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UNDER A CRUEL SUN:¹ MY LIFE AS A FEMALE JUDGE AND UNDERGROUND EDUCATOR UNDER THE SOVIETS, THE TALIBAN, AND THE AMERICANS

MARZIA BASEL* & DANA MICHAEL HOLLYWOOD**

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This essay is a collaboration between Judge Marzia Basel and Dana Hollywood, editor-in-chief of the Journal of Women and the Law. Portions of the text in italics represent the experiences and views of Judge Basel. Text in roman type solely represents the opinions of Dana Hollywood and should in no way be attributed to Judge Basel.

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.²

1. The authors gratefully acknowledge that the title and structure of this essay are derived from an extraordinary memoir, UNDER A CRUEL STAR, by Heda Margolius Kovály. See HEDA MARGOLIUS KOVÁLY, UNDER A CRUEL STAR (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.³ 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.⁴ 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.⁵ Afghanistan covers some 245,000 square miles, an area approximately the size of Texas.⁶ "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

internally displaced. Thus, more than 50 percent of Afghanistan's indigenous population (estimated at 15 to 17 million persons at the war's beginning [in 1979], now estimated to be as many as 22 million) became casualties — killed, wounded, or made homeless by the war.

LARRY P. GOODSON, *AFGHANISTAN'S ENDLESS WAR* 5 (2001) (citations omitted).

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. RTS Q. 733, 734 n.6 (2001) (quoting REBECCA COOK, *THE ELIMINATION OF SEXUAL APARTHEID: PROSPECTS FOR THE FOURTH WORLD CONFERENCE ON WOMEN* 3 (1995)).

5. RALPH H. MAGNUS & EDEN NABY, *AFGHANISTAN: MULLAH, MARX, AND MUJAHID* 2 (2002).

6. LIBRARY OF CONGRESS, *AFGHANISTAN: THE NATURAL ENVIRONMENT* (1997), <http://lcweb2.loc.gov/frd/cs/aftoc.html>.

Corridor . . . and by Pakistan to the east and south.”⁷ Its diverse topography is inhabited by an equally diverse population,⁸ 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.”⁹ Although there has been much intermingling over the centuries, the peoples of Afghanistan still have distinct ethnic, physical, and linguistic differences.¹⁰ Recent estimates suggest that Afghanistan may have a population of close to thirty million people,¹¹ divided into approximately twenty main ethnic groups.¹² A majority of Afghans can speak at least one of the two official languages of Pushtu or Dari,¹³ but over thirty different languages are spoken.¹⁴ Though the etymology of the term “Afghan” remains unclear, until very recently the term was synonymous with Pushtu.¹⁵ 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.¹⁶

The largest and traditionally most politically powerful ethnic group, the Pushtuns, represent at least fifty percent of Afghanistan’s population.¹⁷ 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.¹⁸ The Pushtun population in Pakistan, for example, constitutes a major ethnic group of about fourteen million people.¹⁹ “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), <http://www.cia.gov/cia/publications/factbook/geos/af.html>.

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’Y 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."²⁰ The most numerous, at between one-fourth and one-fifth of the population, are the Tajiks.²¹ Tajiks inhabit the northeastern part of the country and spill over into the former Soviet Republic of Tajikistan.²² "Tajiks appear to have Persian features and speak Dari,"²³ the Afghan dialect of Farsi or Persian.²⁴ Other sizeable ethnic groups include the Hazaras, the Uzbeks, and the Aimaq, which are roughly equal in size,²⁵ in addition to less numerous but still substantial Turks, Kazaks, Sikhs, Hindus, and Jews.²⁶ This incredible "ethnic mixture has traditionally known a high propensity for violence, often between ethnic groups, subtribes, and even cousins."²⁷ 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."²⁸

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.²⁹ Approximately eighty-five percent of the population is Hanafi Sunni and the remainder Jafari Shi'a.³⁰ This religious division results in a more

20. GOODSON, *supra* note 2, at 16.

21. *Id.*; MAGNUS & NABY, *supra* note 5, at 10.

22. *See* GOODSON, *supra* note 2, at 15, 16.

23. MARTIN EWANS, *AFGHANISTAN: A SHORT HISTORY OF ITS PEOPLE AND POLITICS* 7 (2002).

24. M. HASSAN KAKAR, *AFGHANISTAN: THE SOVIET INVASION AND THE AFGHAN RESPONSE*, 1979-1982, 1 (1995).

25. MAGNUS & NABY, *supra* note 5, at 10.

26. *Id.*

27. GOODSON, *supra* note 2, at 17.

28. *Id.*

29. *See id.* at 17-19.

