The Opium Survey 2007, supra* note 14, at 3.

⁹⁷ *Id.* at iv. Most of the increase in opium cultivation was seen in the southwestern provinces, on the border of Pakistan, particularly in the province of Helmand. There has been a decrease in cultivation in the northern and central regions, where there is more governmental control. *Id.* See also *The Afghan Opium Situation: Briefing to the H. Comm. on Int’l Relations, supra* note 14 (Maria Costa added that “the yield from [the 2006] harvest [was] 6,100 tons of opium . . . [and that] over 600 tons of heroin will flood the world market with a potential street value of well over \$50 billion. That’s a massive windfall for organized crime, insurgents and terrorists.”).

⁹⁸ *The Opium Survey 2007, supra* note 14, at iv.

⁹⁹ *Id.*

¹⁰⁰ Afg. Drug Law, *supra* note 10.

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crease in opium cultivation. The Five Pillar Plan has failed to sufficiently support Afghanistan's judiciary in order for the Counter Narcotics Act to be successfully enforced.¹⁰¹ General James Jones, NATO Supreme Commander, stated that "reforming the Afghan justice system, though not NATO's responsibility in Afghanistan, 'is one of the pillars that needs . . . the most attention in the shortest amount of time.'"¹⁰² In an April 2006 report, the U.S. State Department noted that Afghanistan still did not have a functioning judiciary to handle the grave narcotics problem, and that one was necessary to assist in bringing narcotics offenders to justice.¹⁰³ Furthermore, a March 2006 report by the U.S. State Department Bureau for International Narcotics and Law Enforcement Affairs, stated that "efforts to interdict precursor substances and processing equipment also suffer from limited police and judicial capacity."¹⁰⁴ And, as of August 2007, the U.S. State Department reported, "the drug trade [in Afghanistan] has undermined virtually every aspect of the Government of Afghanistan's (GOA) drive to build political stability, economic growth, and rule of law and its capacity to address internal security problems."¹⁰⁵ Others have asserted, "Afghanistan cannot be said to have a genuine *system* of justice at present. To be sure, there are many appointed judges and prosecutors in the country, there are laws on the books, and there are occasional trials, but there is no functioning *system*."¹⁰⁶

Specifically, Afghanistan's judicial system fails to adequately balance its formal and customary legal systems so that its laws are properly enforced.¹⁰⁷ The Afghan judicial system also suffers from

¹⁰¹ See generally NATO Supreme Commander Praises Progress of Afghan Army, *supra* note 65.

¹⁰² See *id.*

¹⁰³ See 2007 Budget Justification, *supra* note 72.

¹⁰⁴ Bureau of Int'l Narcotics and Law Enforcement Affairs, International Narcotics Control Strategy Report (Mar. 2007), available at <http://www.state.gov/p/inl/rls/nrcrpt/2007/vol1/html/80858.htm>.

¹⁰⁵ THOMAS A. SCHWEICH, U.S. DEP'T OF STATE, U.S. COUNTERNARCOTICS STRATEGY FOR AFGHANISTAN 1 (2007) [hereinafter DEP'T OF STATE 2007 REPORT], available at <http://www.state.gov/documents/organization/90671.pdf>.

¹⁰⁶ U.S. INST. OF PEACE: SPECIAL REPORT 117, ESTABLISHING THE RULE OF LAW IN AFGHANISTAN 5 (2004), available at www.usip.org/pubs/special-reports/sr.117.htm [hereinafter USIP Special Report 117].

¹⁰⁷ See generally Amy Senier, *Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law*, FLETCHER SCH. ONLINE J. ISSUES RELATED TO SW. ASIA AND ISLAMIC CIVILIZATION, at 2 (Spring 2006), available at http://fletcher.tufts.edu/al_nakhlah/archives/spring2006/senier.pdf.

a lack of professionalism and high degree of corruption.¹⁰⁸ Because of these conditions, the judiciary is currently incapable of enforcing the Counter Narcotics Drug Law.

1. Which Law is Law—Afghanistan’s Customary Law and Formal Law

The first problem with Afghanistan’s legal system is that a clear rule of law does not exist.¹⁰⁹ The framework of Afghanistan’s law is not limited to Afghanistan’s new Constitution and recent legislation such as the Counter Narcotics Drug law.¹¹⁰ Rather, tribal communities in Afghanistan employ their own system of non-codified customary law, guided in part by the principles of Islamic law known as *shari’a*.¹¹¹ There are approximately fifty-five ethnic groups in Afghanistan’s tribal areas and each one has its own customary legal system.¹¹² Although there are notable differences in each legal system, there is a common trend to utilize mediation and arbitration as a means of settling disputes.¹¹³ Furthermore, most customary systems in Afghanistan’s tribal areas are founded on a

¹⁰⁸ See USIP Special Report 117, *supra* note 106, at 5–7; THOMAS BARFIELD, NEAMAT NOJUMI, & J. ALEXANDER THIER, U.S. INSTITUTE OF PEACE, THE CLASH OF TWO GOODS: STATE AND NON-STATE DISPUTE RESOLUTION IN AFGHANISTAN, available at http://www.usip.org/ruleoflaw/projects/clash_two_goods.pdf.

¹⁰⁹ USIP Special Report 117, *supra* note 106, at 5–7; Senier, *supra* note 107, at 2; BARFIELD, *supra* note 108, at 2.

¹¹⁰ See USIP Special Report 117, *supra* note 106; Senier, *supra* note 107; BARFIELD, *supra* note 108. Afg. Const.; Afg. Drug Law, *supra* note 10.

¹¹¹ Senier, *supra* note 107. Prior to the 1964 unification of the Court system, Afghanistan had a dual legal system where *shariah* courts adjudicated criminal, family and personal disputes while the state courts adjudicated civil, tax, and commerce matters. *Id.* Despite the attempt to unify the Court system, villagers in tribal areas continued to rely on customary law through the Soviet invasion into the late 1980s. *Id.* However, in the 1990s, when the Taliban took power, there was a very “harsh application of *shariah* law by state courts consistent with the Taliban’s pursuit of an Islamic state.” *Id.* at 1–2. Furthermore,

Shari’a laws are set forth in and formulaically originate from a number of important sources. These include primary sources such as the Qur’an (the divine revelation) and the hadith, also called the sunna, which consists of the utterances and actions of the Prophet Muhammed. The main secondary sources of Islamic law are Ijma’ (consensus) and Qiyas (analogy), both of which derive from the *ijtihad*, a contested process of deductive reasoning by which Qur’an or sunna are applied to new concerns, and *Istishab* (legal presumption).

Mark A. Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 COLUM. J. TRANSNAT’L L. 349, 367 (2004).

¹¹² Senier, *supra* note 107, at 2. Furthermore, the majority Pashtun community views Pashtunwali, its own form of customary law, as *the* legitimate law. See Drumbl, *supra* note 111.

¹¹³ Senier, *supra* note 107, at 2.

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theory of restorative justice, requiring the perpetrator to seek forgiveness while the victim is compensated for his suffering.¹¹⁴ Additionally, although the customary system is generally considered informal in nature, the *jirgas*, or village elders that are traditionally relied on for resolving disputes,¹¹⁵ adhere to established procedures.¹¹⁶ For example, during *jirga* proceedings, the parties may choose to represent themselves or may seek representation,¹¹⁷ and while the *jirga's* decisions are orally communicated to the parties before a male-only (women are not allowed) audience, they have precedential value.¹¹⁸

Additionally, there is an appellate system that allows a dissatisfied party to have his case reviewed by a second *jirga*.¹¹⁹ Substantively, the *jirgas* rely on customary law and accepted Islamic traditions for handling disputes.¹²⁰ In arriving at its decision, the *jirga's* goal is to achieve community harmony, not to enforce outcomes.¹²¹ Instead, the community relies on “shunning or exiling a party that refuse[s] to compromise.”¹²² Thus, in Afghanistan, the majority of the population understands justice to involve a tradition of customary law.¹²³

Along with Afghanistan's system of traditional customary law, Afghanistan also employs a formal system of justice responsible for enforcing codified law such as the recently enacted Counter Narcotics Drug Law. For those in rural areas, “centralization has never been popular. This is due in part to strong local social organ-

¹¹⁴ *Id.*

¹¹⁵ See Drumbl, *supra* note 111.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 383.

