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FIGHTING BACK AGAINST THE TALIBAN: THE CASE FOR RESTORING AFGHAN MEN AND WOMEN'S RIGHT TO SELF-DETERMINATION

Since achieving independent statehood in the early twentieth century,¹ Afghanistan has been enmeshed in turmoil. The people of Afghanistan have not experienced any sustained period of political stability, much less any form of democratic government.² Over the past several decades, changes in rule occurred frequently, and often violently, with the 1990s being no exception.³ In 1992, the Mujahideen resistance ousted the communist regime that was the remainder of the 1979-89 Soviet occupation.⁴ Shortly after Afghanistan's new President, Burhanuddin Rabbani, began his reign that year,⁵ a new resistance movement appeared prepared for battle near the Pakistani border.⁶ As it fought its way through Afghanistan and into political power, this force became known to the world as the Taliban.

Reports indicate that the Taliban movement originated in fundamentalist Islamic schools, called *madrassas*, located in Pakistan.⁷ The name Taliban stems from the word *talib*, meaning religious student.⁸ Although the Taliban is comprised of men who claim Afghan nationality, their origins are not pure: many are

1. See BARNETT R. RUBIN, *THE FRAGMENTATION OF AFGHANISTAN: STATE FORMATION AND COLLAPSE IN THE INTERNATIONAL SYSTEM* 19, 54 (1995). Although the origins of the Afghan state date back to the eighteenth century, *see id.* at 45, Afghanistan did not permanently expel colonial forces until 1919, *see id.* at 54.

2. See Amin Saikal, *The Rabbani Government, 1992-1996*, in *FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN* 29, 29-30 (William Maley ed., 1998).

3. *Id.*

4. *Id.* at 29.

5. *Id.*

6. See Anthony Davis, *How the Taliban Became a Military Force*, in *FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN* 43, 43 (William Maley ed., 1998) (citing the Taliban's official report that its militia originated in Kandahar, an Afghan province bordering Pakistan). *But see id.* (stating that "the essential outlines of how the Taliban moved from the madrassas of Pakistani Baluchistan [a region bordering Afghanistan] to the Presidential Palace in Kabul are clear enough"); *see also* BARNETT R. RUBIN, *THE SEARCH FOR PEACE IN AFGHANISTAN: FROM BUFFER STATE TO FAILED STATE* 139 (1995) (stating that the Taliban crossed the border into Afghanistan after organizing in Pakistan).

7. See Davis, *supra* note 6, at 43; Ahmed Rashid, *Pakistan and the Taliban*, in *FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN* 72, 72-73 (William Maley ed., 1998); U.S. DEP'T OF STATE, *ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM FOR 1999: AFGHANISTAN*, at 1-2 (Sept. 9, 1999), at http://www.state.gov/www/global/human_rights/irf_rpt/1999/irf_afghanis99.html [hereinafter *REPORT ON INTERNATIONAL RELIGIOUS FREEDOM*] (on file with author).

8. William Maley, *Introduction to FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN* 1, 1 (William Maley ed., 1998).

Afghan refugees who grew up in camps in Pakistan,⁹ while others are Pakistani members of the Pashtun tribe.¹⁰ Nevertheless, these men now claim Afghanistan as their own, and seek to impose their interpretation of Islamic law upon its people.¹¹ Currently, the Taliban controls about ninety percent of Afghanistan's territory, including the capital region of Kabul.¹² It is still warring with factions within Afghanistan, organized under President Rabbani's ally Ahmad Shah Massoud,¹³ and it must use force and terror to keep the Afghanistan population in line.¹⁴ Since the Taliban occupation began, many civilians have left or attempted to leave Afghanistan,¹⁵ and refugees still living in Pakistan and Iran because of the 1979 Soviet invasion have refused to return while the Taliban remains in power.¹⁶

Nor has the world community welcomed the Taliban regime. Only three countries—Pakistan, Saudi Arabia and the United Arab Emirates—recognize the Taliban as a legitimate state.¹⁷ The United Nations (UN) also has refused to recognize the Taliban government;

9. Rashid, *supra* note 7, at 72-73.

10. RUBIN, *supra* note 6, at 139. The Pashtun tribe is one of many ethnic groups that occupy the Afghanistan-Pakistan region. *See id.* at 23.

11. *See* REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 7, at 1-2.

12. Anthony Loyd, *The Last Stand Against the Taliban*, N.Y. TIMES, Jan. 21, 2001, § 6 (Magazine), at 44. As of last year, some reports indicated that the Taliban controlled ninety-five percent of Afghanistan. *Protest in Pakistan Takes Aim at Taliban; Police Use Force to End Women's Rights Rally*, CHI. TRIB., Dec. 11, 2000, at News 5, LEXIS, News Library, Chicago Tribune File [hereinafter *Protest in Pakistan*]; *All Things Considered: Taliban Sends Delegation to Washington to Lobby for International Recognition of the Taliban as Afghanistan's Legitimate Government* (NPR radio broadcast, Sept. 29, 2000), LEXIS, News Library, National Public Radio (NPR) File [hereinafter *All Things Considered*]; *CBS Evening News: Taliban in Afghanistan Claim Restrictions Placed on Women Are for the Women's Own Protection* (CBS television broadcast, Oct. 23, 2000), LEXIS, News Library, CBS News Transcripts File [hereinafter *CBS Evening News*].

13. *See* Loyd, *supra* note 12; REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 7, at 1-2.

14. *See* Maley, *supra* note 8, at 22; *see also infra* notes 68-112 and accompanying text (describing the Taliban's oppression of the Afghan population, especially women).

15. *See* PETER MARSDEN, *THE TALIBAN: WAR, RELIGION AND THE NEW ORDER IN AFGHANISTAN* 89 (1998); Loyd, *supra* note 12.

16. MARSDEN, *supra* note 15, at 89; Loyd, *supra* note 12. Refugees have specifically cited the Taliban's oppression of women as a reason for their refusal to return. *See* MARSDEN, *supra* note 15, at 89 (stating that "many refugees feel they cannot consider returning to Afghanistan until their daughters can be sure of receiving an education and unless women are allowed to work"); Pamela Constable, *Tongue-Lashing the Taliban; Grandmotherly U.N. Official Berates Afghans on Their Treatment of Women*, WASH. POST, Sept. 20, 2000, at A22, LEXIS, News Library, Washington Post File ("The Taliban's treatment of women has made it an international pariah . . . and made some female refugees reluctant to return home.").

17. *See* Anastasia Telesetsky, *In the Shadows and Behind the Veil: Women in Afghanistan Under Taliban Rule*, 13 BERKELEY WOMEN'S L.J. 293, 300 (1998); *All Things Considered*, *supra* note 12.

Afghanistan's seat in the General Assembly is still occupied by President Rabbani.¹⁸ Perhaps the Taliban would have received a warmer welcome if it were a democratically elected government that respected human rights. It, however, is not. The Taliban's oppression of the Afghan people, particularly its systematic oppression of women, has received vehement international criticism.¹⁹ Prior to the Taliban invasion, Afghan women enjoyed at least some of the freedoms²⁰ internationally recognized as fundamental, such as the right to work, the right to an education and freedom of movement.²¹ Today they have none of these.²² This massive regression of women's rights has been a dominant factor in the world community's refusal to recognize the Taliban.²³ Even other Islamic

18. HUMAN RIGHTS WATCH, *Asia Overview: Afghanistan*, in HUMAN RIGHTS WATCH WORLD REPORT 2000, at 166, 168 (1999); Saikal, *supra* note 2, at 42; Matthew Griffin, Note, *Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy Through its Accreditation Process, and Should It?*, 32 N.Y.U. J. INT'L L. & POL. 725, 746-47 (2000); U.S. DEPT OF STATE, AFGHANISTAN COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1998, at 1 (Feb. 26, 1999), at http://www.state.gov/www/global/human_rights/1998_hrp_report/afghanis.html [hereinafter REPORT ON HUMAN RIGHTS PRACTICES] (on file with author).