30. *Id.* at 17. "Although the followers of Islam belong to a single community of believers, there are two major historic divisions: Sunni and Shii. Sunni Muslims constitute 85 percent of the world's Muslims; Shii about 15 percent." JOHN L. ESPOSITO, *ISLAM: THE STRAIGHT PATH* 4 (1988). The seeds of the schism date back to the death of the Prophet Muhammad. *Id.* at 37. Prior to his sudden death in 632 AD, he had left no instructions as to whom should succeed him as head of the Islamic movement. *See id.* at 37-38. One group maintained that the successor should be elected; another held that the only legitimate heirs to his authority were his blood descendants. *See id.* at 38-39. The rift erupted twelve years after Muhammad's death, with the choosing of the third khalifa (successor or deputy). *See id.* One group supported Uthman, a rich nobleman with no blood ties to the Prophet. *See id.* at 39. Another group supported Ali, the Prophet's cousin and son-in-law. *Id.* Though Uthman prevailed as the khalifa, Ali's followers, later to be called Shi'i (*shiat-u-Ali*, party of Ali) eventually galvanized a movement known as Shi'ism. *Id.* at 39.

basic gap between the groups: "Shi'as are among the most economically disadvantaged people in Afghanistan."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."³² "The period of pre-Islamic Arabia — known as *Jahiliyyah*, or the Age of Ignorance" was defined by a polytheistic culture and "a belief that gods and goddesses protected individual tribes."³³ "Allah, the supreme high god, was the creator and sustainer of life but remote from everyday concerns"³⁴ One night in the month of Ramadan 610 A.D., during the *Jahiliyyah*, God sent the angel Gabriel to reveal his word to Muhammad, a successful businessman.³⁵ "Muhammad continued to receive divine revelations" from God for twenty-two years.³⁶ For Muhammad and his followers, "heeding God's warning required turning away from the path of unbelief and turning toward . . . the straight path (*sharia*) or law of God."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.³⁸ The Qur'an contains legal prescriptions, but consists primarily of broad moral directives indicating what Muslims "ought to do."³⁹ Over time, Islamic standards gradually replaced earlier tribal laws and Arab customs.⁴⁰

31. U.S. DEPT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, AFG. REPORT ON HUMAN RIGHTS PRACTICES FOR 1996 (1997), <http://www.usemb.se/human/1996/southasia/afghanistan.html> [hereinafter HUMAN RIGHTS PRACTICES FOR 1996].

32. ESPOSITO, *supra* note 30, at 3.

33. Leila P. Sayeh & Adriaen M. Morse, Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT'L L.J. 311, 314 (1995) (citation omitted).

34. ESPOSITO, *supra* note 30, at 5.

35. JOHN BAGOT GLUBB, THE LIFE AND TIMES OF MUHAMMAD 83-84 (1970); *see also* ESPOSITO, *supra* note 30, at 8.

36. ESPOSITO, *supra* note 30, at 8 (indicating that the revelations spanned from 610-632 A.D.).

37. *Id.* at 14.

38. Sayeh & Morse, *supra* note 33, at 315 (citing ESPOSITO, *supra* note 30, at 8-9).

39. ESPOSITO, *supra* note 30, at 79.

40. *Id.* at 79-80.

II. THE SOVIETS:⁴¹ 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.⁴² "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."⁴³ King Zahir Shah, who ruled Afghanistan from 1933-1973, continued these progressive reforms.⁴⁴ 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.⁴⁵ Afghanistan's new Constitution guaranteed equality to

41. There are several excellent accounts of the 1979-1989 Soviet war in Afghanistan, which would prove to be the Soviet Union's last "hot war." The best is the brilliant account provided by M. Hassan Kakar. M. HASSAN KAKAR, *AFGHANISTAN: THE SOVIET INVASION AND THE AFGHAN RESPONSE, 1979-1982* (1995). The book only covers the period up to 1982, when the author was jailed by the Kabul regime as a dissident. *Id.* at 16, 379. Nonetheless, an epilogue chronicles the Soviet's disastrous final years in Afghanistan. *Id.* at 257-300. See generally SVETLANA ALEKSIEVICH ET AL., *ZINKY BOYS: SOVIET VOICES FROM THE AFGHANISTAN WAR* (Robin Whitby trans., W. W. Norton & Co. 1992); ANTHONY ARNOLD, *AFGHANISTAN: THE SOVIET INVASION IN PERSPECTIVE* (1985); ANTHONY ARNOLD, *FATEFUL PEBBLE: AFGHANISTAN'S ROLE IN THE FALL OF THE SOVIET EMPIRE* (1993); ARTEM BOROVNIK, *THE HIDDEN WAR: A RUSSIAN JOURNALIST'S ACCOUNT OF THE SOVIET WAR IN AFGHANISTAN* (1990); DIEGO CORDOVEZ & SELIG S. HARRISON, *OUT OF AFGHANISTAN: THE INSIDE STORY OF THE SOVIET WITHDRAWAL* (2001).

42. Sonali Kolhatkar, *The Impact of U.S. Intervention on Afghan Women's Rights*, 17 *BERKELEY WOMEN'S L.J.* 12, 14 (2002).

