Under a Cruel Sun: My Life as a Female Judge and Underground Educator Under the Soviets, the Taliban, and the Americans

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Three forces have shaped my life as an Afghan woman. Each reduced my country to rubble, reduced the rubble to dust, and resulted in one of the deadliest conflicts of the second half of the twentieth century.  

1. The authors gratefully acknowledge that the title and structure of this essay are derived from an extraordinary memoir, UNDER A CRUEL SUN, by Heda Margolius Kovály. See HEDA MARGOLIUS KOVÁLY, UNDER A CRUEL SUN (Franci Epstein & Helen Epstein trans., 1986). Ms. Kovály’s stunningly beautiful account as a Czech Jew chronicles the Nazi invasion of Czechoslovakia, her deportation to Auschwitz, the post-war years under Stalin, and the arrest, conviction, and execution of her husband in the infamous 1952 Slansky trial. Id.  

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2. During Afghanistan’s two decades of war:  
Nearly 2 million Afghans have been killed . . . (as well as at least 15,000 Soviet soldiers during the 1980s), and 600,000 to 2 million wounded. More than five million Afghans fled to Pakistan and Iran, producing the world’s largest single refugee population since 1981, while at least 2 million more Afghans were
The first force was the invasion of Afghanistan by the Soviet Union in 1979 and the Soviet-dominated Communist period, an era that promised social change and modernity but instead wrought repression and terror. The second was the medieval labyrinth that was rule under the Taliban, a brutal and misogynistic reign of terror that instituted a nightmarish policy of sexual apartheid. The third was the American invasion in September 2001, an effort that sought to slay monsters it had created more than a decade earlier.

I. AFGHANISTAN: A STATE IN SEARCH OF A NATION

The stunning tragedy which is contemporary Afghanistan is matched by its stunningly rugged and diverse beauty. Geographically, the country encompasses snow-covered mountains, rolling steppe, and uncultivable deserts. Afghanistan covers some 245,000 square miles, an area approximately the size of Texas. "Afghanistan is completely landlocked, bordered by Iran to the west... by the Central Asian States of Turkmenistan, Uzbekistan, and Tajikistan to the north and northeast... by China at the easternmost top of the Wakhan


3. Under "the first communist regime of 1977-1979... 50,000 to 100,000" Afghans were killed "in purges of potential opponents." 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, 357 (2004). "During the Soviet Union's 1979 invasion and occupation, '80,000 Afghan guerillas and a million Afghan civilians are believed to have died, and a third of the population fled the country' in horror." Talya Friedman, Cures to the Enigmatic Taliban Plague: Legal and Social Remedies Addressing Gender Apartheid in Afghanistan, 23 LOY. L.A. INT'L & COMP. L. REV. 81, 82-83 (2001) (quoting MARY LOUISE CLIFFORD, THE LAND AND PEOPLE OF AFGHANISTAN 192-93 (1989)).

4. Sexual apartheid has been defined as "the oppression of individuals, and their exclusion from equal enjoyment of human rights, on the grounds that they are women. Sexual apartheid can be more subtle than racial apartheid because the forms of oppression are woven into the fabric of society. The agents of modern sexual apartheid consider the subordinate and domestically oriented role and status of women part of the natural order, and assume women's servitude as a condition of society itself." Guglielmo Verdirame, Testing the Effectiveness of International Norms: UN Humanitarian Assistance and Sexual Apartheid in Afghanistan, 23 HUM. RTSQ. 733, 734 n.6 (2001) (quoting REBECCA COOK, THE ELIMINATION OF SEXUAL APARTHEID: PROSPECTS FOR THE FOURTH WORLD CONFERENCE ON WOMEN 3 (1995)).


Corridor . . . and by Pakistan to the east and south. It is truly a country
the diverse
topography is inhabited by an equally diverse population, which
serves to undermine state-building and the emergence of a national
identity. As one scholar has noted, “Afghanistan has never been a
homogeneous nation but rather a collection of disparate groups divided
along ethnic, linguistic, religious, and racial lines and forced together
by the vagaries of geopolitics.” Although there has been much inter-
ingling over the centuries, the peoples of Afghanistan still have
distinct ethnic, physical, and linguistic differences. Recent estimates
suggest that Afghanistan may have a population of close to thirty
million people, divided into approximately twenty main ethnic
groups. A majority of Afghans can speak at least one of the two of-
official languages of Pushtu or Dari, but over thirty different languages
are spoken. Though the etymology of the term “Afghan” remains
unclear, until very recently the term was synonymous with Pushtu.
Thus, the use of the term to identify the nation dates at least as far
back as the eighteenth century, when Pushtun tribes inhabited central
Asia.

The largest and traditionally most politically powerful ethnic
group, the Pushtuns, represent at least fifty percent of Afghanistan’s
population. They are predominantly located in the south and east
of the country, though like a number of other Afghan ethnic groups,
they extend beyond Afghanistan. The Pushtun population in
Pakistan, for example, constitutes a major ethnic group of about
fourteen million people. “Despite the traditional dominance of the
Pushtuns, there are significant minorities in Afghanistan . . .
These are largely nontribal minorities who speak Indo-European or

7. Id.
8. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: AFGHANISTAN (2005),
9. GOODSON, supra note 2, at 14.
10. See MAGNUS & NABY, supra note 5, at 1-2.
11. CENT. INTELLIGENCE AGENCY, supra note 8.
12. MAGNUS & NABY, supra note 5, at 10.
13. Id. at 13.
14. CENT. INTELLIGENCE AGENCY, supra note 8.
15. MAGNUS & NABY, supra note 5, at 11.
16. Id. at 11.
17. Id. at 10, 12.
18. GOODSON, supra note 2, at 14.
19. Syed Saleem Shahzad, Pakistan the Odd One Out, ASIA TIMES, Sept. 16, 2003,
reprinted in S. ASIA RES. INST. FOR POL’LY DEV. (2003), http://www.sarid.net/conflict-
zone/pakistan/03sep16-pakistan-the-odd-man-out.htm.
Ural-Altaic languages and combine Western with Central Asian physical traits." The most numerous, at between one-fourth and one-fifth of the population, are the Tajiks. Tajiks inhabit the northeastern part of the country and spill over into the former Soviet Republic of Tajikistan. "Tajiks appear to have Persian features and speak Dari," the Afghan dialect of Farsi or Persian. Other sizeable ethnic groups include the Hazaras, the Uzbeks, and the Aimaq, which are roughly equal in size, in addition to less numerous but still substantial Turks, Kazaks, Sikhs, Hindus, and Jews. This incredible "ethnic mixture has traditionally known a high propensity for violence, often between ethnic groups, subtribes, and even cousins." As one scholar has accurately remarked, "[o]nly outside threats seem to unite the Afghans, and those alliances are temporary and limited. When the threat is eliminated or sufficiently reduced, people return to regular patterns of traditional warfare." 

Like Afghanistan's topography and multifaceted ethnic cleavages, religion fosters divisions within Afghan society. Although Afghanistan is a Muslim country, sectarian differences over Qur'anic and legal interpretations deeply divide Afghans. Approximately eighty-five percent of the population is Hanafi Sunni and the remainder Jafari Shi'a. This religious division results in a more
basic gap between the groups: "Shi'as are among the most economically disadvantaged people in Afghanistan."\textsuperscript{31}

Islam descends from the Semitic religions and shares with Judaism and Christianity the concepts of "an uncompromising monotheism, the belief in God's revelation, His prophets . . . and the Day of Judgment."\textsuperscript{32} "The period of pre-Islamic Arabia — known as \textit{Jahiliyyah}, or the Age of Ignorance" was defined by a polytheistic culture and "a belief that gods and goddesses protected individual tribes."\textsuperscript{33} "Allah, the supreme high god, was the creator and sustainer of life but remote from everyday concerns . . . ."\textsuperscript{34} One night in the month of Ramadan 610 A.D., during the \textit{Jahiliyyah}, God sent the angel Gabriel to reveal his word to Muhammad, a successful businessman.\textsuperscript{35} "Muhammad continued to receive divine revelations" from God for twenty-two years.\textsuperscript{36} For Muhammad and his followers, "heeding God's warning required turning away from the path of unbelief and turning toward . . . the straight path (\textit{sharia}) or law of God."\textsuperscript{37} The revelations God made to Muhammad are collected in the Qur'an. As Islam's sacred scripture, the Qur'an provides both Islam's core tenets and the criteria for being Muslim.\textsuperscript{38} The Qur'an contains legal prescriptions, but consists primarily of broad moral directives indicating what Muslims "ought to do."\textsuperscript{39} Over time, Islamic standards gradually replaced earlier tribal laws and Arab customs.\textsuperscript{40}