19. See, e.g., *All Things Considered*, *supra* note 12 (noting that most countries are withholding recognition from the Taliban until it improves the status of women, ends its support of terrorists and holds free elections); *E.U. House Calls for Sanctions on Taliban*, HINDU, Dec. 9, 2000, LEXIS, News Library, Hindu File (describing a resolution passed unanimously by the European Parliament condemning the Taliban's support of terrorism and discrimination against women, and the Parliament's encouragement of the UN and other nations to follow suit); Bruce I. Friedland, *Americans Aid Women Silenced by the Taliban*, DALLAS MORNING NEWS, Sept. 30, 2000, at 43A, LEXIS, News Library, Dallas Morning News File (discussing efforts by the Feminist Majority Foundation to raise money for illegal home schools for girls in Afghanistan and to lobby the U.S. government to increase pressure on Taliban supporters); *Protest in Pakistan*, *supra* note 12 (describing police suppression of a rally against the Taliban by the Revolutionary Afghan Women's Association in Islamabad, Pakistan). The Feminist Majority Foundation has dedicated part of its website to activism on behalf of Afghan women's rights. See *Stop Gender Apartheid in Afghanistan*, FEMINIST MAJORITY FOUND., at <http://www.feminist.org/afghan/facts.html> (last visited Dec. 3, 2000) [hereinafter *Stop Gender Apartheid*]. The entertainment industry also has been instrumental in calling for the protection of Afghan women. For example, a protest of women's oppression in Afghanistan was the subject of a recent episode of the television program *7th Heaven*. See John Maynard, *Highlights*, WASH. POST, Oct. 4, 1999, at C7, 1999 WL 23307219.

20. See *infra* notes 54-56 and accompanying text.

21. See *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, arts. 13, 23, 26, U.N. Doc. A/810 (1948).

22. See *infra* notes 95-112 and accompanying text.

23. See, e.g., H.R. Con. Res. 414, 106th Cong. (2000) (enacted) (condemning the Taliban's activities, including its "abuses against women and children," and stating that the United States would support efforts to commence a political agenda "that would lead to the people of Afghanistan determining their own destiny through a democratic process and free and fair elections"); S. Con. Res. 150, 106th Cong. (2000) (enacted) (same); S. Res. 68, 106th Cong. § 1 (1999) (stating that the U.S. should refuse to recognize any government in Afghanistan that does not respect the rights of women); H.R. Res. 187, 106th Cong. § 1 (1999) (same); *On the Situation in Afghanistan*, G.A. Res. 1267, U.N. SCOR, 4051st mtg., U.N. Doc. S/RES/1267

governments, such as Iran, have condemned the Taliban's abuse of women.²⁴

Although the Taliban leadership recently claimed that it has in fact eased its restrictions on women,²⁵ it has also defended its actions as being in accordance with Islamic law and protested what it views as foreign interference in its affairs.²⁶ The people of Afghanistan, however, could make the same claim of foreign interference against the Taliban. Some observers have noted the participation of other countries—specifically, Pakistan and Saudi Arabia—in the Taliban's rise to power.²⁷ Pakistan is not only accused of funding and supplying the Taliban with weapons, but also serving as its base of organization.²⁸ Saudi Arabia has also been accused of funding the Taliban.²⁹

Because of these circumstances, the remedy against the institutionalized misogyny being perpetrated in Afghanistan may lie in the international principle of self-determination. Interna-

(1999) (authorizing international sanctions against the Taliban while "[r]eiterating its deep concern over the continuing violations of international humanitarian law and of human rights, particularly discrimination against women and girls").

24. See Matthew A. Levitt, *The Taliban, Islam and Women's Rights in the Muslim World*, 22 FLETCHER F. WORLD AFF. 113, 113 (1998).

25. See Constable, *supra* note 16; *All Things Considered*, *supra* note 12; *CBS Evening News*, *supra* note 12. Some commentators find this hard to believe, especially when in offering concessions to women's rights Taliban officials use analogies like, "[M]any Afghans generally abhor dogs but treat them well if they are trained to obey commands." Constable, *supra* note 16. As of September 2000, Amnesty International reported that "there's been no improvement in the treatment of women and girls in Afghanistan." *All Things Considered*, *supra* note 12.

26. See Nancy Hatch Dupree, *Afghan Women Under the Taliban*, in *FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN* 145, 159 (William Maley ed., 1998); MARSDEN, *supra* note 15, at 116.

27. See Anwar-ul-Haq Ahady, *Saudi Arabia, Iran and the Conflict in Afghanistan*, in *FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN* 117, 132-33 (William Maley ed., 1998); see also *infra* notes 196-215, 224-27 and accompanying text (citing and describing reports of Pakistan and Saudi Arabia's contributions to the Taliban's military offensive). Some observers have also implicated the United States in supporting the Taliban. See Ahady, *supra*, at 132-33; Richard Mackenzie, *The United States and the Taliban*, in *FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN* 90, 95-100 (William Maley ed., 1998); see also *Statement of Congressman Dana Rohrabacher, U.S. Policy Toward Afghanistan, Senate Foreign Relations Subcommittee on South Asia, WOMEN'S ALLIANCE FOR PEACE AND HUMAN RIGHTS IN AFGHANISTAN (WAPHA)* (Apr. 14, 1999), at <http://www.angelfire.com/on/wapha/dana.html> (claiming that there has been "a covert policy by [the Clinton] administration to support the Taliban movement's control of Afghanistan"). Although the United States remained conspicuously aloof while the Taliban rose to power, see Mackenzie, *supra*, at 95-97; Maley, *supra* note 8, at 2; Saikal, *supra* note 2, at 39-40, it has now condemned the Taliban for its treatment of women, see Mackenzie, *supra*, at 90-91, 100-03; sources cited *supra* note 23.

28. Davis, *supra* note 6, at 69-71.

29. Ahady, *supra* note 27, at 132; Rashid, *supra* note 7, at 76.

tional law³⁰ has mandated nonintervention into the internal affairs of states; this doctrine is rooted in the respect of each state's right of self-determination.³¹ The International Court of Justice (ICJ) emphasized this principle in *Nicaragua v. United States*,³² which held that the United States' aid to the Contra Rebels constituted an illegal intervention and use of force, and a violation of Nicaragua's sovereignty.³³ This Note argues that Pakistan and Saudi Arabia are guilty of the same crime; furthermore, this Note argues that condemnation of their actions by the world community would be an opportunity to reconcile the tension between the self-determination of states and the self-determination of people.³⁴ Given the Taliban's external origins and its abuse of Afghan citizens, using international mechanisms to restore the self-determination of Afghanistan would emphasize that that principle should in fact be based upon

30. International law, as defined in the Statute of the International Court of Justice, consists of "international conventions, [or treaties] . . . international custom, . . . general principles of law recognized by civilized nations[, and] . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations" Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1031, 1060.

31. See *infra* notes 128-45 and accompanying text. Although the meaning and scope of self-determination is not settled, see FERNANDO R. TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW 130 (1998), this Note equates self-determination with the "right [of people to] freely determine their political status and freely pursue their economic, social, and cultural development." *Id.* at 130-31 (quoting International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1(1), 993 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1(1), 993 U.N.T.S. 3); Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT'L & COMP. L.Q. 857, 858 (1994) (same).

32. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

33. *Id.* at 146-47.

34. See *infra* notes 139-40 and accompanying text; see also *infra* notes 179-83 and accompanying text (discussing one scholar's theory as to why this tension exists). Traditionally, international law was indifferent to how state governments came to power. THOMAS D. GRANT, THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION 105 (1999); Fernando R. Tesón, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323, 331-32 (1996). Thus, international actors considered the right of self-determination in "external" contexts—meaning that it applied to relationships between states rather than to the relationship between a state and its people. See McCorquodale, *supra* note 31, at 863-64. Today, the right of self-determination is seen by many as "internal," particularly in light of growing international recognition of human rights. See *id.* at 865; see also TESÓN, *supra* note 31, at 129 ("The principle of respect for human rights is a genuine principle, in the sense that it trumps majoritarian preferences, including claims of national self-determination."). As stated by Professor Robert McCorquodale, "The 'internal' aspect of the right concerns the right of peoples within a State to choose their political status, the extent of their political participation and the form of their government." McCorquodale, *supra* note 31, at 864. The tension between the two conceptualizations of the right to self-determination lies in the balance between international respect for state autonomy and international interest in the protection of human rights within a sovereign state. See J. Oloka-Onyango, *Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millenium*, 15 AM. U. INT'L L. REV. 151, 167-68 (1999).

the self-determination of people through democratic process. Also, condemning the Taliban's gender-based oppression and recognizing the right of self-determination of women³⁵ would improve the status of women's rights under international law.