43. *Id.*

44. U.S. DEP'T OF STATE, BUREAU OF S. ASIAN AFFAIRS, *BACKGROUND NOTE: AFGHANISTAN* (2005), <http://www.state.gov/r/pa/ei/bgn/5380.htm> (last updated Apr. 2005) [hereinafter *BACKGROUND NOTE: AFGHANISTAN*].

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

46. Constitution of the Islamic Republic of Afghanistan, ch. I, art. II (1964), available at <http://www.afghanland.com/history/constitution.html>.

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.

48. See Mohamed Ismail Sloan, *A Brief History of War in Afghanistan*, <http://www.ishipress.com/afghans.htm>.

49. *Id.*

50. *Id.*

51. *Id.*

52. See Cosma Shalizi, *Incipit Tragoedia*, BACTRA REV. (1998) (reviewing M. HASSAN KAKAR, *AFGHANISTAN: THE SOVIET INVASION AND THE AFGHAN RESPONSE, 1979-1982* (1995)), <http://cscs.umich.edu/~crshalizi/reviews/kakar-soviet-invasion>.

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.”⁵⁴

In the early 1970s, the country was beset by serious economic problems.⁵⁵ “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.”⁵⁶ 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, 1973.⁵⁷ “Daoud abolished the monarchy,” proclaimed a republic, “abrogated the 1964 Constitution,” and ambitiously appointed himself President, Prime Minister, Foreign Minister, and Minister of Defense.⁵⁸ 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.⁵⁹ 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.⁶⁰ 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.⁶¹ 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.⁶² “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.

59. DOUGLAS MACEACHIN, PREDICTING THE SOVIET INVASION OF AFGHANISTAN: THE INTELLIGENCE COMMUNITY’S RECORD 3, available at <http://www.cia.gov/csi/monograph/afghanistan>.

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.”⁶³ This was sparked partly by Daoud’s growing unpopularity, but more directly by his attempts to suppress the communists.⁶⁴ As security consultants, he had used SAVAK, the despised secret police of the Shah of Iran.⁶⁵ SAVAK was blamed with the assassination of Mier Akbar Khybar, a highly regarded and patriotic leader of the Left.⁶⁶ 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.”⁶⁷ The Red Orchestra⁶⁸ 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.”⁶⁹ 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.⁷⁰ 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,”⁷¹ and the regime “carried out massive repression,

63. *Id.*

64. See MACEACHIN, *supra* note 59, at 6-8.

65. KAKAR, *supra* note 41, at 257-300.

66. *Id.*

67. MAGNUS & NABY, *supra* note 5, at 122.

68. In 1983, four years after the Soviet Union’s invasion of Afghanistan, in an address to the Central Committee of the Communist Party of the Soviet Union, Konstantin Chernenko likened the U.S.S.R.’s “ideological work” to an orchestra, whereby “harmony is achieved by skillful conducting.” Chernenko stated:

Comrades, our entire system of ideological work should operate as a well-arranged orchestra in which every instrument has a distinctive voice and leads its theme, while harmony is achieved by skillful conducting. The main demands on Party leadership of ideological work are constantly to check the tone of propaganda against our policy goals and people’s interest, and to ensure that word becomes deed, as Lenin put it. Propaganda is called upon to embrace every aspect of social life and every social group and region and to reach every individual.

EDWARD F. DANDAR, JR., THE NAT’L WAR COLLEGE NAT’L DEF. UNIV. STRATEGIC STUDY, SOVIET ACTIVE MEASURES: IMPACT ON U.S. FOREIGN POLICY DECISION-MAKING 16 (1985), available at <http://www.ndu.edu/library/n3/SSP-85-055b.pdf>.

69. HUMAN RIGHTS WATCH, BETWEEN HOPE AND FEAR: INTIMIDATION AND ATTACKS AGAINST WOMEN IN PUBLIC LIFE IN AFGHANISTAN 5 (2004), <http://hrw.org/backgrounder/asia/afghanistan1004/index.htm> [hereinafter BETWEEN HOPE AND FEAR].

70. See Kolhatkar, *supra* note 42, at 14.

71. *Id.* at 15.

including systematic torture of thousands of detainees by the secret police . . . and indiscriminate bombing of rural areas."⁷² Tragically, this violence undermined the regime and fueled opposition to its reforms, particularly the expansion of women's rights.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 1968.⁷⁴ 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.⁷⁵ Babrak Karmal, who arrived atop a Soviet tank,⁷⁶ was installed as Prime Minister.⁷⁷ Three days later, massive Soviet ground forces invaded from the north.⁷⁸ By the spring of 1980, more than 100,000 Soviet troops were present in Afghanistan.⁷⁹

In April 1979, six months before the Soviet invasion, seven Afghan groups based in Pakistan began meeting with and receiving weapons⁸⁰ and assistance from CIA officials.⁸¹ These groups had previously declared a *jihad*, or holy war, against the P.D.P.A. regime, and now expanded their *jihad* to include the Soviet invaders.⁸² Consequently, their combatants came to be known as Mujahidin.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

72. *Id.*

73. *Id.* at 15.