\textsuperscript{32} ESPOSITO, supra note 30, at 3.
\textsuperscript{34} ESPOSITO, supra note 30, at 5.
\textsuperscript{35} JOHN BAGOT GLUBB, \textit{The Life and Times of Muhammad} 83-84 (1970); see also ESPOSITO, supra note 30, at 8.
\textsuperscript{36} ESPOSITO, supra note 30, at 8 (indicating that the revelations spanned from 610-632 A.D.).
\textsuperscript{37} Id. at 14.
\textsuperscript{38} Sayeh & Morse, supra note 33, at 315 (citing ESPOSITO, supra note 30, at 8-9).
\textsuperscript{39} ESPOSITO, supra note 30, at 79.
\textsuperscript{40} Id. at 79-80.
II. THE SOVIETS: THE DOWNWARD SPiral

I was born east of Kabul, the capital of Afghanistan, in 1968 to a middle class family. My father was a judge and inculcated in me both a love of learning and a strong sense of public service. He would often repeat to me the maxim “to those who are given much, much is expected.” I was indeed given much; born into a family that adored me, I was told I could do anything. I began school with the intent of one day becoming a judge, like my father. At that time, I never considered gender as a restraint on what I could achieve. This was the Afghanistan of the past, a time when women had the right to send their children to school, to vote, to serve their community, and to walk down the street without a male escort.

The movement for women’s rights in Afghanistan dates back to as early as 1928, when Queen Souriya worked to open schools for girls, in opposition to Afghan tradition. “Her husband, King Amanullah, abolished child marriages, promoted universal education for girls and boys, and even imposed Western European dress codes on the population of Kabul.” King Zahir Shah, who ruled Afghanistan from 1933-1973, continued these progressive reforms. The Constitution of 1964, promulgated by King Zahir Shah, created a two-chamber legislature. Of the deputies who served in the legislature, the King appointed one-third, the people elected one-third, and provincial assemblies indirectly selected one-third. Afghanistan’s new Constitution guaranteed equality to

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43. Id.


45. Id.
men and women, while simultaneously emphasizing the country's Islamic roots.46

After what seems a lifetime of bombs, mutilations, and deaths, I find myself questioning whether there was ever a time my country was not at war. Even now, as I recall those first few idyllic childhood years, I have to pinch myself to make sure that I am not dreaming. Yet the fact is, for the first few years of my life there was no war.

It was not until Judge Basel was about five years old when the center failed to hold and things began to fall apart.47

Afghanistan's descent into conflict and instability in recent times began in 1973 with the overthrow of King Zahir Shah.48 King Zahir Shah was not regarded as an inspired leader.49 In fact, "he hardly led at all, preferring to take it easy and to let the tribes govern themselves."50 Positive remarks about Zahir Shah were sparse at that time, but in the years that followed "almost all Afghans longed for his return, considering what happened after he was removed from power."51 Under the King, Afghanistan never amounted to much more than a desperately poor, backwards, illiterate country largely dependent upon foreign aid.52 Yet it was peaceful and independent; it was a country in which a girl could reasonably entertain dreams of going to school and college and serving her society as a lawyer. Notwithstanding the 1964 Constitution, King Zahir Shah's reign failed to produce substantial, lasting change, although one change in particular would have far-reaching consequences for Afghanistan.53

47. The phrase is from the first stanza of a poem by W.B. Yeats. See W.B. YEATS, THE SECOND COMING (1916), available at http://www.stfrancis.edu/en/yeats!.htm:
   Turning and turning in a widening gyre
   The falcon cannot hear the falconer;
   Things fall apart; the centre cannot hold;
   Mere anarchy is loosed upon the world,
   The blood-dimmed tide is loosed, and everywhere
   The ceremony of innocence is drowned;
   The best lack all conviction, while the worst
   Are full of passionate intensity.
49. Id.
50. Id.
51. Id.
53. See BACKGROUND NOTE: AFGHANISTAN, supra note 44.
Zahir Shah had “permitted the growth of unofficial extremist parties on both the left and the right. These included the communist People’s Democratic Party of Afghanistan (PDPA), which had close ideological ties to the Soviet Union.”

In the early 1970s, the country was beset by serious economic problems. The country’s plight became even worse when the rains failed in the years between 1969 and 1972. By 1971, there was widespread famine and... as many as 100,000 people... died.

Maintaining that the King had mishandled the economic crisis, the King’s cousin and former Prime Minister, Sardar Mohammad Daoud, seized power in a military coup on July 17, 1973. “Daoud abolished the monarchy,” proclaimed a republic, “abrogated the 1964 Constitution,” and ambitiously appointed himself President, Prime Minister, Foreign Minister, and Minister of Defense.

Although Daoud was considered a nationalist, during his decade-long stint as Prime Minister from 1953 to 1963, he had established close ties with Moscow and entered into a number of agreements for economic and military aid. Predictably, Moscow cheered Daoud’s takeover and, during a visit to Moscow the following June, the Soviets agreed to provide an additional $600 million in economic assistance to Kabul.

Concerns in Washington led U.S. Secretary of State Henry Kissinger to travel to Kabul in November 1974. Shortly after Kissinger’s trip, a delegation from the U.S. Agency for International Development (USAID) offered its own economic and technical assistance.

With Daoud’s bloodless coup, Afghanistan lost its independence. Beginning with that act and for the next twenty years, Afghanistan would be a pawn in the Cold War. When the Cold War finally ended in the late 1980s, it went from being a pawn to a failed state, and the primary battleground upon which to wage the world’s next great conflict: the War on Terror.

Prime Minister Daoud’s tenure would be short-lived. “On April 27, 1978, the P.D.P.A. initiated a bloody coup, which resulted

54. Id.
55. See EWANS, supra note 23, at 126.
56. Id.
57. BACKGROUND NOTE: AFGHANISTAN, supra note 44.
58. EWANS, supra note 23, at 130.
60. Id. at 4.
61. Id. at 5.
62. See BACKGROUND NOTE: AFGHANISTAN, supra note 44.
in the overthrow and murder of Daoud and most of his family. This was sparked partly by Daoud's growing unpopularity, but more directly by his attempts to suppress the communists. As security consultants, he had used SAVAK, the despised secret police of the Shah of Iran. SAVAK was blamed with the assassination of Mier Akbar Khybar, a highly regarded and patriotic leader of the Left. As one scholar has written, "[t]he coup d'état ... established a new pattern that was to dominate Afghan politics for the next decade and a half — a pattern of total dependence on the Soviet Union." The Red Orchestra had begun.