¹¹⁸ *Id.*

¹¹⁹ *Id.* If after the second *jirga* review, the party is still unsatisfied, a member of the second *jirga* may choose to seek a final review on the party's behalf. The final review is known as the *takhm*. “All disputants must accept the final decision of the *takhm*. Punishments for failing to abide by the outcome of the *takhm* range from cash fines to the burning of the house of the guilty or unsuccessful disputant.” *Id.* at 383.

¹²⁰ Ali Wardak, *Building A Post-War Justice System In Afghanistan*, 41 CRIME L. & SOC. CHANGE 319 (2004), available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN016659.pdf>. *Jirgas* tend to be predominantly male-only bodies and can, at times be influenced by warlords and those with guns and money. *Id.* See also Christina Jones-Pauly & Neamat Nojumi, *Balancing Relations Between Society and State: Legal Steps Toward National Reconciliation and Reconstruction of Afghanistan*, 52 AM. J. COMP. L. 825 (2004).

¹²¹ BARFIELD, *supra* note 108, at 7.

¹²² *Id.*

¹²³ See Drumbl, *supra* note 111, at 352–53.

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ization and a tradition of independence, which means that decisions imposed from the outside are usually resented locally.”¹²⁴ The relationship between these two systems is complicated and varies from region to region.¹²⁵ For example, in some areas the formal courts rely on and enforce decisions made by the *Jirgas*, while in other regions, there is no relationship between the two systems.¹²⁶ In sum, Afghanistan’s judiciary struggles to find a balance between the formal and informal systems.¹²⁷

Although recent judicial reform efforts have neglected to consider the customary legal system in Afghanistan, instead focusing on the formal system, great confusion within the formal system still remains.¹²⁸ Afghanistan’s Constitution states, in part, that “no law can be contrary to the beliefs and provisions of the sacred religion of Islam.”¹²⁹ And, if a clear legal provision for the case before the court does not exist,¹³⁰ “the courts’ decisions shall be within the limits of th[e] Constitution in accord with the Hanafi jurisprudence”¹³¹ For cases that address personal matters, involving members of the Shia Sect, Article 131 of the Constitution provides that

Courts shall apply Shia school of law . . . in accordance with the provisions of law. In other cases if no clarification by this constitution and other laws exist and both sides of the case are followers of the Shia Sect, courts will resolve the matter according to laws of this Sect.¹³²

Although, these constitutional provisions are reserved for specified circumstances, some courts in the formal system continuously apply Islamic law and ignore recently enacted statutory law (and cus-

¹²⁴ Faiz Ahmed, *Judicial Reform in Afghanistan: A Case Study in the New Criminal Procedure Code*, 29 HASTINGS INT’L & COMP. L. REV. 93, 106 (2005). See also Jones-Pauly, *supra* note 120.

¹²⁵ Katherine McCullough, *Current Development 2005-2006: Out with the Old and in with the New: The Long Struggle for Judicial Reform in Afghanistan*, 19 GEO. J. L. ETHICS 821, 826–28 (2006).

¹²⁶ *Id.*

¹²⁷ See Senior, *supra* note 107; BARFIELD *supra* note 108; Drumbl, *supra* note 111; Wardak, *supra* note 120.

¹²⁸ See National Strategy, *supra* note 11.

¹²⁹ Afg.Const art. 3.

¹³⁰ See Law of the Organization and Authority of the Courts of Islam, art. 7 (2005) [hereinafter *Judicial Laws of Afghanistan*], available at <http://www.supremecourt.gov.af/PDFfiles/Law%20on%20Organization%20and%20Jurisdiction%20of%20Courts%20of%20the%20Judiciary,%20English.pdf>; Afg. Const. arts. 130 & 131.

¹³¹ Afg. Const. art. 130.

¹³² *Id.*

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tomary law for that matter). The state of Afghanistan's *formal* judicial system is such that traditional Islamic Law is favored over recently enacted statutes as well as Afghanistan's Constitution.¹³³

While sufficient attention is paid to Islamic tradition, the Constitution does not explicitly reference customary law,¹³⁴ which is not surprising given that the JRC (a group of Islamic scholars who were charged with the task of reforming Afghanistan's judicial sector) did not designate any seats for *jirgas* to represent the customary law system.¹³⁵ The virtual ignorance of customary law in Afghanistan's new formal judicial system is problematic given the fact that "the [Ministry of Justice] estimates that 90% of Afghans rely on customary law due to a lack of 'trust and confidence' in the nation's formal judicial institutions."¹³⁶ Thus, judicial reform efforts that have focused on the formal system have failed to adequately implement formal law as well as customary law.¹³⁷

The formal and customary legal systems have practically no communication, which leads to inconsistent practices for addressing illegal drug activity.¹³⁸ For instance, in mediating drug-related disputes, the *jirgas'* lack of communication with the formal system means that many offenders escape punishment.¹³⁹ An example of this common occurrence is the story of Daoud Khan, an Afghan citizen living in the rural region of Faizbad.¹⁴⁰ Daoud Khan brought seventy kilograms of opium to a manufacturing plant and it was processed into ten kilograms of heroin.¹⁴¹ Khan then hired a driver to take him and the processed heroin to a designated place to sell the heroin.¹⁴² Along the way, the car was seized and searched, and the driver was arrested while Khan escaped.¹⁴³ The driver paid a bribe for his release,¹⁴⁴ and upon his return to the village, Khan claimed that the driver reported him to the police in exchange for half of the heroin. Khan then demanded that the

¹³³ See USIP Special Report 117, *supra* note 106; Senier, *supra* note 107.

¹³⁴ Senier, *supra* note 107, at 3; See also Ahmed, *supra* note 124.

¹³⁵ Senier, *supra* note 107, at 3.

¹³⁶ *Id.* at 2.

¹³⁷ See USIP Special Report, *supra* note 106.

¹³⁸ See Ahmed, *supra* note 124; Jones-Pauly, *supra* note 120.

¹³⁹ See Ahmed, *supra* note 124; Jones-Pauly, *supra* note 120.

¹⁴⁰ David Mansfield, REPORT, EXPLORING THE SHADES OF GREY: AN ASSESSMENT OF THE FACTORS INFLUENCING DECISIONS TO CULTIVATE OPIUM POPPY IN 2005/06 31 (2006).

¹⁴¹ Mansfield, *supra* note 140, at 31.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

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driver repay him for the lost heroin.¹⁴⁵ “The [j]irga decided that the driver should . . . swear on the holy Koran that he did not report Daoud Kahn to the authorities The driver did so and it was decided that Daoud Kahn should repay him the 300,000 Afs as requested.”¹⁴⁶ Although, the *jirga*'s decision left Kahn in debt, he never served time in jail.¹⁴⁷

However, in the formal system, the Counter Narcotics Drug Law establishes that anyone implicated in a drug trafficking offense involving over five kilograms of heroin is subject to “life imprisonment, and a fine of between 1,000,000 Afs and 10,000,000 Afs.”¹⁴⁸ Thus, in the case of Kahn, punishment under the customary system required only that he pay a substantial fee, whereas punishment under the formal system would have meant life in prison for Kahn.¹⁴⁹

In another case, Abdul Washir agreed to traffick eighteen kilograms of opium for an opium trader. The opium was seized, and when Washir returned to his village, the “[j]irga decided that Abdul Washir would have to repay the money he owed . . . in the end he had to give the cash and his seventeen-year-old daughter to the trader [who was about sixty years old] as his third wife as repayment for the opium he lost.”¹⁵⁰ The *jirga*'s decision not only violated international human rights law with the decision to sell Washir's daughter, but also allowed Washir to escape the ten to fifteen years of imprisonment he would have received as punishment under enforcement of the Counter Narcotics Drug Law.¹⁵¹

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Afg. Drug Law, *supra* note 10, at art. 16.

¹⁴⁹ Mansfield, *supra* note 140, at 31. *See also* Afg. Drug Law, *supra* note 10; *See* Drumbl, *supra* note 111.

¹⁵⁰ Mansfield, *supra* note 145, at 31.

¹⁵¹ *Id.* It is not uncommon for jirgas to render decisions that require insolvent drug trafficking offenders to repay debts by offering their daughters. *See* Hayatullah Gaheez, *Daughters for Debts*, ALTERNET, Jan. 5, 2005, <http://www.alternet.org/drugreporter/20892/> (last visited Mar. 14, 2008). An official with the International Committee on Human Rights stated that

if such practices were brought to our attention we could act . . . but neither ICHR nor the police are informed. Unfortunately many of these women who are paid in return for opium debts either end up addicted to the drug or commit suicide. It's a very sad situation.