74. See generally ADAM ULAM, *THE COMMUNISTS: THE STORY OF POWER AND LOST ILLUSIONS, 1948-1991* (1992).

75. BACKGROUND NOTE: AFGHANISTAN, *supra* note 44.

76. MAGNUS & NABY, *supra* note 5, at 129.

77. BACKGROUND NOTE: AFGHANISTAN, *supra* note 44.

78. *Id.*

79. GOODSON, *supra* note 2, at 59.

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.

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.

82. EWANS, *supra* note 23, at 54, 153.

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, Zbigniew 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.*

86. JANETTE RAINWATER, TERRORISM AND BLOWBACK, PART TWO: “TERRORISM,” BLOWBACK AND US FOREIGN POLICY, 1953-1992, <http://www.janrainwater.com/htdocs/2.htm>.

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.

THOMAS POWERS, INTELLIGENCE WARS: AMERICAN SECRET HISTORY FROM HITLER TO AL-QAEDA 287 (2002). See also Ken Silverstein, *Stingers, Stingers, Who’s Got the Stingers?*, SLATE, Oct. 2, 2001, <http://slate.msn.com/id/116582>.

brightly-colored plastic toys, which exploded when picked up by children.⁸⁸

The Soviets also left some ten million landmines in their wake.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 ordinances.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.⁹¹ In 1988, Afghanistan, Pakistan, the United States, and the Soviet Union signed the Geneva Accords.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, 1989.⁹³ Tragically, the Mujahidin were not a party to the Accords and refused to accept their terms.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.⁹⁵

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

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

88. Shalizi, *supra* note 52.

89. See generally HUMAN RIGHTS WATCH, LANDMINE MONITOR REP. 2001: AFGHANISTAN (2001), available at <http://www.icbl.org/lm/2001/afghanistan> [hereinafter LANDMINE MONITOR].

90. See *id.*

91. BACKGROUND NOTE: AFGHANISTAN, *supra* note 44.

92. *Id.*

93. *Id.*

94. See *id.*

95. RAINWATER, *supra* note 86.

96. See Edward A. Gargan, *Afghanistan: Healing a Broken Land*, N.Y. TIMES, Apr. 30, 1992, at A10.

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

98. Several recent sources attempt to explain the Taliban's rise to power and its perverse fundamentalism. See generally FUNDAMENTALISM REBORN?: AFGHANISTAN AND THE TALIBAN (William Maley ed., 1998); MICHAEL GRIFFIN, REAPING THE WHIRLWIND: THE TALIBAN MOVEMENT IN AFGHANISTAN (2001); ROBERT D. KAPLAN, SOLDIERS OF GOD: WITH ISLAMIC WARRIORS IN AFGHANISTAN AND PAKISTAN (2001); PETER MARSDEN, THE TALIBAN: WAR, RELIGION AND THE NEW ORDER IN AFGHANISTAN (1998); NEAMATOLLAH NOJUMI, THE RISE OF THE TALIBAN IN AFGHANISTAN: MASS MOBILIZATION, CIVIL WAR, AND THE FUTURE OF THE REGION (2002); AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA (2000); SHAY SHAUL, ENDLESS JIHAD: THE MUJAHIDIN, THE TALIBAN AND BIN LADIN (2002).

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.

101. GOODSON, *supra* note 2, at 74-75. See also Carlotta Gall, *From the Rubble: A City of Old? Or All Shiny and New?*, N.Y. TIMES, June 27, 2005, at A4.

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.¹⁰⁵ Pakistani and Saudi Arabian fundamentalists extended support to a new movement, known as the Taliban or religious students, in the summer of 1994.¹⁰⁶ The Taliban were composed of Pushtun refugees and war veterans from rural Pakistani and Afghan *madrasahs*, or Islamic schools.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."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.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 1996.¹¹⁰ By the time of the American invasion, the Taliban effectively controlled ninety percent of the country and was indisputably the *de facto* ruler.¹¹¹ The Taliban consisted of a six-member ruling council in Kabul.¹¹² Ultimate authority, however, rested with the reclusive Mullah Omar and the Taliban's inner *shura*, or council, located in Kandahar.¹¹³ The Northern Alliance, led by President Rabbani, held a sliver of territory in the northeast.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."¹¹⁵ Similarly, Arundhati Roy, the Booker Prize-winning author from India, explains:

105. *Id.* at 76.

106. *Id.*

107. *Id.*

108. *Id.*

109. See Kolhatkar, *supra* note 42, at 18.

110. See *id.*

111. See BACKGROUND NOTE: AFGHANISTAN, *supra* note 44.

112. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, 4 U.N. Doc. E/CN.4/2000/6/Add.4 (Mar. 13, 2000) (prepared by Radhika Coomaraswamy), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G00/115/81/PDF/G0011581.pdf?OpenElement> [hereinafter *Violence Against Women*].