This Note first discusses a brief history of Afghanistan, focusing on women's rights. Secondly, it details the horrifying conditions in which Afghan women now live. This Note then discusses international law as it applies to the doctrine of nonintervention and the right of self-determination, ultimately focusing on the landmark *Nicaragua* case. Next, it examines Pakistan and Saudi Arabia's actions through the lens of *Nicaragua* and argues that those countries' support of the Taliban constitutes a violation of international law. Finally, this Note contemplates the positive implications of an international response, such as UN enforcement action, to this violation for self-determination jurisprudence, especially the incorporation of women's rights into its definition and practice.

AFGHANISTAN: PAST AND PRESENT

The country of Afghanistan does not fit the modern definition of a nation-state.³⁶ Afghanistan is comprised of several different tribes, which differ in both ethnicity and religion.³⁷ The various Afghan governments established during the twentieth century failed to achieve a cohesive Afghan nation, centralizing primarily in urban areas where only a minority of the Afghan population resides.³⁸ Furthermore, foreign interests continuously have attempted to manipulate Afghanistan for their own purposes.³⁹ All of these factors have influenced the numerous shifts in Afghan rule—and the status of women's rights—over the past few decades.

35. Self-determination discourse has often excluded women from the definition of peoples, focusing on, for example, classifications of "common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; common economic life; and being a certain number." McCorquodale, *supra* note 31, at 866. Feminists have criticized this exclusion of women. See, e.g., Oloka-Onyango, *supra* note 34, at 189-90 (stating that "[w]omen have a radical claim to entitlement" of self-determination).

36. RUBIN, *supra* note 1, at 3-15.

37. Maley, *supra* note 8, at 4-5.

38. WILLIAM MALEY & FAZEL HAQ SAIKAL, INTERNATIONAL PEACE ACADEMY, POLITICAL ORDER IN POST-COMMUNIST AFGHANISTAN 14 (1992).

39. See KAMAL MATINUDDIN, THE TALIBAN PHENOMENON: AFGHANISTAN 1994-1997, at 148-82 (1999). For example, Afghanistan's history in the twentieth century is rife with struggles between communist and capitalist interests. For comprehensive discussions of the history of American and Soviet influence in Afghanistan, see generally HAFIZULLAH EMADI, STATE, REVOLUTION, AND SUPERPOWERS IN AFGHANISTAN (1990); MALEY & SAIKAL, *supra* note 38; RUBIN, *supra* note 1.

Afghanistan achieved its official independence in 1919 under the leadership of King Amanullah.⁴⁰ Seeking to build a modern Afghanistan, King Amanullah implemented several progressive reforms modeled after Western practices.⁴¹ Not only did he institute dramatic changes in the economic structure of the state,⁴² he also implemented major social reforms,⁴³ including women's liberation.⁴⁴

These reforms infuriated many tribal landowners and religious leaders, who perceived them as contrary to the teachings of Islam.⁴⁵ In 1929, King Amanullah was ousted in a military coup.⁴⁶ Shortly thereafter, the rights women gained under Amanullah's reign were eradicated by the new king.⁴⁷ In 1930, King Nadir "declared the inequality of men and women, closed down all girls schools throughout the country, and re-invoked the veil for women."⁴⁸

After King Nadir was assassinated in 1933, the succeeding government continued Afghanistan's modernization.⁴⁹ Women's emancipation, however, did not resume again until the 1950s.⁵⁰ In 1959, Premier Daoud declared that wearing the veil was optional for women.⁵¹ As with previous reforms involving women's legal status, this declaration outraged conservative Islamic leaders.⁵² This time, however, "Premier Daoud used the military to crush [his] opposition to his 'women's movement' and to teach a lesson to opposition forces elsewhere."⁵³ After Daoud's reign, women's freedom in urban areas remained fairly constant. Women worked outside the home in numbers comparable to men.⁵⁴ Women enjoyed equal opportunity

40. EMADI, *supra* note 39, at 1; RUBIN, *supra* note 1, at 54.

41. EMADI, *supra* note 39, at 3-4; RUBIN, *supra* note 1, at 55-56.

42. RUBIN, *supra* note 1, at 55.

43. EMADI, *supra* note 39, at 4; RUBIN, *supra* note 1, at 55-56. Some of these social reforms included separation of church and state, compulsory education for children, and monogamy in marriage. See EMADI, *supra* note 39, at 4.

44. EMADI, *supra* note 39, at 4; RUBIN, *supra* note 1, at 56; Telesetsky, *supra* note 17, at 295.

45. RUBIN, *supra* note 1, at 57.

46. EMADI, *supra* note 39, at 5; RUBIN, *supra* note 1, at 57.

47. See EMADI, *supra* note 39, at 8.

48. *Id.*

49. See *id.* at 8-9.

50. See *id.* at 36-37.

51. See *id.* at 37; RUBIN, *supra* note 1, at 71-72.

52. EMADI, *supra* note 39, at 37.

53. *Id.* According to Emadi, "Tanks and aircraft fighters raided villages for several days. As a result more than 600 people, including religious and tribal leaders, were arrested and executed in the capital penitentiaries." *Id.* But see RUBIN, *supra* note 1, 71-72 (stating that even though Daoud "confronted both the tribes and the religious establishment, using women as symbols," he suppressed protests "firmly but without violence").

54. Prior to Taliban control, "70% of school teachers [including 60% of those at Kabul University], 50% of civilian government workers, and 40% of doctors in Kabul were women."

in education: many schools were co-educational and women made up fifty percent of the students at Kabul University.⁵⁵ Women even participated in the government as both ministers and members of parliament in certain administrations.⁵⁶

In contrast to urban areas, the tribal, patriarchal family structure in rural areas has greatly limited women's freedom throughout Afghanistan's history.⁵⁷ Although sexist practices vary from tribe to tribe, the general rule is that the man is the head of household.⁵⁸ Male domination manifests itself in veiling, as well as the "segregation and seclusion of women,"⁵⁹ a practice called *purdah*.⁶⁰ Women are commodified through arranged marriages⁶¹ and polygamy is common.⁶² Adultery and "sexual misconduct" by women are considered "a political threat to the honor and strength of a family" and are punishable by death or exile.⁶³ Yet, despite the fact that rural Afghan women have not experienced the same liberation as their urban counterparts,⁶⁴ they have not accepted gender-based oppression passively.⁶⁵ As described by one source:

Women contest male domination through "ordinary forms of resistance." They claim, for example, that, despite appearances, they actually wield much power; they create a distinct women's culture . . . ; they have frequent discussions of the suffering that is the lot of woman; and . . . some commit sexual indiscretions, which others help conceal. One element of women's self-image in Afghanistan, at least among the Pashtuns, is the belief that men, for all their posturing, are weaker than women, and that women could defend *namus*⁶⁶ at least as well if they had the chance—and the guns.⁶⁷

Stop Gender Apartheid, *supra* note 19. Women also worked in such traditionally male occupations as the army and police force. EMADI, *supra* note 39, at 101.

55. *Stop Gender Apartheid*, *supra* note 19.

56. EMADI, *supra* note 39, at 101.

57. RUBIN, *supra* note 1, at 41.

58. *Id.* at 23-24.

59. *Id.* at 24.

60. Dupree, *supra* note 26, at 153.

61. RUBIN, *supra* note 1, at 23-24.

62. *Id.* at 24.

63. *Id.*

64. *See id.* at 79-80.

65. *Id.* at 41.

66. As inferred from Rubin's definition of *namus*, "zan, zar, zamin (woman, gold, land)," *namus* essentially means property. *Id.* at 24.

67. *Id.* at 41.

Unfortunately, "ordinary forms of resistance" have not effected gender equality for rural Afghan women. Indeed, if they did have the guns, their forms of resistance might be armed rather than ordinary.

