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## Greetings and Grievances: A Letter from Afghan Professors

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Laurel Currie Oates\*

On that first day, all of us were wary. Although I had taught in Afghanistan on two prior occasions, this was the first time some of my “students” were professors who taught Shariah<sup>1</sup> law at the country’s two most conservative universities: the University of Nangarhar, which is in the eastern part of Afghanistan, and the University of Kandahar, which is in the south.<sup>2</sup> Wearing traditional clothing and beards, the professors who sat in front of me looked very much like the “insurgents” so often featured on my evening newscasts. I, on the other hand was a woman, albeit an older woman, from the United States.<sup>3</sup>

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\* Laurel Currie Oates is a Professor of Law at Seattle University School of Law. I would like to thank Patti McLaughlin, Mark Hough, Michael Oates, Anne Enquist, and Mimi Samuel for reading earlier drafts of this article. In addition, I would like to thank my research assistant, Lorie Hahn, for her valuable assistance.

<sup>1</sup> Many of the words used in this article can be spelled in more than one way. For example, “Shariah” is also sometimes spelled “Sharia.” CAMBRIDGE DICTIONARIES ONLINE, *Sharia*, <http://dictionary.cambridge.org/dictionary/british/sharia?q=shariah> (last visited Aug. 25, 2013).

<sup>2</sup> The University of Nangarhar, which is located in Jalalabad, was established in 1963. NANGARHAR UNIVERSITY, ISLAMIC REPUBLIC OF AFG., *History*, <http://nu.edu.af/en/page/891> (last visited July 22, 2013). The Shariah faculty (department) was established in 1992; it currently has 686 students, 625 of whom are men and 61 of whom are women. *See* NANGARHAR UNIVERSITY, ISLAMIC REPUBLIC OF AFG., *Faculty of Sharia*, <http://nu.edu.af/en/page/5097> (last visited June 27, 2013); NANGARHAR UNIVERSITY, ISLAMIC REPUBLIC OF AFG., *History* <http://nu.edu.af/en/page/891> (last visited June 27, 2013). The University of Kandahar, which is located in Kandahar City, was established in 1990. The Shariah faculty was established in 2008. *See id.*

<sup>3</sup> When I am in Afghanistan, I dress conservatively, wearing a long skirt or pants and a tunic. In addition, I wear a scarf. In the summer months, sandals seem to be just fine.

All went well in that first class, and the professors and I spent the next three weeks together; me helping them improve their English<sup>4</sup> by teaching short courses in US Criminal Law, Contract Law, and Family Law, and them teaching me about Shariah law and Afghan culture. While language and cultural barriers kept us from doing some of the things I might do with American professors, for example, going out for dinner, we became comfortable enough with each other that we could have lively conversations, both inside and outside of the classroom, about education, families, religion, and politics.

Consequently, on that last day, it seemed natural for me to ask the professors what they would like me to tell my students and the other members of my faculty about Afghanistan. After a short conversation among themselves, most of it in English, but some of it in Pashto,<sup>5</sup> the professors announced they wanted to draft a letter to US law professors. The following letter is the product of the work session that followed in which the professors dictated and I typed. When I was not sure that I understood the point the professors were making, I asked for clarification and, at the end, we edited the letter, correcting most of the problems with sentence construction, grammar and punctuation, and usage. The contents of that letter are set out below.

Greetings to the professors in America:

We hope that the professors in America will take an active role in making suggestions that will help solve the world's problems.

We are all humans, no matter whether we are Muslim or Christian.

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<sup>4</sup> The professors who drafted the letter had studied English for several years and had reasonably good conversational skills. While a few of the professors were younger, my best guess is that most of them were in their 40s or 50s, which means that they were adults during the Soviet occupation.

<sup>5</sup> Afghanistan has two official languages: Afghan Persian, which is called Dari, and Pashto. CENT. INTELLIGENCE AGENCY, *The World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html> (last visited June 27, 2013).

All American law professors should learn Islamic law, and they should learn about it from Islamic scholars.

America wants democracy all over the world. However, America does not honor the votes of the people and supports governments that are not the governments the voters want. For example, America supported Mubarak in Egypt.

Most of the problems are created by the fact that America treats people differently, applying one policy to one group and a different policy to another group. For example, America has helped Southern Sudan where most of the people are Christian. However, America does not support the people of Palestine.