Id. *See also* Afg. Drug Law, *supra* note 10, at art. 16(2)(vi); Drumbl, *supra* note 111.

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In conclusion, Afghanistan's justice system is unbalanced, leading to inconsistent approaches for handling illegal drug-related activity, and, as is seen here, drug offenders often escape punishment while international standards for human rights are violated.

2. Lack of Professionalism

Afghanistan's Constitution requires that judges "have a higher education in law or in Islamic jurisprudence, and . . . have sufficient expertise and experience in the judicial system of Afghanistan."¹⁵² Furthermore, Article 58 of the Law of the Organization and Authority of the Courts of Islamic Republic of Afghanistan requires that members of the Supreme Court "hold [a] BA degree from any faculties of law or Shariha or above it or holds [a] diploma on [sic] Religious Studies from an officially recognized center or equivalent."¹⁵³

In association with Italy, the United States has supported Afghanistan's objective of appointing only qualified judges by training and educating over 750 judges.¹⁵⁴ Yet, "improvement of the quality and professionalism of judges and prosecutors is the greatest need in the justice sector."¹⁵⁵ As it stands, the Supreme Court of Afghanistan, which is responsible for managing both the district and provincial courts, requires about 1,350 judges in order to appropriately function. Currently, there are only half that number of judges, and of that group, approximately only one third have received adequate training under Afghanistan's Constitution.¹⁵⁶ The judges, for example, struggle to write legal opinions and manage

¹⁵² Afg. Const. Article 118 ch. 7. art. 3.

¹⁵³ Judicial Laws of Afghanistan, art. 58, *supra* note 130.

¹⁵⁴ Kenneth Katzman, CRS REPORT FOR CONGRESS, AFGHANISTAN: POST-WAR GOVERNANCE, SECURITY, AND U.S. POLICY 36 (2006), available at <http://italy.usembassy.gov/pdf/other/RL30588.pdf>. Between 2001 and 2005, Italy spent \$45 million on improving the judicial system by allocating money towards training seminars for judges and prosecutors and for building court houses. Scott Baldauf, *The Whole Justice System of Afghanistan is Rotten*, CHRISTIAN SCI. MONITOR, Feb. 21, 2006, available at <http://www.rawa.org/court.htm>.

¹⁵⁵ USIP Special Report 117, *supra* note 106, at 9.

¹⁵⁶ BARFIELD, *supra* note 108, at 20. Afghanistan's Court System is comprised of the Supreme Court, the Ministry of Justice, the Attorney General's Office, and the Ministry of the Interior. *Id.* The Ministry of Justice is responsible for running correctional facilities, acting as counsel for the Government of Afghanistan, legislating, and providing legal assistance in rural areas. *Id.* The Attorney General's Office prosecutes crimes and the Ministry of the Interior runs the police force in Afghanistan. *Id.* Since "Supreme Court justices are responsible for managing the personnel, budgets and policy decisions for the entire court system, down to the lowest district court," having only a small number of able and compe-

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counsel in their courtrooms.¹⁵⁷ And, “in interviews conducted by the International Commission of Jurists . . . the judges interviewed did not express any real interest in being trained in the application of statutory law, saying that all relevant laws could be found in the Koran.”¹⁵⁸

American and Italian-led judicial training programs are not rectifying this problem, as the programs tend to be “Kabul-centric” in the sense that it is inconvenient for aspiring legal professionals from the rural areas to travel to the city for necessary training.¹⁵⁹ Another problem is that law school students tend to believe that they will be unable to financially support themselves as legal professionals.¹⁶⁰ Magistrates reportedly “receive a salary of \$45 each month, and payment can be delayed [for] three or four months.”¹⁶¹ Law school students are also hesitant to enter the profession due to the formal system’s inconsistent application of the law.¹⁶² These conditions make the critical task of recruiting capable judges and other legal professionals even more difficult.¹⁶³

3. A Corrupt Judicial System

Article 21 of Afghanistan’s Counter Narcotics Drug law provides in part that any public official who intentionally demands seeks, receives, accepts, or agrees to accept a bribe relating to drug trafficking or any duty connected to drug law enforcement is subject to punishment, including imprisonment and monetary fines.¹⁶⁴ The reality in Afghanistan, however, is that public officials often accept bribes from drug traffickers, leaving the judicial system in a corrupted state.¹⁶⁵ For example,¹⁶⁶ an elder from Paktia, Afghanistan stated in an interview that: “Islam says that if you find a thief,

tent Supreme Court Justices has devastating effects on the system at large. Bauldauf, *supra* note 154.

¹⁵⁷ See USIP Special Report 117, *supra* note 106, at 20–21. In general, there is great confusion as to what constitutes the law of Afghanistan, and furthermore, citizens of Afghanistan are also unfamiliar with the current state of Afghan law, which makes it even more difficult for Afghan judges to rule on cases. BARFIELD, *supra* note 108, at 20.

¹⁵⁸ McCullough, *supra* note 125, at 839.

¹⁵⁹ *Id.* at 838.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 840.

¹⁶² *Id.* at 838.

¹⁶³ *Id.* at 840–41.

¹⁶⁴ Afg. Drug Law, *supra* note 10, at art. 21(1)(c).

¹⁶⁵ USIP Special Report 117, *supra* note 106, at 3.

¹⁶⁶ *Ours to Lose*, *supra* note 94.

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he has to be punished. If a murderer is arrested, he has to be tried and executed. In our country, if a murderer is put in prison, after six months he bribes the judge and escapes.”¹⁶⁷

Furthermore,

insecurity and lack of trust in justice institutions are the most immediate constraints to justice reform and establishment of rule of law . . . [In Afghanistan] the justice system is weak generally and human rights and legal protections guaranteed to all Afghans by the constitution, laws of state, and international treaties are routinely denied.¹⁶⁸

A justice system requires above all things, that the people have faith that the system will in fact deliver justice; due to corrupt practices, Afghan citizens don’t have this faith and often opt for alternatives to the formal judicial system.¹⁶⁹

Although there are codified statutes such as the Counter Narcotics Drug law, the Law of the Organization and Authority of the Courts, and the new Constitution, these laws have yet to be appropriately enforced because judicial reform efforts have failed to account for the customary system of law. Also, the judiciary is riddled with un-professionalism and corruptive practices that rob the system of any credibility.¹⁷⁰

4. *Not Enough Focus on the Judicial System and Too Much Focus on Eradication*

In addressing Afghanistan’s drug cultivation and trafficking dependency, the U.S. favors eradication as a short-term “fix” for the problem.¹⁷¹ These efforts, however, are in vain.¹⁷² American officials admit that eradication without a stable government and

¹⁶⁷ *Id.* at 61.

¹⁶⁸ INTERNATIONAL MONETARY FUND, ISLAMIC REPUBLIC OF AFGHANISTAN: INTERIM POVERTY REDUCTION STRATEGY PAPER, IMF COUNTRY REPORT NO. 06/194 at 30 (2006) [hereinafter IMF Country Report] (On file with author).

¹⁶⁹ See Senior, *supra* note 107, at 2. See also IMF Country Report, *supra* note 168. R

Furthermore,
Those who can use the courts rarely choose to do so Executive officials in the provinces, provincial, district governors, police and prosecutors tend to bypass the courts to settle difficult or important disputes, and many local court judges also refer disputes to community-based mechanisms for settlement . . . [and] 80-90% of disputes—criminal and civil—are resolved outside of the formal system.