The Taliban used this strategy of armed force to take control of Afghanistan.⁶⁸ Despite its dominance over the Afghan territory and population, however, the Taliban has not been widely recognized as the official government of Afghanistan⁶⁹—primarily because of its barbaric legal system and abuse of human rights.⁷⁰ The Taliban regime has no constitution⁷¹ and its judiciary lacks any procedural guarantees of due process, fair trials or humane punishment.⁷² Its Ministry for the Promotion of Virtue and the Suppression of Vice (PVSV) acts as both police officer and judge, patrolling the streets to enforce morality among the Afghan populace.⁷³ The PVSV scrutinizes, among other things, women's dress and the length of men's beards, as well as civilians' loyalty to the Taliban's brand of Islam.⁷⁴ Those found in violation of these codes are punished immediately, often through beatings.⁷⁵

Trials, when they are held, are "summary" at best and without appeal.⁷⁶ Punishments are conducted publicly.⁷⁷ Convicted murderers and rapists are executed, sometimes by the family members of the victim.⁷⁸ Those convicted of adultery—women, according to most reports⁷⁹—are stoned to death or flogged;⁸⁰ "[t]hose found guilty of homosexual acts [are] crushed by having walls toppled over them."⁸¹ Convicted thieves have been subjected to hand and foot

68. Maley, *supra* note 8, at 1-2.

69. *See supra* notes 17-18 and accompanying text.

70. *See supra* note 23 and accompanying text; Telesetsky, *supra* note 17, at 299.

71. REPORT ON HUMAN RIGHTS PRACTICES, *supra* note 18, at 1.

72. *See* REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 7, at 5.

73. *Id.*

74. *Id.* For example, officers of the PVSV reportedly have required civilians to recite Islamic prayers. *Id.* at 7.

75. *Id.* at 5.

76. *Id.*

77. *Id.*

78. *Id.*

79. *See, e.g.,* REPORT ON HUMAN RIGHTS PRACTICES, *supra* note 18, at 14 ("Women accused of adultery offenses are . . . subjected to violence. At least one accused adulteress was sentenced to 100 lashes; her sentence was carried out publicly."); *see also Stop Gender Apartheid*, *supra* note 19 (stating that "[a] woman caught trying to flee Afghanistan with a man not related to her was stoned to death for adultery").

80. REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 7, at 5.

81. *Id.*

amputations,⁸² and one woman had the end of her thumb cut off for wearing nail polish.⁸³

Women in particular have been targeted by the Taliban. The regulation of women's appearance is perhaps the most visible form of Taliban oppression.⁸⁴ Women must be covered completely—from head to toe—while in public.⁸⁵ Besides stigmatizing women as inferior,⁸⁶ this requirement hampers the mobility of many Afghan women. Specifically, the garment that women must wear, the *burqa*, is relatively expensive.⁸⁷ Not all women can afford a *burqa*;⁸⁸ therefore, more than one woman may be forced to share a single *burqa* or go without entirely.⁸⁹ Some disabled women or women requiring prosthetic devices, both fairly common tragedies in Afghanistan because of its history of conflict and the prevalence of land mines,⁹⁰ cannot wear a *burqa* correctly.⁹¹ Without *burqas*, women cannot leave their homes without risking detention or violence from the PVSV.⁹² One "elderly woman was brutally beaten with a metal cable until her leg was broken because her ankle was accidentally showing from underneath her burqa."⁹³ Another female refugee witnessed the attempted shooting of a woman for the same infraction.⁹⁴

82. *Id.*

83. Telesetsky, *supra* note 17, at 294.

84. *See id.*; *see also* REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 7, at 5.

85. REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 7, at 5.

86. The veiling and covering of women has its origins in the Islamic religion. *See id.* This practice serves the function of prohibiting males from looking at women, which in turn prevents "moral corruption" and "sexual anarchy." Dupree, *supra* note 26, at 151. The practice of covering has also been interpreted as keeping women invisible in the public area, which is seen as reserved for males. *See* Telesetsky, *supra* note 17, at 296. In Taliban-controlled areas of Afghanistan, the prohibition against women wearing shoes that make noise when they walk solidifies this invisibility. *See* REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 7, at 6.

87. *See* Telesetsky, *supra* note 17, at 296.

88. *See* REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 7, at 6.

89. *See* Telesetsky, *supra* note 17, at 296.

90. For statistics on the occurrence of land mines in Afghanistan, *see* REPORT ON HUMAN RIGHTS PRACTICES, *supra* note 18, at 9.

91. *See* REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 7, at 5-6.

92. *Id.*

In a 1998 survey, Physicians for Human Rights (PHR) found that 22 percent of the female respondents surveyed reported being detained and abused by the Taliban; of these incidents, 72 percent were related to alleged infractions of the Taliban's dress code for women. Most of these incidents reportedly resulted in detentions that lasted 1 hour or less, but 84 percent also resulted in public beatings and 2 percent resulted in torture.

Id.

93. *Stop Gender Apartheid*, *supra* note 19.

94. *See* Telesetsky, *supra* note 17, at 303.

This restrictive physical covering is only one example of women's erasure from public life. When the Taliban took control of Kabul in September 1996, it immediately issued orders that women could no longer work outside the home⁹⁵ or seek an education.⁹⁶ Nor can women leave their homes without a male relative,⁹⁷ and men accompanying women are subject to interrogation by the PVSV to verify their identities.⁹⁸ As in Saudi Arabia,⁹⁹ women in Taliban-controlled areas of Afghanistan are forbidden to drive.¹⁰⁰ Moreover, public transportation systems are segregated by gender.¹⁰¹ The windows of women's buses must be covered, and only boys under the age of fifteen may be employed to collect women's fares to prevent interaction between women and the male bus drivers, who are further separated from the female passengers by a curtain.¹⁰² The windows of houses in which women live must be painted over so that strangers cannot see the women inside.¹⁰³

The effect of these prohibitions is not merely superficial; the damage the Taliban has caused is very real. Because women cannot work in the public sphere, many women—and widows in particular—are living in poverty and hunger.¹⁰⁴ Gender segregation in medical services has resulted in a dramatic decrease in women's health.¹⁰⁵ Moreover, the Taliban has restricted humanitarian aid to

95. See REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 7, at 6.

96. See *id.* at 2-3. The Taliban forbids the schooling of female children over the age of eight. See *id.* at 3. Although Taliban leaders promise that they will allow the education of Afghan girls in the future, they have also stated that such education would be confined to the Koran. See *id.*

97. See *id.*

98. CBS Evening News, *supra* note 12; Friedland, *supra* note 19; Protest in Pakistan, *supra* note 12.

99. See Mai Yamani, *Some Observations on Women in Saudi Arabia*, in FEMINISM & ISLAM: LEGAL AND LITERARY PERSPECTIVES 263, 272 (Mai Yamani ed., 1996). In Saudi Arabia, this prohibition on women's driving, while customary, was not made law until 1990, after forty-seven Saudi women engaged in a "driving demonstration" in the country's capital. *Id.* The timing of this protest was particularly notable in that it occurred during the Gulf War, when much of the world's attention was on the Middle East. *Id.*

100. See REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 7, at 6.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* Another source describes the situation as follows:

For the first time in its history, beggars roam the streets of Kabul or huddle outside relief agencies. A high proportion are children and women, many of whom are widows or those responsible for disabled men unable to work. A January 1997 survey by ICRC [International Committee of the Red Cross] recorded the presence of 50,000 widows, each with an average of 7-9 children.

Dupree, *supra* note 26, at 155.

105. REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 7, at 7. This is a result of many factors. First, women comprised a significant percentage of Kabul's medical

Afghan women.¹⁰⁶ In 1997, the Taliban decreed that international humanitarian aid "be provided to women through their close male relatives rather than directly."¹⁰⁷ This rule places women at the mercy of their male relatives, if they are lucky enough to have them. Furthermore, the rule that women be accompanied by a male relative was extended to Muslim female UN and non-governmental organization (NGO) workers in 1998.¹⁰⁸ Because of this rule, humanitarian relief in Afghanistan has been reduced drastically.¹⁰⁹

In addition to the state-sanctioned physical and psychic violence against women discussed above, crimes of murder, rape, kidnapping and forced marriage have flourished under the Taliban regime.¹¹⁰ Although some of this violence has been attributed to other factions, many reports cite members of the Taliban as perpetrators.¹¹¹ Despite the Taliban's claim that its gender stratification policies protect Afghan women, especially from sexual assault,¹¹² this rhetoric evidently has not deterred its soldiers from raping and kidnapping.