Sometimes American soldiers in Afghanistan treat the people not as humans, but as animals. For example, soldiers enter Afghani homes without permission and they capture people and keep them in jail without any court proceedings. Although they say they believe in the rule of law, American soldiers do not follow their own laws or Afghan law.

We don't know who the terrorists are. Are the terrorists the Americans or the Taliban?

The American government wants to solve problems in Islamic regions through military means, which is not appropriate. Islamic law is from God and there are specific rules. We do not understand why America does not want us to apply Islamic law. Western law is for rich countries. Poor countries cannot apply Western law, but they can apply Islamic law.

There would be no need for fighting if areas could establish their own Islamic governments.

Americans dismiss Afghanistan's family law. They broadcast TV programs that show families living in ways that are not the way that we live in Afghanistan.

If an Israeli is killed, the killing receives lots of international attention. If a Palestinian is killed, there is only silence.

It is good that the American troops will be leaving.

Like many Afghans, some Americans are corrupt. They send aid, but they demand money before they will help your district with its projects.

Many of Afghanistan's government ministers work for (on behalf of) foreign countries and not on behalf of the Afghan people.

America has put lots of money into Afghanistan, but not enough into infrastructure. Aid money should be used to build dams that create electric power, to help build factories, and to support local businesses.

We hope that American law professors will share our concerns with those in the American government.<sup>6</sup>

Over the last couple of months, I have asked myself why I feel such a strong desire to publish this letter. The easy answer is that I told the professors that I would share it. Although I could have accomplished that goal by attaching the letter to an email addressed to my own faculty, it seems, however, that the letter deserves a wider distribution and an even broader critique.

The letter deserves a wider distribution because, although stories about Afghanistan often dominate the news, we almost never hear from those in Afghanistan who are among the most conservative. We hear about them, but not from them. However, this group has tremendous influence, and there is a good chance that their influence will determine what happens in Afghanistan in the next decade.

The letter also provides an opportunity to critique the United States' role in Afghanistan. No one would disagree that the costs have been high. Between 2001 and 2011, more than two million Americans served in Iraq or Afghanistan, with almost half of those individuals serving more than one tour of duty.<sup>7</sup> In addition, since the United States invaded Afghanistan in

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<sup>6</sup> Letter from Afghanistan Professors to American Professors (2013) (on file with author).

<sup>7</sup> Luis Martinez & Amy Bingham, *U.S. Veterans: By the Numbers*, ABC NEWS (Nov. 11, 2011) <http://abcnews.go.com/Politics/us-veterans-numbers/story?id=14928136#1>.

late 2001, more than 2,200 Americans have lost their lives and more than 18,000 have been injured in hostile actions.<sup>8</sup> The financial costs have also been high. During that same time period, the United States spent \$444 billion on military-related expenses and \$89 billion in aid.<sup>9</sup> These numbers do not take into account the costs to Afghans. While it is difficult to find accurate numbers, sources indicate that between 2001 and 2011, 12,500 to 14,700 Afghan civilians were killed.<sup>10</sup> And deaths are on the rise. According to a United Nations report released on June 11, 2013, 3,092 Afghan civilians were killed or injured in the first half of 2013.<sup>11</sup> Many of those were Afghan children.<sup>12</sup>

The benefits are much harder to measure. On the one hand, much of Kabul has been rebuilt; many who fled Afghanistan have returned, and more boys—and girls—are in school. On the other hand, Afghanistan is still not a safe place. Thus, while I do not share many of the professors' beliefs, I am not comfortable simply dismissing their concerns. During our classes, the professors listened to me with respect and curiosity; they seemed genuinely interested in learning about the United States and, in particular, about our system of law. As a result, I left Afghanistan believing

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<sup>8</sup> The Associated Press, *US Military Deaths in Afghanistan at 2,103*, ABC NEWS (June 18, 2013), <http://abcnews.go.com/Politics/wireStory/us-military-deaths-afghanistan-2103-19431162#.Ucj8xzSmjps>.

<sup>9</sup> See Amy Belasco, Cong. Research Serv., *The Cost of Iraq, Afghanistan, and Other Global War on Terror Operations Since 9/11 \*1* (Mar. 29, 2011), available at <http://www.fas.org/spp/crs/natsec/RL33110.pdf>.