113. See *id.*

114. Anthony Davis, *How the Taliban Became a Military Force*, in *FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN* 67-68 (William Maley ed., 2001).

115. Ratna Kapur, *Un-Veiling Women's Rights in the 'War on Terrorism'*, 9 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:

116. Arundhati Roy, *Brutality Smeared in Peanut Butter*, GUARDIAN OF LONDON, Oct. 23 2001, at G2.

117. Kapur, *supra* note 115.

118. Roy, *supra* note 116.

119. See John F. Burns, *New Afghan Rulers Impose Harsh Mores of the Islamic Code*, N.Y. TIMES, Oct. 1, 1996, at A1.

120. HUMAN RIGHTS WATCH, CRISIS OF IMPUNITY: THE ROLE OF PAKISTAN, RUSSIA, AND IRAN IN FUELING THE CIVIL WAR 16 (2001), available at <http://www.hrw.org/reports/2001/afghan2/Afghan/0701.pdf>.

121. BARNETT R. RUBIN, WRITENET FOR UNHCR, AFGHANISTAN: THE FORGOTTEN CRISIS: UPDATE MARCH-NOVEMBER 1996 (1996), available at <http://www.fuhem.es/portal/areas/paz/observatorio/informes/afganistan.htm#48> [hereinafter THE FORGOTTEN CRISIS]. See also Fred Halliday, *Kabul's Patriarchy with Guns*, THE NATION, Nov. 11, 1966, at 20-22.

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 Kabul¹²⁶ 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.

126. Radio Kabul was renamed Radio Shariat in October 1996. Nancy Hatch Dupree, *Afghan Women Under the Taliban*, in *FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN* 148 n.11 (William Maley ed., 2001).

127. *Id.* at 148. See also CHRISTINA LAMB, *THE SEWING CIRCLES OF HERAT* 30 (2002).

128. The Taliban ordered that houses with female occupants have their windows painted over so that women in the homes could not be visible from the street. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *AFGHANISTAN COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1998* (1999), available at http://www.state.gov/www/global/human_rights/1998_hrp_report/afghanis.html [hereinafter *HUMAN RIGHTS PRACTICES FOR 1998*].

129. See John F. Burns, *Kabul's Islamic Rulers Face Rivals' Guns and Growing Popular Discontent*, N.Y. TIMES, Oct. 22, 1996, at A14.

from working, 30,000 of whom were war widows.¹³⁰ 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.”¹³¹ 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.¹³²

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.¹³³ 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.¹³⁴ “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.”¹³⁵

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.¹³⁶ 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.¹³⁷ 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.¹³⁸ 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.*

131. AMNESTY INT’L, AFGHANISTAN: GRAVE ABUSES BY THE TALIBAN IN THE NAME OF RELIGION (1996), available at <http://web.amnesty.org/library/index/ENGASA110131996> [hereinafter GRAVE ABUSES].

132. HUMAN RIGHTS PRACTICES FOR 1998, *supra* note 128.

133. *See id.*

134. *Violence Against Women*, *supra* note 112, at 7.

135. *Id.*

136. GRAVE ABUSES, *supra* note 131.

137. U.S. DEPT OF STATE, WOMEN AND GIRLS IN AFGHANISTAN: FACT SHEET RELEASED BY THE SENIOR COORDINATOR FOR INT’L WOMEN’S ISSUES (1998), http://www.state.gov/www/global/women/fs_980310_women_afghan.html [hereinafter WOMEN AND GIRLS IN AFGHANISTAN]. *See also* GRAVE ABUSES, *supra* note 131.

138. *Violence Against Women*, *supra* note 112, at 7; HUMAN RIGHTS PRACTICES FOR 1998, *supra* note 128.

[burqa].”¹³⁹ 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.”¹⁴⁰ 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.”¹⁴¹ In addition to public beatings, women who violated standards of morality were publicly lashed in front of large crowds, often in a stadium.¹⁴² Women found guilty of adultery could be stoned to death.¹⁴³

Under Taliban rule, an already inadequate health care system deteriorated precipitously so that countless women died of treatable illnesses.¹⁴⁴ Initially, like other women, female medical practitioners were banned from work.¹⁴⁵ Nonetheless, as male doctors were severely limited in their ability to treat female patients,¹⁴⁶ this policy proved untenable, and the resulting international uproar forced the Taliban to modify it.¹⁴⁷ Female doctors and nurses were allowed to resume their jobs in Kabul and elsewhere, but generally under strict guidelines.¹⁴⁸ Beginning in September 1997, female medical patients were segregated into different hospitals.¹⁴⁹ 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.”¹⁵⁰

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.

142. *Violence Against Women*, *supra* note 112, at 7.

143. Friedman, *supra* note 3, at 91.

144. See *Behind the Veil of Oppression*, THE HINDU ONLINE, Nov. 4, 2001 (2005), <http://www.hindu.com/thehindu/mag/2001/11/04/stories/2001110400100100.htm>.