The Taliban's repression of women can be described as nothing short of war, and yet, the Taliban defends its actions as within its authority as Afghanistan's government and as followers of Islam.¹¹³ It is clear, however, that the Taliban has undermined the Afghan people's right of self-determination through the use of force. In recent years, the international community has grown less tolerant of such violence, following the development of the concept that state sovereignty and self-determination are predicated upon the practice

profession, *see supra* note 53, yet were fired when the Taliban took over the city. REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 7, at 6. Since then, under international pressure, the Taliban has allowed some female doctors and nurses to practice under restricted conditions. *Id.* Male doctors cannot see female patients without the presence of a male relative, and even then they are forbidden to touch them. *Id.* at 7. As characterized by the United States Department of State, this prohibition "drastically limits the possibility of any meaningful treatment." *Id.* Furthermore, hospitals have been segregated by gender, although not equally: in 1997, the Taliban banned women from all hospitals in Kabul except for one partially-constructed facility. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *See Country Reports: Afghanistan*, in FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES: 1999-2000, at 39, 41 (Adrian Karatnycky ed., 2000) [hereinafter *Country Reports: Afghanistan*]; Jan Goodwin, *I Could Have Been Executed*, GLAMOUR, May 2000, at 286, 287-88, 300; REPORT ON HUMAN RIGHTS PRACTICES, *supra* note 18, at 14.

111. *See sources cited supra* note 110.

112. *See Dupree, supra* note 26, at 149-51; CBS Evening News, *supra* note 12.

113. *See Dupree, supra* note 26, at 159.

of democracy and respect of human rights.¹¹⁴ Furthermore, women's rights advocates have actively sought to bring gender equality into this conceptualization, demanding the recognition of *women's* right to self-determination and the incorporation of that right into domestic and international law.¹¹⁵

Despite numerous declarations and conventions declaring the equality of men and women, such as the Convention on the Elimination of All Forms of Discrimination Against Women,¹¹⁶ the Declaration on the Elimination of Violence Against Women,¹¹⁷ and the UN Charter itself,¹¹⁸ social systems that subjugate women continue to exist. Women's rights have been unenforced by the world community, presumably because those in power have an interest in maintaining gender inequality domestically.¹¹⁹ One crime that usually receives an active response, however, is the use of force by one state against another.¹²⁰ Ironically, it is the principle of self-determination that underlies the prohibition of the use of force between states: the use of force against one state by another constitutes a violation of the former state's sovereignty and self-determination under international law.¹²¹

ILLEGAL INTERVENTION AND SELF-DETERMINATION

The main purpose of establishing the United Nations was to create an international system that would lead to and maintain world peace.¹²² After World War II, the founders of the UN sought

114. See GRANT, *supra* note 34, at 92, 94; Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 19-21 (1997).

115. See, e.g., Oloka-Onyango, *supra* note 34, at 157-58 (recognizing "the need to 'degender' self-determination's predominant male focus, by bringing women directly into the discussion on the subject and by firmly ensconcing feminist perspectives into the conceptualization of statehood and self-determination"); Schachter, *supra* note 114, at 13 ("[T]he movement for women's rights [] has spread widely and deeply and, in many ways, challenges the authority of the state.").

116. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981). This Convention was signed but not ratified by Afghanistan and the United States. See BURNS H. WESTON ET AL., SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL LAW AND WORLD ORDER 1301 (3d ed. 1997). It was ratified with qualification by Pakistan and neither signed nor ratified by Saudi Arabia. *Id.* at 1301-02.

117. *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/RES/48/104 (1994).

118. See U.N. CHARTER pmbl.

119. See Oloka-Onyango, *supra* note 34, at 185-86.

120. See Mary Ellen O'Connell, *Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy*, 36 COLUM. J. TRANSNAT'L L. 473, 473 (1997).

121. See *infra* notes 128-45 and accompanying text.

122. U.N. CHARTER pmbl.; U.N. CHARTER art. 1, para. 1.

to avoid another war and the horrors it produced.¹²³ Besides establishing a forum for international cooperation,¹²⁴ the UN created a charter outlining international principles,¹²⁵ established a court for the adjudication of disputes between states¹²⁶ and designated a peacekeeping force to intervene in precarious situations.¹²⁷

One principle contained in the UN Charter is the prohibition against the use of force by one nation against another.¹²⁸ Article 2 states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."¹²⁹ Further pronouncements against "acts of aggression" are found in Articles 1(1) and 39, which state the willingness of the United Nations to intervene against such aggression.¹³⁰ The UN also elaborated on the meaning of aggression in its Resolution on the Definition of Aggression.¹³¹ Article 1 of the resolution states that "[a]ggression is the use of armed force by a State against the sovereignty, territorial

123. *See id.* at pmbl.

124. *See id.* at art. 35. It is important to note that the UN General Assembly is not a legislative body; therefore, it does not create international law. STEPHEN M. SCHWEBEL, JUSTICE IN INTERNATIONAL LAW 499-501 (1994); *see also supra* note 30 (identifying sources of international law). It would be wrong, however, to assume that the recommendations of the UN General Assembly do not influence international law. As stated by Stephen Schwebel, former Judge of the International Court of Justice, "General Assembly resolutions may authoritatively find what the law is, and such resolutions, declaratory of international law, can have an important effect in crystallizing and even progressively developing international law." SCHWEBEL, *supra*, at 502.

125. U.N. CHARTER art. 2.

126. *Id.* at art. 7; *see* Statute of the International Court of Justice, June 26, 1945, art. 1, 59 Stat. 1031, 1055.

127. U.N. CHARTER arts. 39, 41-42. Article 39 of the Charter authorizes the Security Council to determine when intervention by the UN peacekeeping force may be warranted. *Id.* at art. 39. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." *Id.* Should the Security Council determine that international peace or security is threatened by a state's actions, it may decide what measures to employ to effectuate its decision to intervene. *Id.* The initial measures available are those "not involving the use of armed force," such as diplomatic severance and economic sanctions, *id.* at art. 41; however, "[s]hould the Security council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action . . . as may be necessary to maintain or restore international peace and security." *Id.* at art. 42. "Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." *Id.*

128. *See id.* at art. 2.

129. *Id.* at art. 1, para. 4.

130. *Id.* at art. 1, para. 1; *id.* at art. 39.

131. *Resolution on the Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975).

integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."¹³² Article 3 sets forth those acts which constitute acts of aggression. They include armed invasion by forces of one state against the territory of another,¹³³ "military occupation . . . resulting from such invasion,"¹³⁴ the use of weapons by one state against another,¹³⁵ and the attack by one state's armed forces against the armed forces of another.¹³⁶ Also included as an act of aggression is "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."¹³⁷

The prohibition against aggression is grounded in respect of state sovereignty and the right of self-determination, in addition to the UN's ultimate goal of maintaining peace.¹³⁸ Although originally interpreted to apply only to states,¹³⁹ international observers have recognized that the principle of self-determination should apply to people as well.¹⁴⁰ This modern interpretation is supported by definitions of self-determination provided in the UN Charter and other international declarations. The UN Charter includes as one of its purposes the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"¹⁴¹ This idea is repeated in Article 55, which states that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."¹⁴² The broadest definition of self-determination, however, is found in the

132. *Id.* at art. 1.

133. *Id.* at art. 3, para. (a).

134. *Id.*

135. *Id.* at art. 3, para. (b).

136. *Id.* at art. 3, para. (d).

137. *Id.* at art. 3, para. (g).

138. See U.N. CHARTER art. 1.

139. See generally Oloka-Onyango, *supra* note 34 (describing historical perceptions of the concept of self-determination and calling for its expansion).

140. See TESÓN, *supra* note 31, at 131; McCorquodale, *supra* note 31, at 858-59; see also Douglas Lee Donoho, *Evolution or Expediency: The United Nations Response to the Disruption of Democracy*, 29 CORNELL INT'L L.J. 329, 367-68 (1996) ("Democracy, political participation rights and the concept of internal self-determination have gained increased stature in international law in recent years. International organizations, bureaucrats and states now commonly link the maintenance of peaceful international relations to the existence of democratic regimes and to the protection of human rights.").

141. See U.N. CHARTER art. 1, para. 2.

142. *Id.* at art. 55, para (c).