See BARFIELD, *supra* note 108, at 3. R

¹⁷⁰ See BARFIELD, *supra* note 108; Wardak, *supra* note 120. R

¹⁷¹ See 2007 Budget Justification, *supra* note 72; *Ours to Lose*, *supra* note 94. R

judiciary is inefficient and ineffective.¹⁷³ Even so, the U.S. continues to diligently eradicate Afghanistan's opium poppy fields.¹⁷⁴

The Bureau for International Narcotics and Law Enforcement Affairs (INL) released a telling budget justification summary for counter-narcotics initiatives in Afghanistan.¹⁷⁵ The statement acknowledged that the U.S. goal was to “reduce poppy cultivation, improve law enforcement capabilities, and reform the Afghan criminal justice system to enhance public security, strengthen the rule of law, and attack illegal drug production and trafficking.”¹⁷⁶ For the “administration of justice” pillar, the INL reserved funds in its budget justification to provide technical support to administrators, needed equipment, support training for judges and prosecutors, and investigators to address counter-narcotics issues.¹⁷⁷ Despite these lofty goals, the INL budget for administration of justice was \$26.5 million, compared to the \$134 million reserved for Crop Control and Eradication efforts.¹⁷⁸ Furthermore, plans for the 2007 budget show that \$38 million was reserved for the administration of justice programs compared to approximately \$232 million reserved for crop eradication.¹⁷⁹ And, “under U.S. leadership, development and poverty relief have taken a back seat—until now, military spending has taken priority, with [\$]82 billion USD spent on military operations in Afghanistan since 2002, compared with just [\$]7 billion USD on aid and development.”¹⁸⁰

In light of a strong correlation between high levels of opium cultivation and low levels of governance,¹⁸¹ U.S. eradication efforts seem even more inefficient. Studies show that “typically illicit drug crop cultivation occurs in a fragile political, socio-economic and environmental setting.”¹⁸² It is not surprising then, that despite ef-

¹⁷² Lea Terhune, Spike in Opium Poppy Cultivation Impedes Afghan Drug War, U.S. State Dep't, Sept. 5, 2006, available at <http://www.america.gov/st/washfile-english/2006/September/20060901153625mlenuhret0.9886438.html>.

¹⁷³ *Id.*

¹⁷⁴ 2007 Budget Justification, *supra* note 72.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ 2007 Budget Justification, *supra* note 72.

¹⁸⁰ Senlis Council, *Karzai's Government Has been Undermined by Failing U.S. Policies*, available at <http://www.chanvre-info.ch/info/en/Senlis-Council-Afghan-Government.html>.

¹⁸¹ 2007 Budget Justification, *supra* note 72. See Senlis Council, *supra* note 73, at 5.

¹⁸² Mansfield, *supra* note 140, at 3. An interview with an Afghan citizen provided the following anecdote:

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forts to eradicate Afghanistan's poppy, there has been an increase in the amount cultivated.¹⁸³ Without a working judiciary in place, the eradication efforts themselves have left Afghanistan riddled with corruption and considerable anti-government sentiment.¹⁸⁴ For example, it is well known that

bribery and protection for those with political power . . . reinforce[s] the view that the wealthy can cultivate opium poppy with impunity. The belief that it is the poor who are most likely to have their crop destroyed and the perception of inequity is further fuelling discontent and anti-government sentiment.¹⁸⁵

Thus, simply eradicating the poppy crop, will not allow the U.S. to meet its goals of increasing governance and stability in Afghanistan.¹⁸⁶ Although the U.S. government favors an eradication method, experts have asserted that "poppy eradication alone does not work and is counter-productive, displacing poppy cultivation to more remote areas and fuelling violence and insecurity . . ."¹⁸⁷ Thus, favoring eradication over other initiatives of the Five Pillar Plan such as judicial reform has not brought the U.S. closer to meeting its objective of creating a terrorist-free Afghanistan.¹⁸⁸

5. *Case Study: Colombia—A Similar Plan Four Years Earlier*

Afghanistan is not the first instance of United States involvement with other countries' counter narcotics activities. The U.S.

Six months ago the Afghan National Police came to my village. They searched the house of an opium trader and found 12 mazar seer of opium (168 kilograms). They arrested the trader and his son. After four days the trader gave a bribe of 370,000 [US\$ 7,400] to the Mazar police to free his son. The trader was not released and went to the high court where he was given a two year jail sentence. The trader has now been released. He paid US\$ 4,000 and US\$ 500 per month so that he can live in his own house.

Id.

¹⁸³ *The Afghan Opium Situation: Briefing to the Committee on International Relations*, *supra* note 14.

¹⁸⁴ Clash of Two Goods, *supra* note 108, at 2–3.

¹⁸⁵ DAVID MANSFIELD & ADAM PAIN, AFGHANISTAN RESEARCH AND EVALUATION UNIT, OPIUM POPPY ERADICATION: HOW TO RAISE RISK WHEN THERE IS NOTHING TO LOSE? 2 (2006).

¹⁸⁶ See *Plan Colombia 3 Year Anniversary Report Card*, U.S. Embassy Fact Sheet, Bogota, Colombia, Mar. 23, 2000, available at http://www.wola.org/Colombia/plan_col_report_card03.pdf; CONNIE VEILLETTE, CRS REPORT FOR CONGRESS, PLAN COLOMBIA: A PROGRESS REPORT (2005); Lisa Hauggard, et al., *Blueprint for a New Colombia Policy*, Mar. 2005 [hereinafter *Blueprint*], available at <http://www.lawg.org/docs/Blueprint.pdf>.

¹⁸⁷ SENLIS AFGHANISTAN, *supra* note 76, at 5.

¹⁸⁸ See *The Afghan Opium Situation: Briefing to the Committee on International Relations*, *supra* note 14; *Ours to Lose*, *supra* note 94.

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has had similar experiences with Colombia. Below is a discussion that compares United States involvement in Colombia's counter narcotics activities with current United States involvement in Afghanistan. The U.S. aided Colombia in carrying out Plan Colombia, an initiative that favored eradication of Colombia's coca fields over long-term judicial reform initiatives.¹⁸⁹ The results of favoring eradication over judicial reform were disastrous, actually leading to an increase in Colombia's cocaine trafficking.¹⁹⁰ In order to avoid similar failure in Afghanistan, it is necessary that the U.S. learn from its mistakes in Colombia.

With 90% of the cocaine distributed in the U.S. trafficked from Colombia, on July 13, 2000, President Clinton signed a bill to provide appropriations to assist Colombia in curbing cocaine trafficking.¹⁹¹ By allocating close to \$1.3 billion to Plan Colombia, the U.S. hoped to fight the illegal drug trade, increase the rule of law in Colombia, foster the respect for human rights in Colombia, expand economic development, institute judicial reform and foster peace¹⁹²—goals similar to the Five Pillar Plan in Afghanistan.

Since 2000 and the implementation of Plan Colombia, the U.S. has favored eradication of the coca crop through the use of aerial and manual spraying.¹⁹³ In 2004, the U.S. took part in a massive eradication initiative in Colombia.¹⁹⁴ Aerial spraying was responsible for eradicating 328,191 acres of coca crop in 2003 and 337,427 in 2004.¹⁹⁵ And, although Plan Colombia was initiated with the intention of being “pro-democracy,”¹⁹⁶ hoping to improve the rule of law in Colombia, Plan Colombia did the opposite: eighty percent of

¹⁸⁹ VEILLETTE, *supra* note 186; *Blueprint*, *supra* note 186.

¹⁹⁰ *Blueprint*, *supra* note 186.

¹⁹¹ Memorandum from Neil Jeffrey, Executive Director of U.S. Office on Colombia to Jess Hunter, Senior Associate (July 8, 2004), (on file with author). The major sources of US funding for Plan Colombia are from the Andean Counterdrug Initiative (ACI), the foreign military program, and the department of defense's counternarcotics account. *Id.*

¹⁹² See *Plan Colombia 3 Year Anniversary Report Card*, U.S. Embassy Fact Sheet, Bogota, Colombia, Mar. 23, 2000, (on file with author); VEILLETTE, *supra* note 186; *Blueprint*, *supra* note 186.

¹⁹³ VEILLETTE, *supra* note 186; *Blueprint*, *supra* note 186.

¹⁹⁴ *Plan Colombia and Beyond: The UN's Data on Colombian Coca-growing*, p. 1–8, June 24, 2006, [hereinafter *Plan Colombia and Beyond*], available at <http://www.ciponline.org/colombia/blog/archives/000275.htm>. See also VEILLETTE, *supra* note 186, at 5.

¹⁹⁵ VEILLETTE, *supra* note 186, at 6.

¹⁹⁶ Hector Mondragon, *Democracy and Plan Colombia*, NACLANEWS, Feb. 6, 2007, available at <http://www.zmag.org/content/showarticle.cfm?ItemID=11863>.