<sup>10</sup> NETA C. CRAWFORD, *CIVILIAN DEATH AND INJURY IN AFGHANISTAN, 2001-2011*, 1 (2011), available at <http://costsofwar.org/sites/default/files/CrawfordAfghanistanCasualties.pdf>.

<sup>11</sup> Sharon Behn, *UN: More Than 3,000 Afghan Civilians Killed and Wounded in the First Five Months, One-Fifth of Them Children*, RAWA NEWS (June 11, 2013), <http://www.rawa.org/temp/runews/2013/06/11/un-more-than-3-000-afghan-civilians-killed-and-wounded-in-the-first-five-months-one-fifth-of-them-children.html>; UNITED NATIONS ASSISTANCE MISSION IN AFG.; UNITED NATIONS ASSISTANCE MISSION IN AFGHANISTAN, <http://unama.unmissions.org/Default.aspx?tabid=12254&ctl=Details&mid=15756&ItemID=36944&language=en-US> (last visited July 13, 2013).

<sup>12</sup> See *supra* text accompanying note 11.

that I owed it to these professors to learn more about their history, their religion, and their legal system.

This article describes some of what I have learned. Because history tends to repeat itself, Part I of this article summarizes Afghanistan's modern history. Part II then looks at Afghanistan since 2001. In this section, I discuss the man the United States went into Afghanistan to kill, Osama bin Laden; the Bonn Agreement; Afghanistan's 2004 Constitution; Afghanistan's judicial systems; and some of the rule of law projects. In Part III, I move to a discussion of the Ulema, or clergy, and in particular the National Ulema Council and its recent declarations. Finally, in Part IV, I reflect on my personal responses to these professors' statements, reflect on what I might have done differently, and formulate some predictions for future interactions.

#### I. A SHORT HISTORY

Because Afghanistan's history is long, I begin with modern events and, out of necessity, describe those events in a way that is simultaneously selective and very general. I start with two points made by the Afghan professors: first, that Afghanistan was never colonized and, second, that Afghanistan has always defeated those who have tried to control it.<sup>13</sup>

The first decades of the 1800s were marked by both internal and external conflicts. Internally, different families, and even members within those families, fought for control of the country.<sup>14</sup> For example, members of the Sadozai family ruled from 1747 until 1823, and members of the Barakzai family<sup>15</sup> ruled off and on for much of the next 100 years. Externally, the Afghanistan state was targeted by the Sikhs who had taken the last of

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<sup>13</sup> For a more complete history of Afghanistan, see THOMAS BARFIELD, *AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY* (2011); See also SHAISTA WAHAB & BARRY YOUNGERMAN, *A BRIEF HISTORY OF AFGHANISTAN* (Infobase Pub. 2007).

<sup>14</sup> WAHAB & YOUNGERMAN, *supra* note 13, at 71–82. See also BARFIELD, *supra* note 13, at 110–14.

<sup>15</sup> *Id.*

Afghanistan's Indian provinces and appeared ready to move west, by the Russians who had reached Afghanistan's western border and supported the Persian campaign to take Herat, and by the British who had sent envoys to establish relationships that would allow it to use Afghanistan as a buffer between India, over which it had established control, and Russia.<sup>16</sup>

The First Anglo-Afghan War lasted from 1839 until 1841.<sup>17</sup> In 1838, Lord Auckland, India's Governor General, issued the Simla Manifesto in which he set out the reasons why the British needed a trustworthy ally in Afghanistan to protect British interests in India from Russia.<sup>18</sup> Although many in both Britain and India thought Auckland's decision to invade Afghanistan was rash and unnecessary,<sup>19</sup> the Army of the Indus, made up of both British and Indian units, attacked Afghanistan in 1839. After the surrender of Dost Muhammad Khan, a member of the Barakzai family, the British installed Shah Shuja, a member of the Sadozai family, as the head of the country.<sup>20</sup>

However, Shah Shuja did not enjoy as much popular support as the British had hoped, and it soon became apparent the British would need to keep a force in Afghanistan if it wanted to maintain control.<sup>21</sup> Afghan resistance and attacks increased as families of British and Indian soldiers began to move in. Afghans objected to the presence of "infidels" (Christians and Hindus) in their country, and bloody uprisings became common.<sup>22</sup> What followed has become part of Afghan's folklore. Unwilling to wait for an armed escort out of the country, in January of 1842 General Elphinstone led 4,500 troops and 12,000 civilians and camp followers east

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<sup>16</sup> BARFIELD, *supra* note 13, at 111.