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States,¹⁴³ which provides:

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action that deprives peoples . . . of their right to self-determination and freedom and independence.¹⁴⁴

The Declaration further states, "In their actions against and resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter of the United Nations."¹⁴⁵

The landmark international law case finding an illegal intervention and use of force is the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*.¹⁴⁶ In that case, Nicaragua brought suit against the United States before the International Court of Justice, alleging that the United States engaged in acts of aggression against Nicaragua and thereby violated its sovereignty.¹⁴⁷ These acts of aggression included laying mines in Nicaraguan waters,¹⁴⁸ invading Nicaraguan airspace with American military planes¹⁴⁹ and aiding the Contra Rebels in the Nicaraguan civil war.¹⁵⁰ Because the United States contested the ICJ's jurisdiction to adjudicate the dispute, it withdrew from the proceedings after the ICJ held that such jurisdiction did exist.¹⁵¹ Relying upon Nicaragua's version of the facts,¹⁵² the court found that the United States had engaged in these acts of aggression and that its aid to the Contras constituted a violation of Nicaragua's sovereignty.¹⁵³

143. *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1971).

144. *Id.* at 121.

145. *Id.* (emphasis added).

146. 1986 I.C.J. 14 (June 27).

147. *Id.* at 18-19.

148. *Id.* at 18-19, 46-48.

149. *Id.* at 18-19, 51-53.

150. *Id.* at 18-19, 21-22, 53-62.

151. *Id.* at 22-23.

152. *Id.* at 25.

153. *Id.* at 48, 52-53, 61-62.

The ICJ, however, ruled against Nicaragua's assertions that the United States had "created" the *contra* force in Nicaragua,¹⁵⁴ and that the United States was liable for the human rights violations committed by the Contra Rebels, such as murder, rape and kidnapping.¹⁵⁵ Despite its finding that the United States had financed the Contras by way of military supplies and humanitarian aid,¹⁵⁶ as well as helped to devise their military strategy,¹⁵⁷ the existence of civil strife in Nicaragua prior to this assistance¹⁵⁸ and the eventual autonomy of the Contras¹⁵⁹ barred the court from imputing responsibility for all Contra actions to the United States.¹⁶⁰ With regard to the United States' responsibility for human rights violations committed by the Contras, the court offered the following analysis:

All the forms of United States participation mentioned above, and even the general control by the [United States] over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by [Nicaragua]. Such acts could well be committed by members of the *contras* without the control of the United States. For conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.¹⁶¹

What the court did find was that the United States had "encouraged" the Contra Rebels to commit anti-humanitarian acts

154. *Id.* at 61.

155. *Id.* at 63-65.

156. *Id.* at 58. The court found evidence of this assistance in the United States Government's budget from 1981 forward. *See id.* Witness testimony revealed that, in addition to providing weapons, ammunition, communications equipment and aircraft, the CIA gave salaries to Contra leaders. *See id.* at 58-59. The CIA provided training in "guerilla warfare, sabotage, demolitions, and in the use of a variety of weapons, including assault rifles, machine guns, mortars, grenade launchers, and explosives," . . . [and] supplied the [Contras] with intelligence, particularly as to Nicaraguan troop movements, derived from radio and telephonic interception, code-breaking, and surveillance by aircraft and satellites." *Id.* at 59.

157. *Id.* at 60-61.

158. *Id.* at 53.

159. *Id.* at 62. Noting that Contra activity continued after the United States ceased to authorize funding for the Contras' military purposes in 1984, the ICJ found that "the evidence available to the Court indicates that the various forms of assistance provided to the *contras* by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid." *Id.*

160. *Id.* at 64.

161. *Id.* at 64-65.

through the production and dissemination of a manual on psychological warfare.¹⁶² This manual, which was allegedly written "by 'a low-level contract employee' of the CIA,"¹⁶³ contained such directives as hiring professional criminals for specific "jobs," "neutralizing" state officials and inciting violence against demonstrators in order to create martyrs.¹⁶⁴ Despite this evidence of "encouragement," and ample evidence of military support, the ICJ held that there was not enough evidence to find the United States culpable for the Contras' alleged human rights violations.¹⁶⁵

Legal scholars have criticized the ICJ's failure to hold the United States liable for aiding and abetting the Contras' human rights abuses. For example, Professor Francis Boyle agreed with the legal standard articulated by the ICJ that the accused party must exercise "operational control" over those who commit human rights abuses; however, he disagreed with the ICJ's holding that it had insufficient evidence to conclude that the United States had such control over the Contras.¹⁶⁶ Specifically, he asserted that the Contras' war "was under the command of a 'unified general staff'"¹⁶⁷—composed of high-ranking officials of the Central Intelligence Agency (CIA), the National Security Council, the State Department and the Department of Defense—and that this staff was fully aware of the atrocities being committed by the Contras against Nicaragua's civilian population.¹⁶⁸ Moreover, Professor Boyle himself observed in Nicaragua that "the deliberate infliction of barbarous outrages upon the civilian population of Nicaragua . . . [was] the operational rationale behind the contras' terror war."¹⁶⁹ Indeed, the facts cited in the *Nicaragua* decision discussing the CIA's written instructions on how to commit psychological warfare confirm the United States' interest in the commission of these outrages.¹⁷⁰

Others have argued that the ICJ's standard for finding control was too high. Professors Mark Gibney, Katarina Tomasevsky and Jens Vedsted-Harsen argued in a recent article that "one of the

162. *Id.* at 66.

163. *Id.* at 67.

164. *Id.* at 66. The manual itself was entitled *Psychological Operations in Guerrilla Warfare* [English translation] and contained chapters such as *Implicit and Explicit Terror* and *Selective Use of Violence for Propagandistic Effects*. See *id.* at 65-66.

165. *Id.* at 148.

166. Francis A. Boyle, *Determining U.S. Responsibility for Contra Operations under International Law*, 81 AM. J. INT'L L. 86, 86 (1987).

167. *Id.* at 88 (quoting CHRISTOPHER DICKEY, *WITH THE CONTRAS* 153 (1985)).

168. See *id.* at 87-88.

169. *Id.* at 88.

170. See *supra* notes 162-65 and accompanying text.

biggest problems with [the ICJ's] result is that 'control' is treated as an either-or proposition. In reality, there will be varying degrees of control—and international human rights law should reflect this fact.¹⁷¹ To explain their argument, they presented the following illustration:

[S]upplying another country with foreign aid which is then used by this other country to purchase weapons of torture on the world market is qualitatively different than actually carrying out the torture. That much is obvious. But a country that supplies weapons of torture to another state, knowing full well that the recipient is using this assistance to commit torture, is doing *something*: it is actually facilitating the pernicious practice. . . . The ICJ decision in *Nicaragua* is especially objectionable because the U.S. Government's actions in supporting the *contras* was ultimately treated under the law as being indistinguishable from countries that had absolutely no connection with the *contras* whatsoever¹⁷²

Gibney, Tomasevsky and Vedsted-Hansen also noted that American law requires "far less 'control'" to find foreign states liable for attacks against American citizens.¹⁷³ Professor Boyle echoed this point, arguing that under the United States' own interpretation of the law of war, the knowledge by some United States' officials of the human rights abuses committed by the Contras would make them vicariously responsible for the latter's war crimes.¹⁷⁴

Professor Fernando Tesón is another legal scholar who has offered substantial criticism of *Nicaragua v. United States*, although from a different angle. He argued that the ICJ incorrectly and unnecessarily assessed the enforcement of human rights as a domestic rather than international issue.¹⁷⁵ The ICJ presented this holding not in response to Nicaragua's argument that the United States be held responsible for the Contras' violations of human rights, but rather the United States' argument that its intervention

171. Mark Gibney et al., *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 285-86 (1999).

172. *Id.* at 287 (footnote omitted).

173. *Id.* at 286 n.77 (citing Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 1605(a)(7) (Supp. II 1996) (holding foreign states responsible for crimes committed by non-state actors who are materially supported by that state); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998) (finding that Iran financially supported the terrorist group accused of committing a suicide bomb attack that killed a United States citizen in Israel)).