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U.S. aid went to military assistance purposes in Colombia and little funding was allocated to judicial reform.¹⁹⁷

Over seven years into Plan Colombia, its results are disheartening. According to the United Nations Office on Drugs and Crime, one trend in Colombia is apparent: “the current anti-drug strategy, which favors forced eradication over governance and development, has failed utterly.”¹⁹⁸ It was also found that eradication efforts were mostly successful in the short-term and did not “appear to be sustainable without government presence on the ground.”¹⁹⁹ In fact, in response to U.S. eradication efforts, farmers simply re-planted their crop in the following seasons.²⁰⁰ Thus, despite billions of dollars in U.S. aid and major eradication efforts there has been an eight percent increase in the amount of cocoa grown in Colombia since the execution of Plan Colombia.²⁰¹

While the U.S. has spent a great deal of time and money eradicating the coca crop, the judicial reform pillar of Plan Colombia has faded virtually into non-existence.²⁰² Similar to Afghanistan, very little attention has been paid to Colombia’s judiciary, since

between 70 and 80 percent of Plan Colombia assistance has been for counternarcotics and counterterrorism, and between 20 and 30 percent for ‘soft’ issues such as strengthening democracy and institutions as well as judicial reform, alternative development, refugee assistance, human rights, and many other purposes. This

¹⁹⁷ *Blueprint*, *supra* note 186, at 1. Since President Uribe took office in 2002, the direction for Plan Colombia has shifted. VEILLETTE, *supra* note 186, at 2. Uribe election campaign was focused on a strict military approach to ridding the country of illegally armed groups (IAG) who benefit from drug trafficking. VEILLETTE, *supra* note 186, at 2. Once in office, Uribe created and implemented *Plan Patriora* to take over IAG-controlled areas. VEILLETTE, *supra* note 186, at 2. Subsequently, “US policy has also evolved from a strictly counternarcotics focus to support for Colombia’s fight against IAGs.” VEILLETTE, *supra* note 186, at 2.

¹⁹⁸ *Plan Colombia and Beyond*, *supra* note 194, at 2.

¹⁹⁹ *Id.* at 3.

²⁰⁰ *Id.* The report also noted that “44 percent of the cocoa fields the UNDOC satellites detected in 2005, making up 61% of all coca detected *did not exist in 2001-2004.*” *Id.* at 7.

²⁰¹ *Id.*

²⁰² See Ambassador Myles R. R. Frechette, *Colombia and the United State—The Partnership: But What is the End Game?* p. 32 (Feb. 2007) [hereinafter *The Partnership*], STRAT. STUD. INST., available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub762.pdf> (stating that “since 2000, the United States has reduced funding for judicial reform in order to shift funds to crop eradication.”). See also Winifered Tate, *Colombia’s Role in International Drug Industry*, FOREIGN POLICY IN FOCUS 2 (June 2001), available at <http://www.fpiif.org/pdf/vol4/30ifcolo.pdf> (stating that six months after the commencement of fumigation in Colombia, judicial aid had yet to be delivered).

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distribution reflects Washington's priorities in Colombia which are unlikely to change.²⁰³

Failure to assist Colombia in judicial reform as a means of curbing coca production and trafficking has had grave consequences. Quite often,

judges are either too intimidated or corrupt to try any of the power actors in Colombia's drug ring . . . [the cartels] are not afraid to bribe or kill civilians or government officials to protect themselves at any cost . . . prosecutors lack the resource capacity [to] track criminals.²⁰⁴

These corruptive practices simply leave Colombian citizens with little faith in the government and virtually unprotected from military groups.²⁰⁵ Further, these practices leave the United States no better off with respect to cocaine trafficking than it was prior to its commitment to Plan Colombia.²⁰⁶

Critics of Plan Colombia have asserted that "Plan Colombia fails to attack the root of Colombia's real problems. Drug trafficking is only one of its effects; the real causes are a weak government, inequality, absence of citizen participation, corruption, and an ineffective legal system."²⁰⁷ And others have said that "as it stands, by pouring money into a society plagued by overwhelming domestic problems, the plan is in effect attacking a cancer with hot compresses."²⁰⁸ Thus, Plan Colombia has failed as a result of too much focus on short-term eradication efforts and not enough focus on long-term judicial reform.

In comparing the Five Pillar Plan and Plan Colombia, there are unavoidable conclusions that deserve attention. First, despite massive amounts of U.S. funding, neither plan has met its objectives of decreasing drug cultivation and trafficking.²⁰⁹ Instead, there has been an increase in cocaine and heroin cultivation and

²⁰³ *Id.*

²⁰⁴ Jennifer L. Ernst, *The Potential for Alternative Development to coca in Colombia: A Desperate Peasantry, a Weak State, and Civil War* (Apr. 21, 2004).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Luz Estella Nagle, Strategic Studies Institute, *The Search for Accountability and Transparency in Plan Colombia: Reforming Judicial Institutions – Again*, at v (May 2001) available at <http://www.strategicstudiesinstitute.army.mil/pdf/PUB24.pdf>.

²⁰⁸ *Id.* at 6.

²⁰⁹ See *The Opium Survey 2007*, *supra* note 14, at 3; *The Afghan Opium Situation: Briefing to the Committee on International Relations*, *supra* note 14.

trafficking in and from Colombia and Afghanistan respectively.²¹⁰ Furthermore, both plans are unbalanced, as reflected in the respective budgets, favoring short-term fixes such as eradication instead of long-term democratic reform initiatives such as judicial reform.²¹¹ In conclusion, the U.S. should learn from its mistakes in Colombia and focus less on eradication and more on long-term judicial reform, so that Afghanistan can effectively enforce its Counter Narcotics Drug Law.

VI. REVERSING THE FAILURE IN AFGHANISTAN

Reversing failure in Afghanistan requires that the U.S. learn from its mistakes in Colombia and accordingly readjust its approach in Afghanistan. The U.S. should refocus its efforts to address long-term solutions such as judicial reform instead of favoring “short-term fixes” such as eradication that it currently employs now.²¹² As was clearly seen in Colombia, and is beginning to occur in Afghanistan, eradication efforts only lead to farmers replanting their crops and becoming increasingly disillusioned with the Afghan (and U.S.) governments.²¹³ The focus of long-term judicial reform efforts in Afghanistan should be to assist the Afghan government in creating an effective judicial system that better balances the customary and formal legal systems, meets sufficient professional standards and is free of corruption—this way, pivotal Acts such as Counter Narcotics Drug Law as well as Afghanistan’s Constitution can most effectively be enforced to curb opium cultivation and all of its grave consequences.²¹⁴ This new approach would allow the U.S. to meet objectives established by the Afghanistan Freedom Support Act; only by adopting a new vision can the U.S. address narcotics activity in Afghanistan and rid terrorist groups of necessary funding.

Currently, Afghanistan’s judiciary suffers from a lack of accountability. Implementing accountability into a judicial system means that citizens hold the government, specifically the judiciary,

²¹⁰ See *The Opium Survey 2007*, *supra* note 14, at 3. See also VEILLETTE, *supra* note 186, at 3.

²¹¹ See VEILLETTE, *supra* note 186; 2007 Budget Justification, *supra* note 72.

²¹² See generally 2007 Budget Justification, *supra* note 72; Senlis Afghanistan, *supra* note 73, at 1–21.

²¹³ See Senlis Afghanistan, *supra* note 73 at 21–22; *The Opium Survey 2007*, *supra* note 14, at 3; *The Afghan Opium Situation: Briefing to the Committee on International Relations*, *supra* note 14.

²¹⁴ See Senier, *supra* note 107; BARFIELD, *supra* note 108.

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to established legal standards.²¹⁵ To achieve this standard, reform efforts should recognize the value of both the customary and formal legal systems and focus on finding a balance between the two. On one hand, the customary legal system in Afghanistan is vital because “it is the traditional systems in Afghanistan which [sic] engage with and embody citizens’ sense of justice . . . consequently, reform efforts that ignore or subordinate customary law will not win the support of those they aim to serve.”²¹⁶ Further, the customary system is crucial for providing judicial access for those in rural areas and reduces the formal system’s caseload, particularly while the formal system is still in its infancy.²¹⁷ On the other hand, the formal system is also crucial, particularly for serious crimes.²¹⁸ “For criminal disputes, it is the duty of the state to deliver justice and to punish the violation of basic rights. In the case of serious crimes, state authority is essential”²¹⁹ Given the severity of Afghanistan’s drug trafficking crisis, it follows that the state should be responsible for adjudicating drug related crimes as well.²²⁰

Below are discussions of two striking judicial reform efforts—one that successfully incorporated customary law into the formal system and another that succeeded in strengthening a formal judicial system. In light of judicial reform efforts and needs in Afghanistan, these models are particularly of note, as success in Afghanistan’s judiciary requires implementing *both* approaches and striking an efficient balance between the two. Only by doing

²¹⁵ Nagle, *supra* note 207. In general, “at the core of the principle of accountability lies the impartial and effective implementation of the laws.” KAMAL HOSSAIN, ASIAN DEVELOPMENT BANK, NEGLECTING LAW REFORMS: SOCIAL AND ECONOMIC COSTS AND CONSEQUENCES 15, available at <http://www.adb.org/documents/reports/law-policy-reform/chap2.pdf>.