145. HUMAN RIGHTS PRACTICES FOR 1996, *supra* note 31.

146. Male doctors could not touch female patients except through their clothing. HUMAN RIGHTS PRACTICES FOR 1998, *supra* note 128; Stephanie Dubitsky, *The Health Care Crisis Facing Women Under Taliban Rule in Afghanistan*, 6 HUM. RTS. BRIEF 10 (2004).

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 . . . practic[ed] in Afghanistan, and male obstetricians [we]re prevented from adequately treating their patients due to the restrictions on male-female contact. The United Nations estimate[d] that, as a result, only ten percent of Afghan women ha[d] access to formal prenatal and maternal medical services, and medically-trained health care providers attend[ed] 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 humans¹⁵⁷ "caused the destruction of public education posters (representing the human body) and hampered the . . . dissemination of health information,"¹⁵⁸ 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 public 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."¹⁶⁰ 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.¹⁶¹

As a result of pressure from the international community, the Taliban made insignificant changes to the policy prohibiting girls from attending school.¹⁶² In 1997 it opened schools for girls aged six to ten.¹⁶³ 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.¹⁶⁴ 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"¹⁶⁵ 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.¹⁶⁶

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."¹⁶⁷ 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.

167. DANTE ALIGHIERI, *THE INFERNO*, XX (John Ciardi trans., Signet Classics 2001) (1315).

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."¹⁶⁸ 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.¹⁶⁹ Visibly moved, Albright listened intently as schoolgirls and their teachers recounted, often in horrifying detail, their flight from the Taliban.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."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."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

168. FEMINIST MAJORITY FOUND., STOP GENDER APARTHEID (2005), <http://www.feminist.org/afghan/facts.html>.

169. Richard Mackenzie, *The United States and the Taliban*, in FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN 90 (William Maley ed., 2001).

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

171. *Id.*

172. *Id.*

issued Executive Order 13,129, which froze assets and prohibited transactions with the Taliban.¹⁷³ The Order, however, was prompted not by the Taliban's treatment of women, but by security concerns.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.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."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.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

173. Exec. Order No. 13,129, 64 Fed. Reg. 36,759 (July 7, 1999).

174. *Id.*

175. *Id.*

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.

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 regime¹⁷⁸ Verdirame is particularly critical of the United Nations Security Council.¹⁷⁹

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 VII¹⁸⁰ in S.C. Res. 1267,¹⁸¹ 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.”¹⁸² 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”¹⁸³ 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.¹⁸⁴

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.”¹⁸⁵ Indeed, in the 1990s, “threats to the peace” were expanded to situations of restoration of democracy (Haiti),¹⁸⁶ 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>.

181. S.C. Res. 1267, U.N.SCOR, 4051st mtg., 15 Oct. 1999, U.N. Doc. S/RES/1267 (1999).

182. Verdirame, *supra* note 4, at 748.

183. S.C. Res. 1267, U.N.SCOR, 4051st mtg., 15 Oct. 1999, U.N. Doc. S/RES/1267 (1999).

184. Verdirame, *supra* note 4, at 752.

185. *Id.* at 750-51.

186. S.C. Res. 875, U.N.SCOR, 3293rd mtg., 16 Oct. 1993, U.N. Doc. S/RES/875 (1993).

crises (Zaire,¹⁸⁷ Kosovo,¹⁸⁸ and Somalia);¹⁸⁹ restoration of internal peace and security (East Timor¹⁹⁰ and Albania);¹⁹¹ and genocide (Rwanda).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."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."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."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 4,000.¹⁹⁶ Unlike past policy pronouncements, and although certainly ancillary to exacting a reprisal

187. S.C. Res. 1080, U.N. SCOR, 3713th mtg., 15 Nov. 1996, U.N. Doc. S/RES/1080 (1996).

188. S.C. Res. 1203, U.N. SCOR, 3937th mtg., 24 Oct. 1998, U.N. Doc. S/RES/1203 (1998).

189. S.C. Res. 794, U.N. SCOR, 3145th mtg., 3 Dec. 1992, U.N. Doc. S/RES/794 (1992).

190. S.C. Res. 1264, U.N. SCOR, 4045th mtg., 15 Sept. 1999, U.N. Doc. S/RES/1264 (1999).

191. S.C. Res. 1114, U.N. SCOR, 3791st mtg., 19 June 1997, U.N. Doc. S/RES/1114 (1997).

192. S.C. Res. 929, U.N. SCOR, 3392st mtg., 22 June 1994, U.N. Doc. S/RES/929 (1994).

193. Verdirame, *supra* note 4, at 751-54.

194. *Id.* at 753.

195. Barry Bearak, *The Afghans Condemning Attacks, Taliban Says bin Laden Not Involved*, N.Y. TIMES, Sept. 12, 2001, at A22.

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 factions¹⁹⁹ “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 Agreement²⁰¹ 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

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.