<sup>17</sup> *Id.* at 115–24.

<sup>18</sup> WAHAB & YOUNGERMAN, *supra* note 13, at 82–83. *See also* Wahid Momand, *Anglo Afghan War 1*, AFGHANLAND <http://www.afghanland.com/history/anglo1.html> (last visited July 13, 2013).

<sup>19</sup> Some labeled the war "Auckland's Folly." Momand, *supra* note 18.

<sup>20</sup> WAHAB & YOUNGERMAN, *supra* note 13, at 74–84.

<sup>21</sup> *Id.* at 84.

<sup>22</sup> *Id.*



into the mountains.<sup>23</sup> Almost 14,000 died of starvation or hypothermia or were killed.<sup>24</sup>

The Second Anglo-Afghan War lasted from 1878 until 1880.<sup>25</sup> Once again, worried about Russian interference in India, the British invaded Afghanistan and installed a leader of their choosing.<sup>26</sup> The first phase of the war ended with the signing of the Treaty of Gandamak, which permitted Afghanistan to retain sovereignty over its internal affairs but gave the British control of Afghanistan's foreign policy.<sup>27</sup> However, when Afghan forces did not get paid, riots broke out and the head of the newly established British mission, Sir Louis Cavagnari, was killed along with his guards.<sup>28</sup> The British retaliated, killing those Afghans thought to be involved in imposing direct rule.<sup>29</sup>

A large number of Afghans from diverse tribes and ethnic groups responded.<sup>30</sup> Although the Afghans did not beat the British in open battle, they were enough of a threat that the British, remembering what had happened at the end of the First Anglo-Afghan War, looked for an Afghan leader who could guarantee British citizens safe passage out of the country.<sup>31</sup> They found that leader in Abdur Rahman, the grandson of Dost Mohammad Khan.<sup>32</sup> Once in power, Rahman, who became known as the Iron Amir, was able to maintain his rule for more than two decades.<sup>33</sup> During this time he squelched more than forty uprisings and created a

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<sup>23</sup> Wahab and Youngerman suggest that General Elphinstone may have been senile. *Id.* at 84–85.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 89–97.

<sup>26</sup> *Id.* at 89–93.

<sup>27</sup> *Id.* at 90; *See also* BARFIELD, *supra* note 13, at 141.

<sup>28</sup> BARFIELD, *supra* note 13, at 141–42.

<sup>29</sup> *Id.*

<sup>30</sup> WAHAB & YOUNGERMAN, *supra* note 13, at 91; *See also* BARFIELD, *supra* note 13, at 141–42.

<sup>31</sup> BARFIELD, *supra* note 13, at 146–47.

<sup>32</sup> WAHAB & YOUNGERMAN, *supra* at note 13, at 95

<sup>33</sup> *Id.*

powerful police state that left the country isolated and economically impoverished.<sup>34</sup> Rahman claimed his rule was divinely sanctioned and declared that he was the imam, or the spiritual leader, of the country.<sup>35</sup> He subsequently established his own court system that applied Shariah law as he, the imam, interpreted it.<sup>36</sup> When Rahman died, no one contested his son's right to succeed him.<sup>37</sup>

The last King of Afghanistan was Mohammed Zahir Shah, who ruled from 1933 until he was ousted by a coup in 1973.<sup>38</sup> During the first three decades of his rule, Zahir Shah was king in name only; his cousin, Mohammed Daoud, ran the country in his capacity as Prime Minister.<sup>39</sup> However, in 1963, Zahir Shah dismissed his cousin and initiated a number of social and economic reforms.<sup>40</sup> However, his most significant contribution was the creation of a new constitution.<sup>41</sup> This constitution, referred to as the 1964 Constitution, established a constitutional monarchy, created a two-house parliament, made provisions for free elections, gave political parties and media unprecedented freedom of speech, and guaranteed women the right to vote.<sup>42</sup> Pictures from the late sixties and early seventies show women in western-style dresses and scarves studying and working with men.<sup>43</sup>

Not all Afghans appreciated Zahir Shah's reforms, and when he went to Europe for medical treatment, his cousin Daoud<sup>44</sup> retook control in a

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<sup>34</sup> BARFIELD, *supra* note 13, at 147.