²¹⁶ Senier, *supra* note 107, at 4.

Customary institutions also afford parties a level of comfort that state courts cannot. *Jirgas* and *shuras* are close to the parties’ communities and often comprised of people with whom they are familiar. While such ties can have the drawback of communal pressure on parties to settle disputes in unfavorable terms, proximity is viewed as favorable to distant state bureaucracies. This should be the case in Afghanistan where the state system has been seen as the locus of abuse and corruption.

Id.

²¹⁷ Leila Chirayath, Caroline Sage & Michael Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, Prepared for the World Development Report 2006: Equity and Development, July 2005, available at <http://www.rrojas.databank.info/wir2006/chirayath.pdf>. See also Senier, *supra* note 107.

²¹⁸ See Senier, *supra* note 107; BARFIELD, *supra* note 108; Wardak, *supra* note 120.

²¹⁹ BARFIELD, *supra* note 108, at 5.

²²⁰ *Id.*

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this will drug related offenders be prosecuted and the opium cultivation crisis addressed.

A. Implementing Customary Law in Tanzania

In 1964, Tanzania²²¹ unified after gaining its independence from Britain and Zanzibar.²²² Its leaders were faced with the task of integrating customary law derived from numerous rural tribal groups, into the new state, which simultaneously needed to serve a growing population of “Western-educated, urban elite.”²²³ Early in its judicial reform process, the Tanzanian government tried to impose a formal judicial system on the rural areas.²²⁴ The tribal communities reacted by avoiding the formal system, opting to rely on “informal mechanisms of dispute resolution based on traditional practices.”²²⁵ To rectify this problem, the government established Arbitration Tribunals in each village, run by local participants.²²⁶ The Arbitration Tribunals evolved in 1985 when they were renamed the Ward Tribunals and put under the control of local administrative officials.²²⁷ The purpose of creating the Ward Tribunals was to decrease violence in rural areas and alleviate the formal

²²¹ Tanzania was formally known as Tanganyika. Chirayath et al., *supra* note 217, at 13. In 1961 Tanganyika gained independence from Britain and in 1963 gained independence from Zanzibar and in 1964 the country of Tanzania was unified. *Id.* Experiences in Tanzania are worth considering, as the country has a long history of customary law, particularly in rural and tribal areas just as Afghanistan does. *Id.*

²²² *Id.* at 13.

²²³ *Id.* at 14. Indigenous groups such as the *Haya*, the *Arusha* and the *Chagga* populated the Tanzanian region for hundreds of years prior to British imperialism and Tanzania’s unification. *Id.* at 9–13. Each of these groups had its own customary legal system. *Id.* The *Haya* had a reasonably sophisticated system which revolved around the *Ntegeka ya Bagarusi* or the Council of Elders. *Id.* at 10. Community committees, with delegates appointed by the parties in dispute, had the responsibility of coming to a binding conclusion. *Id.* Enforcing the Council’s decision was driven by community peer pressure, as Council members were highly regarded in society. *Id.* In addition, the *Haya* handled conflicts among traders and chairpersons through separate dispute mechanisms within the specialized trade groups. *Id.* The *Arusha’s* customary legal system centered around philosophies of social cohesion and discussion. *Id.* at 11. At judicial proceedings, counselors were not responsible for adjudicating and concluding, but rather, for moderating the parties. *Id.* Finally, the *Chagga’s* proceedings were moderated by district leaders who adjudicated and decided the outcome of the dispute. *Id.* at 13.

²²⁴ *Id.* at 14. The Tanzanian Minister of Justice appointed judges to recently incorporated courts known as “Primary Courts.” Because the newly appointed judges were not required to meet with and consult with local elders, conflict among the new judges and the tribal people quickly arose. *Id.* at 14.

²²⁵ *Id.* at 14.

²²⁶ *Id.*

²²⁷ *Id.* at 15.

system from its already overcrowded courts.²²⁸ Consequently, rural dwellers who had traditionally relied on a customary legal system, had access to a judicial system that was simultaneously recognized by the formal system and provided them with a legal process they trusted and to which they were accustomed.²²⁹

A recent study, accounting for “community perceptions of the tribunals,” found that the Ward Tribunals ranked highest for being “just and fair,” out-rating the primary courts as well as other informal mechanisms for dispute resolution.²³⁰ The study “suggests the tribunals have been relatively successful due to their procedural resemblance to traditional mechanisms. The relative informality of the tribunals was seen as a positive attribute; several respondents cited overly technical procedures and the incomprehensibility of the magistrates’ decisions as reasons for distrusting primary courts.”²³¹ Thus, acceptance and utilization of the judicial system in Tanzania is largely due to citizens utilizing a familiar, trustworthy customary system that is rooted in tribal tradition.²³²

B. *Strengthening the Formal System in Chile*

Chile’s political and court system fell victim to military rule in 1973.²³³ In 1980, with the military dictator Pinochet in power, the military enjoyed control over all government institutions, including the judiciary.²³⁴ In later years of the Pinochet regime, the judiciary was labeled as a “failure,” and it was stated that “the higher struc-

²²⁸ *Id.*

²²⁹ *Id.* “The Ward Tribunals remain the state’s sole outlet for promoting dispute settlement at a grassroots level.” *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ See Meredith Fensom, *Judicial Reform in the Americas: the Case of Chile* (2004) (unpublished M.A. thesis, University of Florida), available at http://etd.fcla.edu/UF/UFE0006263/fensom_m.pdf. Prior to the 1970s and the Salvador Allende administration (which replaced the formal judicial system with untrained neighborhood tribunals, all members of Allende’s party) Chile had an independent judiciary. *Id.* at 81. Chile’s experiences in judicial reform are clearly different than Afghanistan’s in the sense that Chile had some experience with a formal system. Nonetheless, through its reform process, Chile faced the same struggle that Afghanistan’s judiciary faces—introducing accountability, and is thus worth considering. See *id.*

²³⁴ *Id.* at 83.

ture of the judicial branch ha[d] accommodated [sic] to the political-military power.”²³⁵

The Patricio Aylwin administration (1990-94) and the Eduardo Frei administration (1994-2000) are responsible for rebuilding Chile’s judiciary.²³⁶ Aylwin made the creation of an independent judiciary a top priority²³⁷ and created the Judicial Reform Commission to report on the courts’ gross failures and violations and to draft legislation for reform.²³⁸ “To address the independence and accountability of the judiciary, President Aylwin first proposed ‘court packing’ as a way to reduce the influence of military-appointed life-tenured judges.”²³⁹ This proposal, although extremely controversial, ultimately proved successful in 1997 (during the Frei administration), and effectively created a more independent judiciary.²⁴⁰ Indeed, “[e]fforts to reintroduce greater accountability resulted in the impeachment of three justices for alleged neglect of judicial duties . . . the proceedings had a profound psychological effect on the Chilean populace: for the first time in 125 years, a judge had been removed from office for professional misconduct.”²⁴¹

Significant criminal law reforms also took place with the creation of an Attorney General’s office and a new criminal code that “greatly expanded legal protections for defendants, especially in the area of pretrial justice . . . for the first time public trials, oral hearings, and the adversarial presentation of evidence [was of-

²³⁵ See Nibaldo H. Galleguillos Portales, *The Politics of Judicial Reform in the Democratic Transition: an Analysis of the Chilean case*, available at <http://ergosum.uaemex.mx/noviembre98/gallegui.html>.

²³⁶ See Fensom, *supra* note 233, at 86–90.