174. Boyle, *supra* note 166, at 88-90.

175. See Fernando R. Tesón, *Le Peuple, c'est moi! The World Court and Human Rights*, 81 AM. J. INT'L L. 173, 173-74 (1987).

was based in part upon Nicaragua's violations of human rights.¹⁷⁶ Essentially, the ICJ stated that the protection of human rights must be enacted through treaties and, therefore, is not encompassed in customary international law.¹⁷⁷ In articulating and defending the principles of nonintervention and self-determination of states, the ICJ excluded the rights of people who comprise states.¹⁷⁸

Professor Tesón described the philosophical rationale behind this holding as the Hegelian Myth.¹⁷⁹ The fallacy of the Hegelian Myth lies in its "assumption . . . that states are somehow moral agents that are free and able to choose, just as individuals are free and able to make moral choices."¹⁸⁰ By personifying states as moral actors, deserving of freedom and autonomy, international law ascribes the power to states that should belong to people.¹⁸¹ According to Tesón, this confusion of the people and their government in legal discourse has undermined human rights:¹⁸²

[T]he assertion of a "fundamental right" of the state to "choose its political system" is no more than a defense of the legitimacy of any use of political power. The transmutation of words has now become a rationalization for oppression; the "freedom" ("independence," "sovereignty," "equal liberty") of the state means *carte blanche* for tyrants to exercise arbitrary power and deny individual freedom¹⁸³

The ICJ's protective language toward state sovereignty in *Nicaragua*, and lack thereof toward human rights, embodied the Hegelian myth.¹⁸⁴ In rushing to protect the right of states to self-determination, the ICJ failed to recognize people's right to self-determination. In doing so, the ICJ ignored the massive wave of human rights protection that has developed in international law since 1945.¹⁸⁵

Notwithstanding these criticisms, the fact that the ICJ formulated a standard for "recogniz[ing] the possibility of holding

176. *Id.*

177. *See id.* (citing *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 130-31, 134 (June 27)).

178. *Id.* at 174-75.

179. *See id.* at 181.

180. *Id.*

181. *See id.* at 181-82.

182. *See id.* at 182.

183. *Id.* Tesón is quoting the ICJ's statement that "[e]very State possesses a fundamental right to choose and implement its own political, economic and social systems." *Id.* at 173 (quoting *Military and Paramilitary Activities*, 1986 I.C.J. at 130-31).

184. *See id.* at 181.

185. *Id.* at 175.

one state responsible for supporting and assisting another in committing violations of international law (including human rights violations)¹⁸⁶ is promising for the enforcement of human rights. Moreover, since the *Nicaragua* decision was handed down fourteen years ago, the world community has progressively shown less tolerance for human rights abuses.¹⁸⁷ The United Nations has demonstrated a willingness to take forcible and non-forcible enforcement actions against states in order to end human rights violations and remedy disruptions of democracy.¹⁸⁸ If this trend continues, a people's right to self-determination may come to fruition, as reflected in the words of the UN Charter and other international treaties, and as articulated by theorists like Professor Tesón. Recognizing the Taliban's takeover as a violation of both the self-determination of Afghanistan as a state and—especially in light of its flagrant human rights abuses—the self-determination of the Afghan people, could cement the inseparability of these variations on the same principle.

THE CASE AGAINST PAKISTAN AND SAUDI ARABIA

The actual origins of the Taliban are shrouded in mystery.¹⁸⁹ The official historians of the Taliban tell a tale of a small force arising from a *madrassa* within Afghanistan, reacting in outrage against highway taxation and rape perpetrated by the Mujahideen.¹⁹⁰ Their success, Taliban sympathizers claim, is owed to religious fervor and the welcoming of the Afghan people.¹⁹¹ Other sources tell a different story: that the Taliban formed in the *madrassas* of Pakistan,¹⁹² and that its success came with the aid of that country and others.¹⁹³ Without that aid, the Taliban never would have achieved so much power in so little time.¹⁹⁴

186. Gibney et al., *supra* note 171, at 284.

187. *Id.* at 295.

188. See Tesón, *supra* note 34, at 343-70 (discussing UN intervention in Iraq, Somalia, Haiti, Rwanda and Bosnia during the 1990s).

189. See Davis, *supra* note 6, at 43.

190. See *id.*; see also MATINUDDIN, *supra* note 39, at 22-26 (citing among the list of outrages random killings, drug-trafficking and homosexuality, including one incidence of gay marriage).

191. See Davis, *supra* note 6, at 43, 55.

192. See RUBIN, *supra* note 6, at 139; Davis, *supra* note 6, at 43; Rashid, *supra* note 7, at 72-74.

193. See *infra* notes 196-215, 224-27 and accompanying text.

194. Davis, *supra* note 6, at 48-49.

Reports pointing toward Pakistan's involvement in the Taliban's rise to power are numerous.¹⁹⁵ The Taliban's first large-scale military attack, in Afghanistan's frontier region of Spin Boldak, was allegedly accompanied "by artillery fire from across the border" in Pakistan.¹⁹⁶ Shortly thereafter, the Taliban claimed to have seized what was known as the Spin Boldak or Pasha arms dump,¹⁹⁷ a large cache of weapons and ammunition brought over from Pakistan in 1991.¹⁹⁸ Some sources argue that this seizure explained how the Taliban became equipped enough to conquer so much territory so quickly;¹⁹⁹ others assert that this explanation is just a ruse to cover-up arms supplies from foreign allies.²⁰⁰ According to one rumor, the Pasha dump actually contained little or nothing, having been looted prior to the Taliban's arrival.²⁰¹ Another report asserts that the dump was still intact, but that the Pakistan troops guarding it "were ordered to walk away when the Taliban arrived."²⁰² In any case, witnesses reported seeing Taliban soldiers with brand new weapons prior to its next big operation—the capture of the Afghan region of Kandahar:

Foreign aid officials leaving the city as or shortly before fighting broke out reported to one Western correspondent seeing several hundred Taliban reinforcements who had crossed the border grouped on the Spin Boldak-Kandahar road. Grease paper, said the foreigners, was everywhere as the madrassa students removed new weapons from their wrappings.²⁰³

In Kandahar, the Taliban seized military vehicles and aircraft, including MiG-21 fighter planes (though many in disrepair), helicopters and tanks.²⁰⁴ These spoils of war, however, may not have come legitimately either. When the Taliban forces reached

195. See *infra* notes 196-215 and accompanying text.

196. See Davis, *supra* note 6, at 45-46.

197. See *id.* at 46; Rashid, *supra* note 7, at 81.

198. See Davis, *supra* note 6, at 46.

199. *Id.* Davis quoted one Pakistani intelligence officer as saying that the dump "was a huge dump, a central dump with rockets, artillery ammunition, tank ammunition, and small arms—both captured from the (pre-1992) Afghan government and Western supplied ammo. I believe they have sufficient stocks to run their affairs for quite some time. For years even." *Id.*

200. *Id.*

201. *Id.*

202. Rashid, *supra* note 7, at 81.

203. Davis, *supra* note 6, at 50 (footnote omitted); see also RUBIN, *supra* note 6, at 139 (stating that Taliban soldiers "streamed across the [Afghanistan-Pakistan] border armed with new weapons").

204. Davis, *supra* note 6, at 48.

Kandahar, a large section of President Rabbani's army did not fight back.²⁰⁵ Later, the Rabbani government accused the Corp commander, Mullah Naqib, of accepting a bribe "from either the Pakistanis or Taliban emissaries on the understanding that after the Taliban takeover he would be permitted [to] retain his position."²⁰⁶

Regardless of how the Taliban obtained its equipment, it is doubtful that they taught themselves how to use it. Military training had to come from someone, and it is highly unlikely that members of the Taliban learned to use complex weapons or pilot aircraft on their own.²⁰⁷ Although the Taliban's military training allegedly began in the Pakistani *madrassas*, after the Taliban conquered Spin Boldak and Kandahar it set up training camps there as well.²⁰⁸ The military instructors were either Pakistani army officers or former Afghan officers who fought with or against the communist regime.²⁰⁹ These officers are also believed to have operated much of the sophisticated equipment themselves.²¹⁰ The fact that the Taliban received direct assistance from the Pakistani military was confirmed by the capture of Pakistani soldiers, officers and other personnel by the Taliban's opposition.²¹¹

After its initial victories, the Taliban began to face effective resistance from President Rabbani and his armies.²¹² Any setbacks the Taliban faced, however, were met with more assistance from Pakistan.²¹³ Some reports indicate that Pakistan sent aircraft technicians to repair the MiG-21 fighter planes captured at Kandahar, as well as additional military vehicles and equipment.²¹⁴ Pakistan also reportedly provided the Taliban with sophisticated

205. *Id.*; see also RUBIN, *supra* note 6, at 139 (stating that the Taliban captured [K]andahar "with little resistance").