<sup>35</sup> WAHAB & YOUNGERMAN, *supra* at note 13, at 94–95.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 100.

<sup>38</sup> *Id.* at 132.

<sup>39</sup> BARFIELD, *supra* note 13, at 169–70.

<sup>40</sup> *Id.* at 170.

<sup>41</sup> *See id.* at 128–29.

<sup>42</sup> *Id.*

<sup>43</sup> Clayton Esterson, *With Dust Removal*, PBASE.COM, <http://www.pbase.com/qleap/image/120404891> (last visited June 30, 2013).

<sup>44</sup> “Daoud” is also spelled “Daud.” BARFIELD, *supra* note 13, at 170.

bloodless coup. In 1973, Daoud created a republic.<sup>45</sup> It was short lived as five years later, in 1978, Daoud was killed by his former socialist allies who subsequently established a socialist government.<sup>46</sup> However, that government lacked popular support and, in 1979, the Soviet Union invaded Afghanistan. This invasion was the beginning of a ten-year war between these two nations that took the lives of approximately one million Afghans and created more than three million refugees.<sup>47</sup>

According to a number of commentators, Afghanistan was the battleground in which the United States and the Soviet Union fought the Cold War.<sup>48</sup> Although the United States did not send troops to Afghanistan, the Central Intelligence Agency (CIA) operated within the country and, along with Pakistan and Saudi Arabia, provided financial support to the mujahedeen, or holy warriors,<sup>49</sup> which was made up of a number of different groups.<sup>50</sup>

The most radical of these groups was Hezb-i-Islami (Islamic Party) led by Gulbuddin Hekmatyar, a Ghilzai Pashtun.<sup>51</sup> Some sources believe that, because of his fierce determination and organizational skills, Hekmatyar received many of the arms and much of the financial aid sent to help the mujahedeen.<sup>52</sup> For example, it is reported he received approximately one-third of all CIA assistance along with the first anti-aircraft Stingers.<sup>53</sup> A second, more moderate group, the Jamiat-i-Islami (Society of Islam), was led by Burhanuddin Rabbani, a Tajik, and was supported by Tajiks and other non-Pashtuns.<sup>54</sup> A third group was led by the charismatic Ahmad Shah

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<sup>45</sup> *Id.* at 170.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 170–71.

<sup>48</sup> *Id.* at 311–12.

<sup>49</sup> *Id.* at ix.

<sup>50</sup> WAHAB & YOUNGERMAN, *supra* note 13, at 173–74.

<sup>51</sup> *Id.* at 173.

<sup>52</sup> *Id.* at 177–78.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 175.

Massoud, a Tajik who operated out of the Panjhir Valley<sup>55</sup> located just north of Kabul. Massoud was a brilliant tactician and was able to disrupt the Soviet supply line.<sup>56</sup>

During the almost ten years of war, most of the international community condemned the Soviet Union's invasion of Afghanistan. The General Assembly of the United Nations passed resolutions year after year calling for the withdrawal of Soviet troops from Afghanistan.<sup>57</sup> With the war taking a toll not only on Afghanistan, but also on the Soviet Union, in 1985 Mikhail Gorbachev sought a diplomatic solution.<sup>58</sup> The process took several years and did not end until 1988 when the Geneva Accords were signed.<sup>59</sup> The Accords guaranteed the complete withdrawal of Soviet troops by February 15, 1989, Afghanistan's right to self-determination, and the right of refugees to return to Afghanistan without fear of persecution or harassment.<sup>60</sup> The mujahedeen were not, however, included in the negotiations, and the group refused to accept the terms of the Accords.<sup>61</sup>

Unfortunately, the withdrawal of the Soviets did not result in peace.<sup>62</sup> Although Dr. Mohammad Najibullah, who had served as President during the Soviet occupation, offered to negotiate a coalition government, the mujahedeen did not accept the offer, believing that they could easily

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<sup>55</sup> While in Afghanistan, I had the opportunity to visit the Panjshir Valley and Massoud's tomb. In the valley there are hundreds, if not thousands, of Soviet tanks and vehicles which the Soviets abandoned when they retreated. While initially some of the professors and students, who were Pashtuns, were reluctant to visit the valley and Massoud's tomb, those who came seem to enjoy sightseeing in their own country. They also seemed to enjoy climbing in and out of the tanks and had a picnic along the river followed by lively games of soccer, badminton, and a traditional Pashtun game.