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²³⁷ Portales, *supra* note 235, at 7. Aylwin, at one time stated that “the judicial branch should be perfected so that it can effectively perform its role as guarantor of the essential rights of the people.” *Id.* at 8. However, Aylwin’s intention to reform the judiciary was met with great opposition from the current members of the Supreme Court. *Id.* at 7.

²³⁸ Portales, *supra* note 235, at 10.

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²³⁹ Fensom, *supra* note 233, at 85. To accomplish his court-packing method, Aylwin succeeded in passing controversial legislation that in January 1992 that

offered to buy out any judge 70 years or older, who resigned his judgeship. Enticed by the compensation package, four Supreme Court judges had decided to take early retirement. This gave Aylwin a more interventionist role in the designation of their replacements . . . [and he selected judges] willing to give consideration to the reforms.

Portales, *supra* note 235, at 10.

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²⁴⁰ Fensom, *supra* note 233, at 86. See also Portales, *supra* note 235.

²⁴¹ Fensom, *supra* note 233, at 87.

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ferred].”²⁴² In addition, Aylwin made the Courts more accessible to the people by controversially creating neighborhood courts that operated outside of the formal court system,²⁴³ and both Aylwin and President Frei increased access to the judicial system by providing free services to the poor. Frei took this initiative even further by creating “a network of ‘mobile consultants’ that would visit the indigent in rural areas in an effort to resolve their grievances before cases reached the courts.”²⁴⁴ By being closer to the judiciary, the people were able to evaluate it accordingly.

Despite the many challenges that Chile faced in approaching Judicial Reform, its efforts have resulted in notable improvements.²⁴⁵ Polls show, for example, that Chile’s judiciary’s approval ratings in the late 1980s were in the single digits, and by 1999 had risen to 30-40%.²⁴⁶ It has also been stated that

Chile’s comparatively successful experiment offers a model. The . . . approach that the designers of Chile’s reform program took towards addressing increased in judicial independence, access and efficiency simultaneously has set the standard for future reform programs . . . the centerpiece of these reforms appears to be the criminal court system.²⁴⁷

C. *Learning from Tanzania and Chile*

In order to achieve judicial success in Afghanistan, the U.S. and Afghan governments should model their reform efforts in Afghanistan after reform efforts in Tanzania and Chile. First, successful judicial reform in Afghanistan requires that development of a system similar to Tanzania’s that incorporates customary law into the formal system. The U.S. and Afghanistan should recognize that by implementing customary law into the formal system citizens will be more likely to utilize the judicial system.²⁴⁸ For example, by

²⁴² *Id.* at 89.

²⁴³ *Id.* at 86. These courts were staffed by attorneys and justices of the peace and not judges. *Id.*

²⁴⁴ *Id.* at 86. Chile also created a new criminal procedure code that has been critically acclaimed as a model for reform. *Id.* at 87.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 91.

²⁴⁷ Fensom, *supra* note 233, at 97.

²⁴⁸ *See* Senier, *supra* note 107. This can be done, some argue by training elders from the *Jiga* to link the customary and formal systems. *Id.* at 6. Proponents also favor reserving seats in the judiciary for elected representatives. *Id.* at 6. Critics of integrating customary law into Afghanistan’s formal system argue that customary law is arbitrary, lacks codified procedure and are undemocratic. *Id.* at 6.

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acknowledging the value in delegating disputes to the *jirgas* in Afghanistan in a similar fashion that the Tanzanian government delegated disputes to the Ward Tribunals, Afghanistan would be able to create a more efficient and publicly accepted judiciary.²⁴⁹ With ninety percent of Afghans relying on customary law due to a lack of “trust and confidence” in the nation’s formal system, the importance of implementing and integrating customary and traditional law into the formal system cannot be understated.²⁵⁰ Thus, if there is any hope of establishing an Afghan judiciary that is accepted and utilized by the people, reformers should consider the Tanzanian model and honor customary law in addition to codified statutory law.²⁵¹

Second, judicial reformers should consider experiences in Chile and work to implement a formal system in Afghanistan that is founded on principles of accountability rather than corruption. The U.S. and Afghanistan should reflect on the aggressive initiatives taken by Chilean leaders and strive to “pack the courts” with educated and genuine judges and legal professionals. The importance of creating accountability in the judicial system was understood by Chilean leaders, and they acted accordingly, at times taking controversial measures.²⁵² A similar premium should be placed on ridding the Afghan Courts of corrupt practitioners, and making the Courts more accessible to the Afghan people. For example, judicial reformers would be able to create credibility in the Afghanistan judiciary by publicly dismissing judges who have taken part in corruptive practices such as accepting bribes from drug trafficking offenders. Reformers should also seek to strengthen the judiciary by encouraging the formal system to recognize the customary system in the same way that Chile’s formal judiciary acknowledged and validated the “mobile consultants” who were able to bring judicial access to many Chilean citizens.²⁵³ Thus, strengthening Afghanistan’s judicial system requires reformers to reflect on experiences in Chile and zealously implement accountability into Afghanistan’s formal judicial system.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 2.

²⁵¹ *Id.* See also Chirayath et al., *supra* note 217, at 1.

²⁵² See generally Fensom, *supra* note 233.

²⁵³ See *id.* at 84–90.

D. *Creating a Relationship between the Customary and Formal Systems*

In addition to learning from reform efforts in Tanzania and Chile, it is equally important that judicial reformers focus on long-term efforts in assisting the Afghan government to create an effective judicial system that accounts for both the customary and formal legal systems.²⁵⁴ Specifically, it is necessary that the two systems formally recognize one another and develop a communicative relationship so that Afghanistan's Constitution and critical laws such as the Counter-Narcotics Drug Law can most effectively be enforced to curb opium cultivation.²⁵⁵ This means that reformers and actors within each system acknowledge the importance that each carries and delegate cases and disputes accordingly.²⁵⁶ "Recognizing the positive role that the informal system can and does play will enable the government to harness the good of that system, while also working to curtail its most problematic aspects."²⁵⁷ Thus, in order to link these systems, a formal relationship that highlights the strengths of each system needs to develop between the two systems to enforce legislation and protect citizens' rights.²⁵⁸ The strengths of each system are considered in turn below.

First, the customary legal system is an invaluable legal mechanism that should be utilized to decrease the formal system's heavy caseload—it is an inexpensive, efficient approach that closely speaks to the beliefs and traditions of the Afghan people, particularly those living in rural areas.²⁵⁹ From a practical standpoint, by leaving the *jirgas* to handle disputes through mediation and arbitration in the rural areas, the formal legal system would be free to refocus its efforts and could better handle the adjudication of drug related offenses and enforcement of the Counter Narcotics Drug Law.²⁶⁰ This legal shift could serve an economic purpose, for "it has been estimated that Afghanistan's judicial reconstruction effort will cost the U.S. \$9 million over two years. By relying on existing customary courts to dispense justice in rural areas . . . Afghanistan

²⁵⁴ Senier, *supra* note 107; BARFIELD, *supra* note 108.

²⁵⁵ See BARFIELD, *supra* note 108, Wardak, *supra* note 120.

²⁵⁶ See BARFIELD, *supra* note 108. See also Drumbi, *supra* note 111; Wardak, *supra* note 120.

²⁵⁷ BARFIELD, *supra* note 108 at 4.

²⁵⁸ *Id.*; Wardak, *supra* note 120.

²⁵⁹ BARFIELD, *supra* note 108.

²⁶⁰ *Id.*

can fill the post-conflict vacuum while it determines the shape of its formal judicial system.”²⁶¹ Thus, during this trying time of transition, it is necessary that the customary legal system in Afghanistan be seriously accounted for and allowed to adjudicate specific and appropriate matters.