198. Pockets of Taliban and al Qaeda resistance remain in Afghanistan as of this writing. In June 2005 an American Chinook helicopter carrying seventeen American troops, including Navy SEALs and Army Special Forces, crashed after coming under hostile fire. Halima Kazem, *Helicopter Crash Rescue Bid Persists Despite Obstacles*, L.A. TIMES, June 30, 2005, at A4.

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.

201. Agreement on Provisional Arrangements in Afghanistan Pending the Reestablishment of Permanent Government Institutions (2001), available at <http://www.afhangovernment.com/AfghanAgreementBonn.htm> [hereinafter Provisional Agreement].

202. AFGHANISTAN’S BONN AGREEMENT, *supra* note 199.

203. *Id.*

204. BETWEEN HOPE AND FEAR, *supra* note 69, at 8.

Loya Jirga delegates.”²⁰⁵ 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.

208. Carlotta Gall, *New Afghan Constitution Juggles Koran and Democracy*, N.Y. TIMES, Oct. 19, 2003, at A3.

209. *Id.*

210. *Id.*

211. *Id.*

212. CONST. OF THE ISLAMIC REPUBLIC OF AFGHANISTAN (adopted by the Loya Jirga on Jan. 4, 2004), available at <http://www.afghanland.com/history/constitution.html>.

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.²¹⁶ The former king will continue to hold the symbolic title of “Father of the Nation,” but there will be no return to the monarchy.²¹⁷ The country is to be governed by civil laws, provided they are in keeping with Islam.²¹⁸

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.”²¹⁹ Recognizing the injustices of the past in the field of education, article XXIV 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.”²²⁰ The Constitution also guarantees women two seats from each province, on average, in the House of People.²²¹ 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.”²²²

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.²²³ 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.”²²⁴ While there were no successful large-scale attacks against voters or polling places the process was marred by sloppy technical and organizational problems.²²⁵ In the weeks prior to the election, the number of registered voters came to exceed the estimated number of eligible voters.²²⁶ In order to prevent

216. *Id.* at arts. LXXXII-LXXXIV.

217. *Id.* at arts. CLVIII.

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.

222. Institute of Peace, *Afghanistan’s Constitution*, 10 PEACE WATCH ONLINE 2 (2004), <http://www.usip.org/peacewatch/2004/6/afghanistan1.html>.

223. *Afghanistan Votes*, N.Y. TIMES, Oct. 12, 2004, at A24. Parliamentary and municipal elections are tentatively scheduled for September 2005. See Robert Birsell, *Afghan Vote Plans Said on Track Despite Worries*, AFG. NEWS NET (Aug. 2005), available at <http://www.afghannews.net/index.php?action=show&type=news&id=3205>.

224. *Afghanistan Votes*, *supra* note 223.

225. Douglas Birch, *Calm, Distrust Mark Historic Vote; Karzai Foes Suspect Fraud in Afghanistan Election; U.N. Will Investigate*, BALTIMORE SUN, Oct. 10, 2004, at 1A.

226. *Id.*

people from voting more than once, each voter's thumb was marked with an indelible ink.²²⁷ Astonishingly, the indelible ink proved anything but, washing away with soap and water.²²⁸ This problem prompted all fifteen candidates opposing Karzai to call for a boycott halfway through the election.²²⁹ Nonetheless, as international organizations pronounced the ballot "mostly fair" the opposition candidates backed down.²³⁰ 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.²³¹ He was inaugurated on December 7, 2004 for a five-year term.²³²

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, hir[ing] female election workers, permit[ting] women to get voter registration cards without photographs, and provid[ing] regularly updated registration figures disaggregated by gender."²³³ Their efforts paid off. Official tallies record that of the 10.5 million registered voters, forty-one percent were women.²³⁴ 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."²³⁵ In one tragic incident "a bomb targeting a bus full of female election workers . . . killed three and injured [twelve]."²³⁶

As she courageously stood for the presidency at the Emergency Loya Jirga, Massouda Jalal was the only female presidential candidate in the election.²³⁷ During the campaign, she repeatedly received

227. *Id.*

228. *Id.*

229. *Id.*

230. Anne Barnard, *Protests Lose Force Day After Afghan Election*, BOSTON GLOBE, Oct. 11, 2004, at A1.

231. *It's Official: Karzai Wins Presidency*, CHI. TRIB., Nov. 4, 2004, at 28.

232. Eric Schmitt & Carlotta Gall, *Karzai Is Sworn in, Citing a 'New Chapter' for Afghanistan*, N.Y. TIMES, Dec. 8, 2004, at A8.

233. HUMAN RIGHTS WATCH, WOMEN AND ELECTIONS IN AFGHANISTAN (2004), available at <http://www.hrw.org/campaigns/afghanistan>.

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”²³⁸ Nonetheless, Jalal finished sixth out of eighteen candidates and received 100,000 votes, slightly more than one percent.²³⁹ She is now serving as the Minister of Women’s Affairs in the Karzai government.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.”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.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.²⁴³

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

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.²⁴⁴

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

238. *Id.*

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>.