The P.D.P.A. proved to be a case-book study on how not to win a country's "hearts and minds." During its first eighteen months in power, the atheistic P.D.P.A. brutally imposed decrees forcing "compulsory social changes, including coeducational schooling, prohibition of forced marriages, and the unveiling of women." Many segments of Afghan society, including the traditional elite and religious establishment, felt threatened by and opposed these far-reaching reforms, many of which ran counter to deeply held Afghan traditions. In implementing the reforms, the P.D.P.A. made no effort to engage traditional social and economic structures. Rather, "reforms were accompanied by fascist attempts to stifle indigenous opposition," and the regime "carried out massive repression,"
including systematic torture of thousands of detainees by the secret police . . . and indiscriminate bombing of rural areas.\textsuperscript{72} Tragically, this violence undermined the regime and fueled opposition to its reforms, particularly the expansion of women’s rights.\textsuperscript{73}

Fearing that a communist state was slipping out of its orbit, the P.D.P.A.’s powerful sponsor acted as it had in Hungary in 1956 and Czechoslovakia in 1968.\textsuperscript{74} In 1979, the Soviet Union had thousands of troops on the ground, and on December 24, large numbers of airborne forces joined them to surround the presidential palace.\textsuperscript{75} Babrak Karmal, who arrived atop a Soviet tank,\textsuperscript{76} was installed as Prime Minister.\textsuperscript{77} Three days later, massive Soviet ground forces invaded from the north.\textsuperscript{78} By the spring of 1980, more than 100,000 Soviet troops were present in Afghanistan.\textsuperscript{79}

In April 1979, six months before the Soviet invasion, seven Afghan groups based in Pakistan began meeting with and receiving weapons\textsuperscript{80} and assistance from CIA officials.\textsuperscript{81} These groups had previously declared a \textit{jihad}, or holy war, against the P.D.P.A. regime, and now expanded their \textit{jihad} to include the Soviet invaders.\textsuperscript{82} Consequently, their combatants came to be known as Mujahidin.\textsuperscript{83} The CIA apparently reasoned that the Mujahidin were worthy of material and financial support as they were the most anti-communist group in Afghanistan. The fact that they were also the most anti-Western group apparently did not matter; nor did the group’s utter disregard for women deter the CIA from withholding support. Gulbuddin Hekmatyar, the notorious Afghan warlord who received the lion’s share of the CIA’s bounty during the early years of the war, first gained notoriety in Kabul for spraying acid onto the faces of

\textsuperscript{72} Id.
\textsuperscript{73} Id. at 15.
\textsuperscript{75} Background Note: Afghanistan, supra note 44.
\textsuperscript{76} Magnus & Naby, supra note 5, at 129.
\textsuperscript{77} Background Note: Afghanistan, supra note 44.
\textsuperscript{78} Id.
\textsuperscript{79} Goodson, supra note 2, at 59.
\textsuperscript{80} “Until 1986, the Americans were careful not to supply [the Mujahidin with] their own arms, but bought Soviet-made weapons from Egypt, Israel, and elsewhere, and sent them in through Pakistan. . . . The Chinese also supplied arms while other countries, notably Saudi Arabia and the Gulf States, contributed financially.” Ewans, supra note 23, at 161.
\textsuperscript{81} William Blum, Killing Hope: U.S. Military and CIA Interventions Since World War II 344 (1995); Goodson, supra note 2, at 146-47 (estimating that U.S. aid to the Mujahidin totaled approximately $3 billion in the 1980s); Kolhatkar, supra note 42, at 153.
\textsuperscript{82} Ewans, supra note 23, at 54, 153.
\textsuperscript{83} Id. at 153.
young girls who went about unveiled. 84 "Even the CIA admitted to his 'vicious' and 'fascist' tendencies." 85 Apparently, in the grand scheme of the Cold War, the fate of a tiny nation like Afghanistan simply did not matter. Indeed, as President Carter's National Security Advisor, Zbignew Brzezinski, explained to a French journalist in 1998 when asked whether he regretted supporting the Mujahidin and giving arms and advice to future terrorists, "[w]hat is more important to the history of the world ... the Taliban or the collapse of the Soviet empire? Some stirred-up Moslems or the liberation of Central Europe and the end of the cold war?" 86

Although the Soviet Union had superior weapons and complete air control, the Mujahidin, armed with the deadly American Stinger anti-aircraft missiles, proved a formidable foe. 87 By the mid-1980s the conflict had settled into a bloody stalemate, with the Afghan people caught in the middle. In an insightful review of M. Hassan Kakar's Afghanistan: The Soviet Invasion and the Afghan Response, 1979-1982, one author explains how the Soviets attempted to deal with their unconventional foes:

Under these circumstances, the Soviets tried what most states faced with popular guerillas attempt: they took the war to the civilians and the countryside. The basic method ... is to depopulate remote, ill-controlled villages. Whether the villagers go to towns and villages you control, or to concentration camps, or flee the country, or simply die, is at best a secondary issue .... The Soviets prosecuted this strategy with remarkable thoroughness. Before the war, the Afghan population is estimated to have been somewhat more than fifteen million people. Over five million — a third of the country — became refugees .... Millions more became refugees within the country, swelling the population of Kabul. Another million people were killed, either in fighting, or in massacres by Soviet troops or by sheer starvation .... In a display of really macabre ingenuity, the Soviets took to scattering

84. Kolhatkar, supra note 42, at 15.
85. Id.
87. As one author has written:
It was Stingers, not cross-border operations, that made the difference. The Muj brought down their first Soviet helicopter with a Stinger in September 1986, and over the following ten months nearly 190 of the lethal missiles were fired by the rebels with an astonishing 75 percent kill rate. That was the beginning of the end for the Soviets.
brightly-colored plastic toys, which exploded when picked up by children.\textsuperscript{88}

The Soviets also left some ten million landmines in their wake.\textsuperscript{89} These landmines continue to restrict areas for cultivation, slow the return of refugees, and maim and kill innocent Afghans. In 2000, an average of approximately eighty-eight casualties per month were attributed to landmines and other unexploded ordnances.\textsuperscript{90}

By the late 1980s, a growing Soviet-American rapprochement, due in large measure to efforts by the new Soviet premier Gorbachev, increased pressure for a settlement.\textsuperscript{91} In 1988, Afghanistan, Pakistan, the United States, and the Soviet Union signed the Geneva Accords.\textsuperscript{92} The Accords called for American and Soviet “noninterference in the internal affairs of Pakistan and Afghanistan, the right of refugees to return to Afghanistan without fear of persecution,” and a timetable to ensure full Soviet withdrawal from Afghanistan on or before February 15, 1989.\textsuperscript{93} Tragically, the Mujahidin were not a party to the Accords and refused to accept their terms.\textsuperscript{94} As a result, on February 15, 1989, when the last Soviet soldier crossed the Amu Darya River bridge, the Mujahidin, still receiving funding from the United States, continued their attack against the government by shelling the major cities, killing thousands of civilians in the process.\textsuperscript{95}

On April 29, 1992, the Mujahidin factions marched upon Kabul and declared themselves leaders of war-weary Afghanistan.\textsuperscript{96} Two months later, Tajik leader Barnahuddin Rabbani declared himself President.\textsuperscript{97}

\textit{I was ecstatic that the fighting had at long last come to an end. Moreover, I was eager to get on with my legal career. Though I had completed all the required course work, my degree from the Judiciary Training program had yet to be granted, for the Communists would only accept female judges who were party members; a

\textsuperscript{88} Shalizi, supra note 52.
\textsuperscript{90} See id.
\textsuperscript{91} BACKGROUND NOTE: AFGHANISTAN, supra note 44.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} See id.
\textsuperscript{95} RAINWATER, supra note 86.
\textsuperscript{97} See MICHAEL GRIFFIN, REAPING THE WHIRLWIND: THE TALIBAN MOVEMENT IN AFGHANISTAN 24 (2001).
condition I was unwilling to meet. Despite the concerns that most women, and I, had about the new government, we could not help but think Afghanistan’s nightmare was at long last over. After all, how could anything be worse than what we had endured the past ten years?

III. THE TALIBAN:98 JOURNEY INTO THE WHIRLWIND99

It took the Mujahidin little time to prove that although they could win the war, they could not secure the peace. Without a common enemy, the various militias’ ethnic differences and greed surfaced and a new war emerged.100 In what was an ironic twist in Afghanistan’s tragic history, “Kabul, which had survived the first . . . stages of the war relatively unscathed, became a major battleground.”101 As many as 50,000 people were killed, 150,000 were wounded, and hundreds of thousands were made homeless following the Soviet withdrawal.102 Forces loyal to guerrilla leader Gulbuddin Hekmatyar immediately launched attacks against Kabul, and shellings rained down on the capital, which had largely been spared the fighting of the past decade.103 In time, every major Mujahidin faction joined in the fighting and Afghanistan became a series of medieval fiefdoms, each controlled by a powerful warlord in the business of making war.104

This continuous violence particularly frustrated Pakistan, as it prevented Afghanistan’s powerful neighbor to the east from


99. The subtitle refers to the remarkable and inspirational autobiography of Eugenia Semyonova Ginzburg, a victim of Stalin’s reign of terror. EUGENIA SEMYONOVA GINZBURG, JOURNEY INTO THE WHIRLWIND (Paul Stevenson & Max Hayward trans., 1967). The author, a Communist supporter, found herself wrongfully accused of being an enemy of the people and subsequently spent eighteen years in Russia’s prison and labor camps. Id.