The customary legal system, however, should not be delegated the task of handling all matters. Rather, the customary system can best serve the legal system at large by mediating disputes between private parties and addressing only those matters that involve issues it has effectively dealt with in the past.²⁶² Since the Taliban’s fall in 2001, residential, commercial, and agricultural farming disputes have made up the largest class of disputes in rural areas.²⁶³ Indeed, “[d]estruction of property, and abuse of power have created complicated disputes with regard to land ownership . . . [and] studies indicate that *jirgas* . . . can be effective in finding a remedy [for these] disputes.”²⁶⁴ Furthermore, the customary system has a tradition of settling matters involving theft of movable and personal property such as money, crops, and livestock.²⁶⁵ By delegating civil matters such as property disputes and theft to *jirgas*, the formal system would be alleviated of the responsibility of handling these matters while citizens enjoy a familiar legal process that has proven effective and efficient in the past.²⁶⁶

Despite success in handling certain civil type matters such as property disputes, the customary legal system has not proven effective in handling criminal matters. For example, the customary legal system fails to adequately punish offenders.²⁶⁷ The customary legal system’s objective is community and social harmony, and it “reaches reconciliation as a result of complex processes of public condemnation, forgiveness, and acceptance. These complex processes generate public recognition of reward and punishment that supports the parties to engage in healing and transformation of identity from victim and perpetrator to normal members of the community.”²⁶⁸ While this approach to reconciliation is appropriate in small communities for civil matters and less serious criminal

²⁶¹ Senier, *supra* note 107, at 4.

²⁶² BARFIELD, *supra* note 108, at 15–16.

²⁶³ *Id.* at 15.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 8.

²⁶⁶ See BARFIELD, *supra* note 108; Wardak, *supra* note 120, at 335.

²⁶⁷ See BARFIELD, *supra* note 108; Wardak, *supra* note 120.

²⁶⁸ BARFIELD, *supra* note 108, at 16.

matters, it is not well suited for enforcing punishment for violations of state law.²⁶⁹ As was previously discussed, it is not unusual for the *jirgas*, working under a philosophy of communal reconciliation, to charge offenders of the Counter Narcotics Drug Law with the payment of monetary damages, allowing offenders to go free.²⁷⁰ This type of punishment will not suffice given the gravity of Afghanistan's drug situation.

The formal system has a tremendous responsibility to protect its citizens—this is where the customary system falls short and where the formal system is indispensable. Specifically, “in the criminal sphere, the government has a right and a duty to deliver justice.”²⁷¹ We have already seen that the *jirgas* in the customary system cannot be relied on for handling disputes involving drug trafficking offenses.²⁷² With an objective of achieving social harmony and reconciliation (as opposed to punishment), the *jirgas* can only be relied on to make community members whole with the repayment of debt—this is far from sufficient given the grave state of Afghanistan's opium cultivation and trafficking practices. Indeed, history has shown that the customary system is better suited in the criminal world for handling smaller matters such as petty theft.²⁷³ Thus, for serious criminal matters such as drug trafficking offenses where punishing offenders is crucial to curbing the practice thereof, Afghanistan's formal judicial system must be prepared for the task of delivering justice.²⁷⁴

In addition to enforcing serious criminal matters and sentencing offenders to punishment, the formal system is instrumental for protection of citizens' rights. Afghanistan's Constitution requires that Afghanistan respect “the Universal Declaration of Human Rights.”²⁷⁵ Again, as instrumental as the *jirgas* are in certain matters, they cannot be relied on to enforce and protect these sensitive rights.²⁷⁶ Gross human rights violations surface, we have already seen, when *jirgas* handle matters involving drug trafficking offenses—offering women as compensation for opium debt is hardly

²⁶⁹ *Id.*

²⁷⁰ See Mansfield, *supra* note 140; Afg. Drug Law, *supra* note 10 (demonstrating different approaches to handling punishment under the customary and formal systems).

²⁷¹ BARFIELD, *supra* note 108, at 23.

²⁷² See Mansfield, *supra* note 140; Afg. Drug Law, *supra* note 10.

²⁷³ BARFIELD, *supra* note 108, at 4, 5, 15–17, 27.

²⁷⁴ BARFIELD, *supra* note 108.

²⁷⁵ Afg. Const. Preamble.

²⁷⁶ See Drumbl, *supra* note 111.

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an internationally accepted practice.²⁷⁷ And, “with international support for Afghanistan heavily influenced by international human rights and women’s rights standards, these traditional practices have made the human rights community very wary of informal justice systems.”²⁷⁸ Therefore, where citizens’ rights are at stake, it is the responsibility of Afghanistan’s formal judicial system to protect these rights as required by Afghanistan’s Constitution.²⁷⁹

Clearly, the customary system and the formal one each serve a critical role. Therefore, it is imperative that the U.S. assist Afghanistan in building a judicial system that utilizes the strengths of each of these systems so that critical goals such as decreasing opium cultivation and enforcing standards set by the Counter Narcotics Drug Law can be reached. In order to achieve success, judicial reformers must guide each system to exercise their strengths and cede power where necessary. Thus, an understanding between the two systems must be struck where the customary justice system respects that the formal justice system has “an obligation to provide security and protect the rights of Afghan citizens.”²⁸⁰ In the criminal context, for example, the government could categorize crimes: “those where prosecution is essential . . . [such as adjudicating drug trafficking offenses] and those where prosecution may actually be avoided in favor of a community-based process approved by the court/prosecution (e.g. petty theft).”²⁸¹ By adopting this type of system, citizens could simultaneously enjoy their trusted and favored customary system while gaining protection from the formal one.²⁸²

In order to achieve an integrated balance where the formal and customary systems are both honored, it is necessary that the two systems link and work together to carry out responsibilities. One way to build this relationship is to create a system of referral²⁸³ where citizens would have the choice to bring a civil claim in either the formal state system or to a *jirga* in the customary system (reserving all serious criminal matters for the state), and “those cases that the *jirga* . . . fail[s] to resolve satisfactorily would be re-

²⁷⁷ See Mansfield, *supra* note 140, at 31; Drumbl, *supra* note 111.

²⁷⁸ BARFIELD, *supra* note 108 at 3.

²⁷⁹ BARFIELD, *supra* note 108, at 3; see Wardak, *supra* note 120, at 329–31.

²⁸⁰ BARFIELD, *supra* note 108, at 4.

²⁸¹ BARFIELD, *supra* note 108, at 23.

²⁸² See BARFIELD, *supra* note 108; Wardak, *supra* note 120.

²⁸³ Wardak, *supra* note 120, at 335.

ferred back to the formal process of the district justice system.”²⁸⁴ Furthermore, the Courts could inform the parties in the first instance that they may choose to take their claim to an informal *jirga* so long as both parties are in agreement.²⁸⁵ For such a system to work, the Court and the *jirgas* would be responsible for informing each other if a dispute has already been heard, and if so, of the outcome.²⁸⁶

In conclusion, in reforming Afghanistan’s judicial system so that it is better equipped to adjudicate drug trafficking offenses, the U.S. should work with Afghanistan to create a system that utilizes the customary system to voluntarily handle civil disputes and minor crimes while the formal system handles serious criminal matters. By creating a formal relationship between the two systems, the strengths of each system would be maximized, allowing Afghanistan’s judicial system to effectively enforce its laws.²⁸⁷

VII. CONCLUSION

Since the shocking events of September 11, fighting the “War on Terror” has been a top priority of the U.S. government. Because terrorist groups receive vital funding from Afghanistan’s thriving practice of cultivating and trafficking opium and heroin, fighting the “War on Terror” requires that the U.S. effectively address the “drug problem” in Afghanistan. Nonetheless, enforcing Afghanistan’s Counter Narcotics Drug Law and the U.S. Five Pillar Plan, created for the purposes of curbing opium cultivation and trafficking in Afghanistan, has proven ineffective. This failure is attributable to the lack of attention paid to and focus on judicial reform. Indeed, the U.S. approach of favoring short-term fixes in the form of eradication has not been successful, and in light of similar mistakes made in Colombia, it is crucial that the U.S. rethink its current approach in Afghanistan. Specifically, the U.S. should rebalance the Five Pillar Plan with emphasis on the judicial pillar. The Afghan and U.S. governments, in working towards judicial reform in Afghanistan, should make efforts to incorporate customary law into Afghanistan’s judicial system to handle civil disputes and minor crimes, while leaving more serious criminal matters such as

²⁸⁴ *Id.*

²⁸⁵ BARFIELD, *supra* note 108, at 25.

²⁸⁶ BARFIELD, *supra* note 108, at 26. “An outreach campaign on legal rights targeted at informal justice providers could facilitate this process.” *Id.*

²⁸⁷ See BARFIELD, *supra* note 108; Wardak, *supra* note 120.

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drug-related offenses for the formal system to handle. With such initiatives in place, Afghanistan could stand a chance of creating a legitimate judicial system that appropriately adjudicates drug offenses, ultimately ridding terrorist groups of their vital funding. Only then will the U.S. be able to truly and successfully fight the “War on Terror.”