206. Davis, *supra* note 6, at 49.

207. *Id.* at 54-55, 68-70.

208. *Id.*

209. *Id.* at 54-55; Rashid, *supra* note 7, at 86-87.

210. Davis, *supra* note 6, at 54-55; Rashid, *supra* note 7, at 86-87.

211. Saikal, *supra* note 2, at 39.

212. Davis, *supra* note 6, at 56-59.

213. *Id.* at 61-63.

214. Davis, *supra* note 6, at 60-61; Rashid, *supra* note 7, at 85. Davis summed up Pakistan's aid to the Taliban as follows:

Logistically, aid has involved expediting supplies of motor and aviation fuel, ammunition, spare parts and new vehicles to the Taliban. Given the scale and scope of Taliban operations it is ridiculous to suggest that such supplies are carried across obscure desert and mountain trails on the backs of donkeys: They are trucked down a few highways and secondary roads in convoys with the full concurrence of border authorities.

Davis, *supra* note 6, at 69.

communications equipment, including a telephone network in Kandahar—courtesy of Pakistan Telecom—and an internal wireless network for use in military operations.²¹⁵

With Afghanistan as an ally, Pakistan had much to gain in terms of security and economic benefits. This alliance would facilitate the creation of trading routes to the newly formed Central Asia republics²¹⁶ and provide a buffer between Pakistan and its enemy Iran.²¹⁷ The main economic benefit the Afghanistan territory promised, however, was its potential for accommodating new oil and gas pipelines that would circumvent Iran.²¹⁸

This opportunity also garnered support from Saudi Arabia, as well as from the United States during the Taliban's initial stages of organization.²¹⁹ The American corporation UNOCAL, along with Saudi oil companies, sought to cultivate a relationship with the Taliban in order to construct a billion-dollar pipeline through Afghanistan territory.²²⁰ UNOCAL's lobbying in the United States, however, met with a cold reception from women's rights groups and the Clinton administration after Kabul fell and the Taliban's misogynistic agenda was enacted.²²¹ But the Taliban's treatment of women did not stop Saudi Arabia from extending diplomatic recognition to the Taliban,²²² which is not surprising considering its own record of sexism and human rights abuses.²²³

Several sources report that Saudi Arabia was the principal financial supporter of the Taliban's operation.²²⁴ Pakistan actively lobbied for Saudi support, as evidenced by frequent meetings between leaders of both countries during the Taliban's rise to

215. Rashid, *supra* note 7, at 85.

216. See Mackenzie, *supra* note 27, at 96.

217. See Rashid, *supra* note 7, at 86.

218. Mackenzie, *supra* note 27, at 96.

219. *Id.*

220. *Id.*

221. *Id.* at 97. Mackenzie notes that, until Madeleine Albright replaced Warren Christopher as Secretary of State in early 1997, the State Department turned a blind eye to the plight of Afghan women. *Id.* The Feminist Majority Foundation and other women's rights groups were instrumental in stalling UNOCAL's plans. *Stop Gender Apartheid*, *supra* note 19.

222. See *supra* note 17 and accompanying text.

223. See Yamani, *supra* note 99, at 270-77. According to Freedom House's annual survey, both Saudi Arabia and Afghanistan are among the thirteen countries receiving the lowest rating for political rights and civil liberties. See Adrian Karatnycky, *The 1999-2000 Freedom House Survey of Freedom: A Century of Progress*, in *FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES: 1999-2000*, at 5, 7 (Adrian Karatnycky ed., 2000).

224. See Maley, *supra* note 8, at 16; Rashid, *supra* note 7, at 76; Telesetsky, *supra* note 17, at 294; *Stop Gender Apartheid*, *supra* note 19.

power.²²⁵ A Pakistani official facilitated contacts between Taliban leaders and Arab princes by organizing hunting trips to Kandahar in 1995.²²⁶ The Saudis arrived "on huge transport planes bringing dozens of luxury jeeps, many of which they left behind for their Taliban hosts."²²⁷

The alleged contributions of Pakistan and Saudi Arabia to the Taliban militia clearly violate the international law against intervention and use of force. By finding the United States liable for its military support to the Contras, *Nicaragua v. United States* demonstrated that the use of force encompasses activities such as providing military supplies, training and other means of support to a group that uses that support for its own acts of aggression. Evidence shows that Pakistan served as a base for the organization of the Taliban, beginning in its *madrassas*, and that both Pakistan and Saudi Arabia maintained the Taliban's offensive through multiple forms of financial and military aid.²²⁸ Assuming this evidence is accurate, Pakistan and Saudi Arabia gave the Taliban the means to conquer Afghanistan. Just as the United States violated Nicaragua's self-determination by supporting the Contra Rebels,²²⁹ Pakistan and Saudi Arabia violated Afghanistan's self-determination by supporting the Taliban.

Although Pakistan and Saudi Arabia's contributions to the Taliban's military offensive are analogous to those condemned in the *Nicaragua* decision, this Note concedes that there is not sufficient evidence to hold that those countries met the threshold of "control" articulated by the ICJ necessary to hold them liable for the Taliban's human rights violations under international law.²³⁰ This Note, however, argues that the illegal actions of Pakistan and Saudi Arabia provide a legal basis for the restoration of Afghanistan's right to self-determination through UN enforcement mechanisms.²³¹ Ultimately, this Note argues that the right of self-determination can no longer be separated from human rights.²³²

225. See Rashid, *supra* note 7, at 76.

226. See *id.*

227. *Id.*

228. See *supra* notes 192-215 and accompanying text.

229. See *supra* notes 146-53 and accompanying text.

230. See *supra* notes 154-61 and accompanying text. At the same time, this Note agrees with the criticisms of that standard articulated *supra* notes 166-74 and accompanying text.

231. See *supra* note 128.

232. Cf. McCorquodale, *supra* note 31, at 865 ("[A] State's internal protection of the right of self-determination is now of international concern, which is consistent with the development of international human rights law so that human rights are now a matter not within a State's domestic jurisdiction.").

CONCLUSION

In 1999, the UN Special Rapporteur for Violence Against Women declared the Taliban regime to be "the most misogynist entity in the world."²³³ This is not surprising given the Taliban's gross violations of Afghan women's rights.²³⁴ Unfortunately, international actors have been reluctant to enforce women's rights, often citing state's rights to sovereignty and freedom from foreign interference.²³⁵ This freedom rests in the international principle of self-determination of states.²³⁶

At the same time, the principle of self-determination has grown to encompass, in the eyes of many, the self-determination of people.²³⁷ As the valuation of human rights and democratic process has increased in the international realm,²³⁸ this expansion of the right of self-determination is logical and necessary. In recognizing the Taliban as a product of foreign interference and, therefore, a violation of Afghanistan's self-determination as a state,²³⁹ the Taliban's flagrant violation of the Afghan people's right to self-determination cannot be ignored. Recognizing their right, and the right of Afghan women in particular, can only have a positive impact on self-determination jurisprudence, and consequently, the rights of men *and women* around the world.

According to its Charter, the United Nations has the right to counter-intervene in order to protect the people of Afghanistan.²⁴⁰ Given the brutality of the Taliban regime, it is hard to imagine a population more in need of such protection. Furthermore, the United Nations should use this opportunity to facilitate the development of Afghanistan's first democratic government, and the right to self-determination of all its citizens—male and female. The plain language of the UN Charter, as well as other international declarations, allows for such enforcement.²⁴¹ If these words are to have any meaning, the UN must condemn the illegal actions of

233. *Country Reports: Afghanistan*, *supra* note 110, at 41.

234. *See supra* notes 84-112 and accompanying text.

235. *See* TESÓN, *supra* note 31, at 162; *see also* Craig R. Whitney, *Hands Off: The No Man's Land in the Fight for Human Rights*, N.Y. TIMES, Dec. 12, 1999, at 4-1 (discussing the reluctance to protect human rights in general under the same rationale).

236. *See supra* note 138 and accompanying text.

237. *See supra* notes 31, 34, 139-40 and accompanying text.

238. *See* Donoho, *supra* note 140, at 367-68.

239. *See supra* text accompanying notes 228-29.

240. *See supra* notes 127, 130 and accompanying text.

241. *See supra* notes 142-45 and accompanying text.

Saudi Arabia and Pakistan, and restore the rights of Afghanistan's women.

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