100. See EWANS, supra note 23, at 179.


102. GOODSON, supra note 2, at 75.

103. See id. at 74.

104. See id. at 74-76.
realizing its aspirations to trade with and influence Central Asia.\textsuperscript{105} Pakistani and Saudi Arabian fundamentalists extended support to a new movement, known as the Taliban or religious students, in the summer of 1994.\textsuperscript{106} The Taliban were composed of Pushtun refugees and war veterans from rural Pakistani and Afghan madrasahs, or Islamic schools.\textsuperscript{107} As one scholar has written, "[t]heir arrival on the Afghan stage marked the end of the period of intra-mujahideen civil war and the beginning of [the next] stage in the Afghan War."\textsuperscript{108} Their arrival also marked a new stage of terror for Afghan women.

Not surprisingly, just as the Mujahidin had disintegrated into warring factions once deprived of a common enemy, they now put aside their differences, renamed themselves the Northern Alliance, and took up arms against the Taliban.\textsuperscript{109} War continued. Although fighting continued in Northern Afghanistan until the 2001 invasion by the Americans, the Taliban controlled two-thirds of the country by the end of 1996.\textsuperscript{110} By the time of the American invasion, the Taliban effectively controlled ninety percent of the country and was indisputably the \textit{de facto} ruler.\textsuperscript{111} The Taliban consisted of a six-member ruling council in Kabul.\textsuperscript{112} Ultimate authority, however, rested with the reclusive Mullah Omar and the Taliban's inner \textit{shura}, or council, located in Kandahar.\textsuperscript{113} The Northern Alliance, led by President Rabbani, held a sliver of territory in the northeast.\textsuperscript{114}

To understand the Taliban, one must understand the forces that created them. Ratna Kapur describes the Taliban as "a force born in the crucible of the Cold War, schooled in the Madrasas and whose members were raised in refugee camps."\textsuperscript{115} Similarly, Arundhati Roy, the Booker Prize-winning author from India, explains:

\textsuperscript{105} Id. at 76.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} See Kolhatkar, \textit{supra} note 42, at 18.
\textsuperscript{110} See id.
\textsuperscript{111} See \textit{BACKGROUND NOTE: AFGHANISTAN}, \textit{supra} note 44.
\textsuperscript{113} See id.
\textsuperscript{115} Ratna Kapur, \textit{Un-Veiling Women's Rights in the 'War on Terrorism,'} 9 \textit{DUKE J. GENDER L. & POL'Y} 211, 220 (2002).
Young boys many of them orphans — who grew up in those times, had guns for toys, never knew the security and comfort of family life, never experienced the company of women. Now, as adults and rulers, the Taliban beat, stone, rape and brutalise women, they don’t seem to know what else to do with them. Years of war has [sic] stripped them of gentleness, inured them to kindness and human compassion. Now they’ve turned their monstrosity on their own people.116

Following a twenty-two month siege, on September 27, 1966, these men “born in the crucible of the Cold War”117 and “inured . . . to kindness and human compassion”118 swept into Kabul and declared themselves the legitimate government of the newly named Islamic Emirate of Afghanistan.119 Saudi Arabia, Pakistan, and the United Arab Emirates rushed to recognize the new government.120 Proving they would not hesitate to settle scores from the past, one of the Taliban’s first acts was to capture former Communist President Najibullah, who had ruled Afghanistan from 1986 to 1992; they tortured and killed him before hanging his body in a public square.121 The Taliban takeover of Kabul did have one positive aspect: it ended the blockade of the city by the Taliban; both food and other items of trade could now reach Kabul.122 The effects, however, were limited. The constant devaluation of the currency resulted in steadily rising prices, placing most goods out of the reach of most residents despite their increased availability.123

The horrors of Taliban rule have been well documented.124 Yet mere words will never convey the horror and brutality that engulfed Afghanistan. In a 2000 report on violence against women, the United Nations Economic and Social Council Special Rapporteur explained:

117. Kapur, supra note 115.
118. Roy, supra note 116.
122. RUBIN, supra note 121.
123. Id.
124. See Violence Against Women, supra note 112.
Most countries of the world appear to tolerate some practices that discriminate against women, but in only some countries is discrimination official policy. In Taliban controlled areas of Afghanistan, discrimination against women is officially sanctioned and pervades every aspect of the lives of women. They are subject to grave indignities in the areas of physical security and the rights to education, health, freedom of movement and freedom of association.\(^{125}\)

Hours after the Taliban took Kabul, orders from the High Council were announced over Radio Kabul\(^\text{126}\) instructing women to stop attending workplaces, prohibiting girls from attending school, and commanding that women only move outside the home when accompanied by a male family member and wearing a burqa.\(^{127}\) A burqa is a head-to-toe black pleated garment that completely covers a woman’s body. Over the eyes there is a three-inch mesh square to permit what is, at best, minimal vision.

_I had never worn a burqa before and I despised it so much I wore it in my dreams. Wearing the burqa I felt imprisoned, both literally and figuratively. In the summer it was so hot that I felt as though I were slowly suffocating. Peering out of that tiny mesh cage, I felt like a caged animal, which is exactly what I and other women had become: caged animals stripped of any freedom or dignity._

Overnight, half of the population of Afghanistan disappeared. Women who had once been teachers, lawyers, engineers, and doctors became ghosts, locked in their homes behind painted black windows.\(^{128}\) As the war had created a large number of widows, the inability of these women to work caused enormous hardship. Overnight, educated, confident women who had once provided for their families and benefitted society were reduced to selling all their worldly possessions, begging in the street for food, or selling themselves.\(^{129}\) In Kabul alone, over 150,000 women were barred

\(^{125}\) _Id._ at 5.


\(^{127}\) _Id._ at 148. See also Christina Lamb, _The Sewing Circles of Herat_ 30 (2002).


from working, 30,000 of whom were war widows. As an Amnesty International Report in 1996 concluded, "the Taliban has thus deliberately created such poverty by arbitrarily depriving half the population under its control of jobs, schooling, mobility, and health care. Such restrictions were literally life threatening to women and to their children." These conditions led many women to suicide; indeed, a 1998 survey by Physicians for Human Rights indicated that an astonishing 97% of Afghan women exhibited signs of major depression and 21% reported having suicidal ideations "extremely often" or quite often.

Members of the Ministry for the Promotion of Virtue and Suppression of Vice, known as the "religious police," were responsible for enforcing the Taliban's misanthropic edicts. The Ministry terrorized women. They had the power to impose on-the-spot punishments, including beatings or imprisonment for "perceived" violations without any due process. "The religious police specifically hit women on private parts of the body, for example the breasts, in the knowledge that women were less likely to show the bruising, even to family members."

After seventeen years of war, thousands of women had lost their husbands, fathers, sons, and brothers in the fighting and had to choose between virtual house arrest or risking a public beating and imprisonment. One woman in the city of Farah was shot by the Taliban for taking her toddler, who was suffering from acute diarrhea, to a doctor without a male escort. Even with the proper male guardian, women were beaten if they made noises when they walked, if they laughed, if they wore white shoes or socks, or if an inch of their ankle showed under their burqa. One "elderly woman was brutally beaten with a metal cable until her leg was broken because her ankle was accidentally showing from underneath her

130. Id.
132. HUMAN RIGHTS PRACTICES FOR 1998, supra note 128.
133. See id.
135. Id.
136. GRAVE ABUSES, supra note 131.
In another instance, "a woman struggling with two small children and groceries in her arms was reportedly beaten by Taliban with a car antenna because she had let her face covering slip a fraction." Other women could not afford the nine dollar burqa and thus could not leave their homes. In one instance a "mother watched her daughter writhe with stomach pain for days. But she did not take her to a free clinic because she could not afford [the burqa]. . . . The [twenty-two]-year old daughter died." In addition to public beatings, women who violated standards of morality were publicly lashed in front of large crowds, often in a stadium. Women found guilty of adultery could be stoned to death.