240. *Id.*

241. AFGHANISTAN’S BONN AGREEMENT, *supra* note 199.

242. LANDMINE MONITOR, *supra* note 89.

243. U.N. DEV. PROGRAMME, NATIONAL HUMAN DEVELOPMENT REPORT 2004, AFGHANISTAN, SECURITY WITH A HUMAN FACE: CHALLENGES AND RESPONSIBILITIES (2004), <http://www.undp.org/dpa/nhdr/af-files/ForewordPrefaceintro.pdf>.

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>.

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.*

252. FEMINIST MAJORITY FOUND.: ATTACKS ON GIRLS' SCHOOLS IN AFGHANISTAN (2005), http://www.feminist.org/afghan/Girls%27_Schools_Attacks.pdf.

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

254. Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1489 (2003).

255. HUMAN RIGHTS WATCH: AFGHANISTAN: U.N. RIGHTS MONITORING STILL NEEDED (2005), <http://hrw.org/english/docs/2005/04/20/afghan10515.htm>.

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.

260. See INT'L RESCUE COMM., THE EXPANSION OF THE INTERNATIONAL SECURITY ASSISTANCE FORCE IN AFGHANISTAN (2004), <http://www.theirc.org/index.cfm/wwwID/1844>.

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.²⁶¹

In December 2001, the United Nations Security Council authorized the deployment of ISAF to Kabul.²⁶² Two years later the Security Council authorized expansion of ISAF "in areas of Afghanistan outside of Kabul and its environs"²⁶³ Also in 2003, command and coordination for ISAF shifted from the United Nations to NATO.²⁶⁴ ISAF was NATO's first mission outside the Euro-Atlantic area.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. . . .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."²⁶⁷

261. Provisional Agreement, *supra* note 201, at Annex 1.

262. S.C. Res. 1386, U.N. SCOR, 4443rd mtg., 20 Dec. 2001, U.N. Doc. S/RES/1386 (2001).

263. S.C. Res. 1510, U.N. SCOR, 4840th mtg., 13 Oct. 2003, U.N. Doc. S/RES/1510 (2003).

264. See NATO, NATO IN AFGHANISTAN FACTSHEET (2005), <http://www.nato.int/issues/afghanistan/> [hereinafter NATO IN AFGHANISTAN]. "ISAF is not a U.N. force, but it is deployed under a mandate of the U.N.S.C. (four SCRs — 1386, 1413, 1444, and 1510 — relate to ISAF)". *Id.* See generally S.C. Res. 1386, U.N. SCOR, 4443rd mtg., 20 Dec. 2001, U.N. Doc. S/RES/1386 (2001); S.C. Res. 1413, U.N. SCOR, 4541st mtg., 23 May 2002, U.N. Doc. S/RES/1413 (2002); S.C. Res. 1444, U.N. SCOR, 4651st mtg., 27 Nov. 2002, U.N. Doc. S/RES/1444 (2002); S.C. Res. 1510, U.N. SCOR, 4840th mtg., 13 Oct. 2003, U.N. Doc. S/RES/1510 (2003).

265. NATO IN AFGHANISTAN, *supra* note 264.

266. AFGHANISTAN'S BONN AGREEMENT, *supra* note 199.

267. *Id.*

As of 2005, ISAF is responsible for approximately 8,000²⁶⁸ troops in Afghanistan, comprised of soldiers from thirty-six NATO countries, nine partner and two non-NATO/non-partner countries.²⁶⁹ 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.²⁷⁰ “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.”²⁷¹ 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.²⁷² 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.²⁷³

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]²⁷⁴ in the North of the country”²⁷⁵ 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

268. While this number is generally stable, “individual contributions by each individual country . . . change on a regular basis due to the rotation of troops.” NATO IN AFGHANISTAN, *supra* note 264.

269. *Id.*

270. FEMINIST MAJORITY FOUND., CAMPAIGN FOR AFGHAN WOMEN AND GIRLS, AFGHANISTAN: WHERE’S THE MARSHALL PLAN? (2005), http://www.feminist.org/afghan/Expand_ISAF.asp.

271. *Id.*

272. Paul Krugman, *The Martial Plan*, N.Y. TIMES, Feb. 21, 2003, at A27.

273. NATO IN AFGHANISTAN, *supra* note 264.

274. *Id.* NATO describes a PRT as a “civil-military partnership to facilitate the development of a secure environment and reconstruction in the Afghan regions.” *Id.*

275. NATO, NATO IN AFGHANISTAN, HOW DID THIS OPERATION EVOLVE? (2005), <http://www.nato.int/issues/afghanistan/evolution.htm>.

of two other PRTs being operational in the west by late summer 2005.²⁷⁶ As of this writing, NATO continues to prepare the expansion of ISAF into the south of the country.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."*²⁷⁸

276. NATO, 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>.

277. *Id.*

278. KOVÁLY, *supra* note 1, at 5.