Under Taliban rule, an already inadequate health care system deteriorated precipitously so that countless women died of treatable illnesses. Initially, like other women, female medical practitioners were banned from work. Nonetheless, as male doctors were severely limited in their ability to treat female patients, this policy proved untenable, and the resulting international uproar forced the Taliban to modify it. Female doctors and nurses were allowed to resume their jobs in Kabul and elsewhere, but generally under strict guidelines. Beginning in September 1997, female medical patients were segregated into different hospitals. As an article in Human Rights Brief noted, "[a]ll female hospital personnel, including physicians, nurses, pharmacists, and technicians, were prohibited from working in the twenty-two hospitals in Kabul. The single medical facility where women were permitted contained only thirty-five patient beds. Clean water, electricity, oxygen, and surgical and diagnostic equipment were not available."

In the field of health care, of particular concern was women's reproductive health. Stephanie Dubitsky explained:

139. Friedman, supra note 3, at 91.
140. WOMEN AND GIRLS IN AFGHANISTAN, supra note 137.
141. Friedman, supra note 3, at 91.
143. Friedman, supra note 3, at 91.
147. Dubitsky, supra note 146.
148. Id.
149. Id.
150. Id.
Even before the Taliban took power, Afghanistan's incidence of maternal mortality was one of the worst in the world. Only a few female obstetricians allowed to work under the rules negotiated by the International Red Cross practiced in Afghanistan, and male obstetricians were prevented from adequately treating their patients due to the restrictions on male-female contact. The United Nations estimated that, as a result, only ten percent of Afghan women had access to formal prenatal and maternal medical services, and medically-trained health care providers attended fewer than six percent of all births.151

Another Taliban edict with deleterious health consequences banned women and girls from using Kabul's thirty-two public bathhouses.152 Bathhouses had always been segregated by sex and were often the only place where women could bathe in warm water.153 As a result of the ban, incidents of gynecological infections, scabies, and uterine infection after childbirth increased.154 Women were not the only ones to suffer a reduction in health care. Prior to Taliban rule, forty percent of the doctors in Kabul were women.155 The loss of such a significant portion of the medical profession caused some hospitals and treatment centers to close, affecting men as well.156 Taliban edicts banning images of humans "caused the destruction of public education posters (representing the human body) and hampered the . . . dissemination of health information," a particular concern in a largely illiterate society such as Afghanistan.159

In the field of primary education, the ban on female employment harmed all children. A U.N. survey conducted in May 1996 indicated that prior to the Taliban "Kabul had 158 pubic schools,

151. Id.
152. Burns, supra note 129.
153. Id.
154. THE FORGOTTEN CRISIS, supra note 121.
155. Friedman, supra note 3, at 86.
156. Id.
157. Taliban edicts banned both images of humans (such as photographs) and representations of human forms (such as models and dolls) as idolatrous. See Friedman, supra note 3, at 89; HUMAN RIGHTS PRACTICES FOR 1998, supra note 128. This belief became known to the world in March 2001 when two Buddha statues dating back to the seventh century were destroyed by the Taliban. U.N. Pleads With Taliban Not to Destroy Buddha Statues, N.Y. TIMES, Mar. 2, 2001, at A3. The larger of the two, at 175 feet tall, was thought to be the world's tallest standing Buddha. Id.
158. HUMAN RIGHTS PRACTICES FOR 1998, supra note 128.
159. According to a 1999 estimate, only fifty-one percent of Afghan men and twenty-one percent of Afghan women were literate (age fifteen and over and able to read). CENT. INTELLIGENCE AGENCY, supra note 8.
accommodating 148,223 boys and 103,256 girls, taught by 11,208 teachers of whom 7,793 were women. Overnight, Kabul lost over 70% of its teachers, causing many schools to shut down. Secondary education was equally impacted; prior to the Taliban, 60% of the professors at Kabul University had been women.

As a result of pressure from the international community, the Taliban made insignificant changes to the policy prohibiting girls from attending school. In 1997 it opened schools for girls aged six to ten. The schools, however, were run by the Ministry of Religious Affairs rather than the Ministry of Education and the main curriculum was the Qur'an. The Taliban’s educational edicts stemmed from its fear that “girls w[ould] be corrupted by anything other than a pure Islamic teaching, consistent with the Taliban interpretation of Islam . . . .” The policies were clear violations of international law. The Special Rapporteur on violence against women noted:

The Taliban’s lack of official commitment to educating girl children is a violation of international law and Afghanistan’s commitments under the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.

For me, hiding in the house behind painted windows, wasting away, while my fellow countrywomen endured injustices was not an option. To do so would be to strengthen a regime I despised with all my heart. I equated silence with acquiescence and believed as Dante had written in The Inferno almost seven-hundred years earlier: “The hottest places in Hell are reserved for those who, in time of moral crises, maintain their neutrality.” I decided the best way I could serve my country was to become an underground educator. I began running a secret school teaching women and girls to read and write. I wanted to prepare them for the day that I knew was sure to come. In the time I conducted my secret school, I had between 350-400 students. The youngest was eight years old, the oldest fifty. Whenever

160. Dupree, supra note 126, at 153-54.
161. Friedman, supra note 3, at 85-86.
162. Violence Against Women, supra note 112, at 5.
163. Id.
164. Id.
165. MARSDEN, supra note 98, at 99.
166. Violence Against Women, supra note 112, at 8.
informers got close, I would move the school to a different house. Within a short time I learned to distinguish who was at the door: my students and a few other teachers assisting me would knock with their palms open while the Taliban would bang at the door with the butts of their rifles. I never lost sight of the danger involved in conducting the school. In one instance, another "woman who [had] defied Taliban orders by running a home school for girls was shot and killed in front of her family and friends."\textsuperscript{6} Although my time as an underground educator was incredibly rewarding, it took an enormous toll on me. In the final days of rule under the Taliban, I fled to Pakistan, where I met various inter-governmental and non-governmental organizations dedicated to helping my country.

The misogyny of the Taliban was matched by the world's indifference. Had the United States and the international community confronted the Taliban five years earlier than it did, both the horrors of life under the Taliban and the deplorable events of September 11, 2001 may have been averted. Tragically, both the United States and the international community chose to look the other way.

On November 18, 1997, Secretary of State Madeleine Albright visited a group of Afghan children in a mud-walled school at an Afghan refugee camp in Nasir Bagh, Pakistan.\textsuperscript{169} Visibly moved, Albright listened intently as schoolgirls and their teachers recounted, often in horrifying detail, their flight from the Taliban.\textsuperscript{170} Before departing, she told the group, "I will do everything I can to help your country . . . I can visit you again, but in Afghanistan, where you will live as full equals . . . We really are all sisters."\textsuperscript{171} At a news conference in front of embarrassed Pakistani officials the following day, Albright used the strongest language yet by a public official in denouncing the Taliban: "I think it is very clear that we are opposed to the Taliban because of their approach to human rights, their despicable treatment of women and children, and their lack of respect for human dignity."\textsuperscript{172} Albright's words were strong, but regrettably, the deeds never matched the words. Eighteen months after Albright's remarks, on July 4, 1999, President Clinton

\textsuperscript{168} FEMINIST MAJORITY FOUND., STOP GENDER APARTHEID (2005), http://www.feminist.org/afghan/facts.html.


\textsuperscript{170} David S. Cloud, Albright Lambastes Taliban over Treatment of Women, CHI. TRIB., Nov. 19, 1997, at 4N.

\textsuperscript{171} Id.

\textsuperscript{172} Id.
issued Executive Order 13,129, which froze assets and prohibited transactions with the Taliban.\textsuperscript{173} The Order, however, was prompted not by the Taliban’s treatment of women, but by security concerns.\textsuperscript{174} Given Albright’s promises to her Afghan “sisters” it is quite extraordinary that nowhere in the Order was the abysmal treatment of women under the Taliban mentioned. Rather, the Order was entirely premised upon what the United States deemed to be a threat to its national security:

The actions and policies of the Taliban in Afghanistan, in allowing territory under its control in Afghanistan to be used as a safe haven and base of operations for Usama bin Ladin and the Al-Qaida organization who have committed and threaten to continue to commit acts of violence against the United States and its nationals, constitute an unusual and extraordinary threat to the national security and foreign policy of the United States, and hereby declare a national emergency to deal with that threat.\textsuperscript{175}

Even more extraordinary, just three months later, following a meeting between Taliban representative Abdul Hakeem Mujahid and Assistant Secretary of State Karl F. Inderfurth, Albright suggested that “the ruling militia ha[ve] a chance at being accorded regular treatment by nations around the world if [they] let go of bin Ladin.”\textsuperscript{176} The United States suspected that bin Ladin (who had helped finance the Taliban seizure of Kabul) had masterminded the bombings of the American embassies in Kenya and Tanzania the summer before.\textsuperscript{177} Whether Albright was in fact promising normal relations with the Taliban in exchange for expelling bin Ladin is unclear; what is clear is that the United States was willing to abandon its Afghan “sisters” for bin Ladin.

The United Nations’ actions were equally reprehensible. In a perspicacious article examining the United Nations’ role in Taliban controlled Afghanistan, Guglielmo Verdirame concludes, “the UN . . . failed to prevent and, later, to become an effective opponent of

\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} Afghanistan’s Ruling Taliban Hints at Interest in U.S. Offer; Deal is Based on Expulsion of Bin Ladin to Face Terrorism Charges, ST. LOUIS POST-DISPATCH, Oct. 26, 1999, at A3.
\textsuperscript{177} See U.S. Missiles Pound Targets in Afghanistan, Sudan, CNN.COM, Aug. 20, 1998, http://www.cnn.com/US/9808/20/us.strikes.01. Following the attacks, the Clinton administration fired Tomahawk cruise missiles at a terrorist training complex run by bin Ladin in eastern Afghanistan near the Pakistani border, killing twenty-one and wounding thirty. Id.
the gender policies of the Taliban regime . . . " Verdirame is particularly critical of the United Nations Security Council.

As was the case with the United States issuance of Executive Order 13,129, when the Security Council decided to use its powers pursuant to Chapter VII in S.C. Res. 1267, the primary reason for doing so "was the alleged support of the Taliban to terrorist activities and their refusal to surrender Usama bin Ladin to the U.S." To its credit, S.C. Res. 1267 did reiterate the Security Council's "deep concern over the continuing violations of international humanitarian law and of human rights, particularly discrimination against women and girls . . . ." Yet, Verdirame notes:

It is quite likely that . . . were the Taliban not accused of offering sanctuary to terrorist organizations, the Security Council would have altogether abstained from intervening in Afghanistan, since the persecution of women is arguably not perceived as likely to endanger peace, let alone to constitute a threat of the peace or breach of the peace.

Nevertheless, scholars have argued that in the 1990s "[a]n important trend ha[d] developed . . . signaling an even greater involvement of the Council in human rights and humanitarian matters, often characterized by interventions under Chapter VII." Indeed, in the 1990s, "threats to the peace" were expanded to situations of restoration of democracy (Haiti), serious humanitarian

178. Verdirame, supra note 4, at 735.
179. Id. at 747-55.
180. Under Chapter Six of the United Nations Charter, "Pacific Settlement of Disputes," the Security Council "may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute . . . ." U.N. Charter art. 34. The Council may "recommend appropriate procedures or methods of adjustment" if it determines that the situation is likely to endanger international peace and security. U.N. Charter arts. 33, 36. These recommendations are not binding on U.N. members. Under Chapter Seven, "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," the Council has broader power to decide what measures are to be taken in situations involving "any threat to the peace, breach of the peace, or act of aggression." U.N. Charter art. 39. In such situations, the Council is not limited to recommendations but may take action, including the use of armed force "to maintain or restore international peace and security." Id. See also Niels Blokker, Is the Authorization Authorized?: Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing,' 11 EUR. J. INT'L L. 541 (2000), available at http://www.ejil.org/journal/Vol11/No3/110541.pdf.
182. Verdirame, supra note 4, at 748.
184. Verdirame, supra note 4, at 752.
185. Id. at 750-51.
crises (Zaire\textsuperscript{187}, Kosovo\textsuperscript{188} and Somalia);\textsuperscript{189} restoration of internal peace and security (East Timor\textsuperscript{190} and Albania);\textsuperscript{191} and genocide (Rwanda).\textsuperscript{192} As Verdirame concludes upon surveying this expansion of Chapter VII actions, “the explicit determination under Article 39 that the systematic discrimination and persecution of women in Afghanistan constitutes a threat of the peace could have been made by the Council.”\textsuperscript{193} Yet it never was. Verdirame offers one explanation: “[t]he Security Council . . . does no more than reflect existing value systems of the international community, and it is exactly this intrinsic flaw that makes the intervention of the Council in questions related to the discrimination of women inevitably less vigorous than in other cases.”\textsuperscript{194} The horrific plight of women in Afghanistan apparently did not rate high enough in the “value systems” of the United States and the international community: they were content to ignore the whirlwind that was ravaging Afghanistan. That changed on September 11, 2001.

IV. THE AMERICANS: TURNING IN A WIDENING GYRE IN THE NEW MILLENNIUM

Within twenty-four hours of the horrific attacks on the World Trade Center and the Pentagon, the United States was ascribing the tragedy to bin Laden, the Taliban’s multimillionaire ally. Shortly after the attack, a spokesman for the Taliban’s supreme leader, Mullah Muhammad Omar, issued a denial stating “Mullah Omar condemns this act. Mullah Omar says Osama is not responsible. We have brought peace to this country and we want peace in all countries.”\textsuperscript{195} Notwithstanding this and other prevarications, the United States wasted little “time in launching an extensive . . . bombing campaign against Afghanistan,” with reports of civilian deaths ranging from 1,000 to 4,000.\textsuperscript{196} Unlike past policy pronouncements, and although certainly ancillary to exacting a reprisal

\textsuperscript{193} Verdirame, supra note 4, at 751-54.
\textsuperscript{194} Id. at 753.
\textsuperscript{196} Kolhatkar, supra note 42, at 19-20.
which had killed some 3,000 Americans, President George W. Bush continuously gave the plight of women under the Taliban as one justification for removing the regime.\(^{197}\) The United States easily won the war.\(^{198}\)

The same month the United States declared that Al Qaeda had been routed from Afghanistan, representatives of a motley assortment of Afghan factions\(^{199}\) "met in Bonn, Germany, under the auspices of the Special Representative of the Secretary-General for Afghanistan to map out Afghanistan’s future."\(^{200}\) On December 5, 2001, the Bonn Agreement\(^{201}\) was signed.\(^{202}\) Though not a comprehensive peace agreement, the Agreement set out a schematic roadmap and timetable for establishing peace and security, reconstructing the country, rebuilding civil society, and protecting human rights.\(^{203}\) Under the Bonn Agreement, in June 2002, the Emergency Loya Jirga (grand council) convened to institute a two-year transitional government and selected Hamid Karzai to serve as President of Afghanistan.\(^{204}\) "Women comprised approximately twelve percent of the Emergency

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197. See, e.g., President George W. Bush, Jan. 29, 2002 State of the Union Address (transcript available at http://archives.cnn.com/2002/ALLPOLITICS/01/29/bush.speech.txt/index.html). President Bush noted that four months prior to the American invasion, "the mothers and daughters of Afghanistan were captives in their own homes, forbidden from working or going to school. Today women are free, and are part of Afghanistan's new government." Id. Since Sept. 11, President Bush has "repeatedly pledged [the United States'] commitment to Afghan women and made the case strongly in his June 2002 commencement speech at West Point: '[a] thriving nation will respect the rights of women, because no society can prosper while denying opportunity to half its citizens." Jennifer Seymour Whitaker, Women at Risk in Afghanistan, BOSTON GLOBE, July 30, 2002, at A15.


199. Representatives included Mujahidin forces who had fought against the Taliban, representatives of the former King Zahir Shah, and representatives of various other exiled Afghan groups. BETWEEN HOPE AND FEAR, supra note 69, at 8. To the surprise of many, albeit with a good deal of pressure from the United States, the former enemies agreed to the general provisions of the Agreement. HUMAN RIGHTS WATCH, AFGHANISTAN'S BONN AGREEMENT ONE YEAR LATER: A CATALOG OF MISSED OPPORTUNITIES (2002), http://www.hrw.org/backgrounder/asia/afghanistan/bonn1yr-bck.htm [hereinafter AFGHANISTAN'S BONN AGREEMENT].

200. AFGHANISTAN'S BONN AGREEMENT, supra note 199.


202. AFGHANISTAN'S BONN AGREEMENT, supra note 199.

203. Id.

204. BETWEEN HOPE AND FEAR, supra note 69, at 8.
Loya Jirga delegates."208 The person to win the second-most number of votes, 171 to Karzai’s 1,295, was Massouda Jalal, a woman, physician, and U.N. staff member, who remained in the race despite great pressure to withdraw.206 Also under the Bonn Agreement, a "Constitutional Loya Jirga was then convened in December 2003 to approve a new constitution and government structure."207

Prior to the constitutional convention in December 2003, a constitutional commission met for months of discussion and consultations.208 In conducting its work, the Commission was keenly aware of the importance of a legitimate constitution supported by the people. As one member explained, "[t]he crisis of Afghanistan has its roots in illegitimate power. We must have legitimacy and responsibility."209 Consequently, members traveled around the country holding public meetings and sent out nearly half a million questionnaires, asking people what principles they believed should guide the country, "what rights should be guaranteed and what system of government they wanted."210 The Commission “received 100,000 questionnaires, 10,000 written opinions and 300 cassettes of ideas recorded by illiterate people . . .”211

On January 4, 2004, Afghanistan’s Constitutional Loya Jirga approved a 162-article constitution.212 The Constitution establishes a presidential system of government with a bicameral legislature.213 The president acts as both head of state and head of government and is directly elected to a maximum of two five-year terms.214 The lower house of the National Assembly, Wolesi Jirga (House of People) is to be comprised of a maximum of 250 persons directly elected to five-year terms.215 The upper house, Meshrano Jirga, (House of Elders) is made up of representatives from provincial and

205. Id. “Approximately 1,600 delegates participated in the Emergency Loya Jirga. One hundred and sixty seats were reserved for women, and overall, some two hundred women delegates were either elected or appointed.” Id. at 9 n.16.
206. Id. at 9.
207. Id. at 8-9.
209. Id.
210. Id.
211. Id.
213. Id. at arts. LX, LXXXII.
214. Id. at arts. LX, LXII.
215. Id. at arts. LXXXII-LXXXIII.
district councils, as well as presidential appointees. The former king will continue to hold the symbolic title of “Father of the Nation,” but there will be no return to the monarchy. The country is to be governed by civil laws, provided they are in keeping with Islam.

The 2004 Constitution contains specific provisions guaranteeing women’s rights. Article XXII affirms that “[t]he citizens of Afghanistan — whether woman or man — have equal rights and duties before the law.” Recognizing the injustices of the past in the field of education, article XVIV states that “[t]he state shall devise and implement effective programs for balancing and promoting education for women, improving of education . . . and the elimination of illiteracy in the country.” The Constitution also guarantees women two seats from each province, on average, in the House of People. According to Peace Watch, a publication by the United States Institute of Peace, the 2004 Constitution is the “most liberal constitution in the region stretching from Syria to Pakistan.”

Ten months after Afghanistan’s Constitution was approved, with the help of the U.N., on October 9, 2004, after twenty years of war, Afghans went to the polls for the first time to elect a president. Despite fears of intimidation and violence by Taliban members and local warlords, over ten million Afghans “bravely turned out to affirm their faith in a democratic future.” While there were no successful large-scale attacks against voters or polling places the process was marred by sloppy technical and organizational problems. In the weeks prior to the election, the number of registered voters came to exceed the estimated number of eligible voters. In order to prevent

216. Id. at arts. LXXXII-LXXXIV.
217. Id. at arts. CLVII.
218. Article III states, “In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam.” Id. at art. III.
219. Id. at art. XXII.
220. Id. at art. XLIV.
221. Id. at art. LXXXIII.
224. Afghanistan Votes, supra note 223.
226. Id.
people from voting more than once, each voter's thumb was marked with an indelible ink. Astonishingly, the indelible ink proved anything but, washing away with soap and water. This problem prompted all fifteen candidates opposing Karzai to call for a boycott halfway through the election. Nonetheless, as international organizations pronounced the ballot “mostly fair” the opposition candidates backed down. On November 3, 2004, following an endorsement by the United Nations-Afghan electoral commission that the election was free and fair, Hamid Karzai was declared the winner of Afghanistan's first-ever presidential election with fifty-five percent of the vote. He was inaugurated on December 7, 2004 for a five-year term.

Prior to the elections, the Afghan government, international donors, and NGOs made great efforts to encourage female voter registration by “start[ing] civic education programs, hire[ing] female election workers, permit[ting] women to get voter registration cards without photographs, and provid[ing] regularly updated registration figures disaggregated by gender.” Their efforts paid off. Official tallies record that of the 10.5 million registered voters, forty-one percent were women. Nonetheless, “in some areas, fear of attacks prevented mobile registration teams from going door-to-door prior to the election,” resulting in “appallingly low [ten percent in some provinces] female registration rates in the south.” In one tragic incident “a bomb targeting a bus full of female election workers . . . killed three and injured [twelve].”

As she courageously stood for the presidency at the Emergency Loya Jirga, Massouda Jalal was the only female presidential candidate in the election. During the campaign, she repeatedly received

227. Id.
228. Id.
229. Id.
234. Id.
235. Id.
236. Id.
237. Id.
threats and was prevented “from speaking at an Afghan New Year celebration at the central shrine in Mazar-e Sharif. . . .”\textsuperscript{238} Nonetheless, Jalal finished sixth out of eighteen candidates and received 100,000 votes, slightly more than one percent.\textsuperscript{239} She is now serving as the Minister of Women’s Affairs in the Karzai government.\textsuperscript{240}

The country which President Karzai inherited as president was one in which “[v]irtually all the institutions of a functioning civil society had been destroyed, including the parliament, the courts, much of the civil service, and most of the educational and health systems.”\textsuperscript{241} Much of the country’s infrastructure had been reduced to rubble in the previous twenty years and over ten million landmines — one for every three Afghans — littered the country.\textsuperscript{242} A 2004 report by the United Nations Development Programme ranked Afghanistan 173 out of 178 countries in the Human Development Index, which measures the progress of nations on key social and economic indicators.\textsuperscript{243}

Despite these and other challenges, Afghanistan has made remarkable accomplishments in the past four years. A 2005 report explained:

\begin{quote}
In contrast to the last decades where women were almost absent in all facets of political and public life, progress can be observed in these spheres . . . the first female Presidential candidate stood for elections in October 2004; in January 2005 the first woman was appointed as Governor of a province; the head of the national human rights commission is a woman. Although few in number and lacking decision-making power, women are employed in the criminal justice sector; and an active, vigorous civil society is emerging, wherein women are actively participating.\textsuperscript{244}
\end{quote}

The Afghan government is responsible for much of this progress. Amnesty International indicates:

\begin{footnotes}
\footnote{238. Id.}
\footnote{239. MIDDLE EAST INST. POLICY BRIEF: AFGHANISTAN’S NEXT STEPS: COMMENTARY ON THE RECENT AND UPCOMING ELECTIONS (2005), http://www.mideasti.org/articles/doc351.html.}
\footnote{240. Id.}
\footnote{241. AFGHANISTAN’S BONN AGREEMENT, supra note 199.}
\footnote{242. LANDMINE MONITOR, supra note 89.}
\footnote{244. AMNESTY INT’L USA, AFGHANISTAN: WOMEN STILL UNDER ATTACK — A SYSTEMATIC FAILURE TO PROTECT (2005), http://www.amnestyusa.org/news/document.do?id=8BFA5524328779D88025700B00425BF9.}
\end{footnotes}
The Afghan government has taken incremental steps to begin to address the issue of the realisation [sic] of women’s rights and gender equality. In the Berlin Conference in late March 2004, the Afghan government outlined to international donor states its commitments to promote the participation of women in the reconstruction of Afghanistan and to ensure equal rights in the political, social and economic sphere. As part of concrete measures to promote gender equality, a gender unit has been established in the Ministry of Rural Rehabilitation and Development. An inter-ministerial Task Force has been created, which is committed to combating violence against women. . . . The Ministry of Women’s Affairs (MoWA) has begun consultations with various ministries to develop a national action plan for women.245

In the field of education, since late 2001, enrollment in schools has increased significantly.246 Nonetheless, as Human Rights Watch reported in 2004, more than half of Afghanistan’s children still do not attend primary school and of those enrolled, only thirty-four percent are girls, who also have high drop-out rates.247 Moreover, only nine percent of all girls attending primary school go on to secondary school.248 “While the government reports that over 80 percent of girls in Kabul attend primary school, in some provinces girls’ enrollment rates have shown little progress.”249 For example, “[o]nly one out of every one hundred girls in Zabul and Badghis provinces attend primary school.”250 Further, in the past two years, local warlords “have attacked or burned dozens of girls’ schools.”251 In Kandahar, warlords had leaflets distributed with the message, “[s]top sending your women to offices and daughters to schools. It spreads indecency and vulgarity. Stand ready for the consequences if you do not heed the advice.”252

Today, warlords represent the primary threat to peace and security in Afghanistan.253 While President Karzai “nominally acts as president of Afghanistan, outside of Kabul, much of the country

245. Id. (citations omitted).
246. BETWEEN HOPE AND FEAR, supra note 69, at 7.
247. Id.
248. Id.
249. Id.
250. Id.
251. Id.
253. AFGHANISTAN’S BONN AGREEMENT, supra note 199.
remains under the de facto control of warlords"254 who "routinely abuse human rights, especially the rights of women and girls."255 As Human Rights Watch has warned, "[t]he power of the warlords has . . . hindered any discernible progress in making the transition from a militarized to a genuinely civilian government."256 Indeed, the physical security situation is so precarious that "Karzai’s vice president was assassinated and Karzai himself narrowly avoided assassination, necessitating the commitment of a cordon of U.S. diplomatic security personnel to ensure his safety."257 As long as the warlords retain their grip on power, and loyalty in Afghanistan remains at the local, rather than national, level, both the government in Kabul and the international community will be unable to effectively address the staggering social and economic problems confronting the Afghan people.

As the Karzai government "is not powerful enough to confront the warlords on its own . . . [i]t needs the sustained and genuine commitment of the United States and others . . . ."258 Yet thus far there has been little commitment within the international community to take the necessary steps, arguably the most important of which would be the expansion of the International Security Assistance Force (ISAF), a peacekeeping mission deployed to Kabul and surrounding areas.259

ISAF was created in accordance with the Bonn Agreement. Its purpose is to assist the Afghan government by creating a secure environment which will allow for fair and free elections; reconstruction projects; the rule of law; and the disarmament, demobilization, and reintegration (DDR) of militia forces into civilian life.260 Annex One to the Bonn Agreement states:

Conscious that some time may be required for the new Afghan security and armed forces to be fully constituted and functioning, the participants in the UN Talks on Afghanistan request the

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256. Afghanistan’s Bonn Agreement, supra note 199.
257. Koh, supra note 254, at 1489-90.
258. Afghanistan’s Bonn Agreement, supra note 199. Inexplicably, the international community continues to support the warlords. Id. The United States “has admitted to arming local warlords as late as October of 2002; Iran and Pakistan also continue to supply and assist local commanders.” Id.
259. Afghanistan’s Bonn Agreement, supra note 199.
United Nations Security Council to consider authorizing the early deployment to Afghanistan of a United Nations mandated force. This force will assist in the maintenance of security for Kabul and its surrounding areas. Such a force could, as appropriate, be progressively expanded to other urban centres and other areas.\textsuperscript{261}

In December 2001, the United Nations Security Council authorized the deployment of ISAF to Kabul.\textsuperscript{262} Two years later the Security Council authorized expansion of ISAF "in areas of Afghanistan outside of Kabul and its environs . . . ."\textsuperscript{263} Also in 2003, command and coordination for ISAF shifted from the United Nations to NATO.\textsuperscript{264} ISAF was NATO's first mission outside the Euro-Atlantic area.\textsuperscript{265}

In Kabul, ISAF has proven a remarkable success. Yet because ISAF has yet to expand beyond the environs of Kabul, the rest of the country remains under the control of warlords and drug-lords. Human Rights Watch notes:

The primary reason ISAF has not been expanded has been the opposition of the United States, which refused to consider expansion beyond Kabul at the time of its creation. The U.S. later modified its position and said it would not oppose expansion, but it also said it would not contribute troops. . . .\textsuperscript{266}

Regrettably, "[o]ther states are also responsible for the failure of ISAF to expand . . . . France, Canada, Australia . . . Germany and the Netherlands, have thus far refused to participate in an expansion of the force."\textsuperscript{267}

\begin{thebibliography}{99}
\bibitem{261} Provisional Agreement, supra note 201, at Annex 1.
\bibitem{265} NATO IN AFGHANISTAN, supra note 264.
\bibitem{266} AFGHANISTAN'S BONN AGREEMENT, supra note 199.
\bibitem{267} Id.
\end{thebibliography}
As of 2005, ISAF is responsible for approximately 8,000 troops in Afghanistan, comprised of soldiers from thirty-six NATO countries, nine partner and two non-NATO/non-partner countries. The figure of 8,000 troops should be compared with other Chapter VII missions. The peacekeeping force in Bosnia, for example, had 62,000 troops; the Kosovo mission had 48,000 troops; the Somalia mission had 28,000 troops; and the Sierra Leone mission had over 17,000 troops. According to a 2003 study by CARE International, Afghanistan has the lowest rate of peacekeepers to population of any recent post-conflict nation. Kosovo had one peacekeeper for 48 people; East Timor had one peacekeeper for every 86, while Afghanistan has just one for every 5,380 people. Once again, Afghanistan does not seem to rate high enough in the international community’s “value system.”

Indeed, with limited resources and Iraq requiring huge expenditures in money and troops, it appears as though the American administration has forgotten about Afghanistan. A February 2003 editorial in The New York Times suggests that the administration initially allocated zero dollars to Afghan reconstruction and it was only when embarrassed Congressional staff members recognized the oversight and wrote in a paltry $300 million that the lapse was covered. The United States has been equally penurious with troop funding: of the roughly 8,000 troops serving in ISAF in February 2005, eighty-nine were American.

Despite such disappointments, there is still hope. In the summer of 2004, “at the Summit meeting of NATO Heads of State and Government in Istanbul, NATO announced that it would establish four provincial reconstruction teams [PRTs] in the North of the country...” A year later, on May 31, 2005 NATO announced that it had significantly expanded ISAF into the provinces of Herat and Farah in the West of Afghanistan with plans...
of two other PRTs being operational in the west by late summer 2005.\textsuperscript{276} As of this writing, NATO continues to prepare the expansion of ISAF into the south of the country.\textsuperscript{277}

**EPILOGUE**

In September 2004 I began studying for a Master of Law Degree (LL.M) at George Washington University in the United States. Upon receiving my degree in 2005 I returned to Afghanistan. My hope is to work as a judge. If that is not possible I will find other ways to serve my country. For the first time, I am able to look at my country's future with hope. Like Heda Margolius Kovály, I too now "know for certain that love and hope are infinitely more powerful than hate and fury, and . . . beyond the line of my horizon there [is] life indestructible, always triumphant."\textsuperscript{278}

\textsuperscript{276} NATO, \textit{Statement by the NATO Spokesman on ISAF's Expansion to the West of Afghanistan} (2005), http://www.nato.int/docu/pr/2005/p05-073e.htm.

\textsuperscript{277} Id.

\textsuperscript{278} KOVALY, \textit{supra} note 1, at 5.