<sup>56</sup> WAHAB & YOUNGERMAN, *supra* note 13, at 175.

<sup>57</sup> *Id.* at 159.

<sup>58</sup> *Id.* at 169–70.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 170.

<sup>61</sup> AFGHANISTAN'S WEB SITE, *Geneva Accords*, <http://www.afghanistans.com/Information/History/GenevaAccords.htm> (last visited June 30, 2013).

<sup>62</sup> WAHAB & YOUNGERMAN, *supra* note 13, at 188.

displace him.<sup>63</sup> That did not happen, and Najibullah was able to stay in power for the next three years.<sup>64</sup> However, in 1992, when the United Nations special envoy announced that he had brokered an agreement to hand over power, Najibullah fled, leaving no one in charge.<sup>65</sup>

In the vacuum, two groups battled for control.<sup>66</sup> Although Massoud asked the Afghanistan Interim Government (AIG) to provide a political framework for the post-Najibullah government, Hekmatyar, the Pashtun mujahedeen leader, attacked Kabul from the south before the Council could meet.<sup>67</sup> Massoud, with the help of General Abdul Rashid Dostum, a Uzbek,<sup>68</sup> won the battle and established a Tajik/Uzbek coalition that controlled Kabul.<sup>69</sup> When Ismail Kahn, a Tajik warlord who ruled the western part of Afghanistan from Herat, joined the coalition, the Pashtuns agreed to a power-sharing agreement brokered by Pakistan's new Prime Minister, Nawaz Sharif.<sup>70</sup> Under the Peshawar Agreement, signed in 1992, a moderate, Sebghatullah Mujadidi, was named as temporary president, and he and thirty delegates established the Republic of Afghanistan on April 28, 1992.<sup>71</sup> Rabbani was selected to become President, Massoud was named as Defense Minister, and Hekmatyar was named as Prime Minister.<sup>72</sup> Hekmatyar, however, refused to join the government.<sup>73</sup>

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<sup>63</sup> *Id.* at 170.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 192–93.

<sup>66</sup> *Id.* at 193.

<sup>67</sup> *Id.*

<sup>68</sup> General Abdul Rashid Dostum is a controversial figure who switched sides on a number of occasions and who is believed to be partly responsible for the alleged massacre of some 2,000 Taliban prisoners after the U.S.-led invasion of Afghanistan in 2001. GLOBALSECURITY.ORG, *Abdul Rashid Dostum*, <http://www.globalsecurity.org/military/world/afghanistan/dostum.htm> (last visited June 30, 2013).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

During the next four years, Hekmatyar continued to challenge the mujahedeen government. In the first year after Rabbani became president, 30,000 civilians were killed and 100,000 injured.<sup>74</sup> By 1996, almost seventy percent of Kabul's buildings had been destroyed, at least 50,000 civilians had been killed, and the streets were controlled by criminals and undisciplined soldiers.<sup>75</sup> Other cities, such as Kandahar, were near anarchy.<sup>76</sup>

It is into this environment that the Taliban,<sup>77</sup> led by Mullah Mohammed Omar,<sup>78</sup> took control.<sup>79</sup> According to popular stories, the Taliban's first operation involved rescuing two girls who had been kidnapped and raped by a guerilla leader; the group then moved on to assisting Pakistan in securing trade routes.<sup>80</sup> Within a year, the Taliban controlled twelve of the southern Pashtun provinces.<sup>81</sup> Although initially defeated, the Taliban ultimately won the fight for Kabul and controlled about ninety percent of Afghanistan by 1999.<sup>82</sup>

Many observers believe Pakistan was instrumental in the rapid rise of the Taliban, citing the fact that, from the very beginning, the Taliban, most of whom were poorly educated, demonstrated the ability to plan, coordinate,

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<sup>74</sup> WAHAB & YOUNGERMAN, *supra* note 13, at 202–03.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> In Persian and Pashtu, the word “taliban” means “students.” MERRIAM-WEBSTER, *Taliban*, <http://www.merriam-webster.com/dictionary/taliban> (last visited Aug. 25, 2013). As a general rule, these students, all of whom are male, come from poor rural families. WAHAB & YOUNGERMAN, *supra* note 13, at 202–03.

<sup>78</sup> In Afghanistan the term “mullah” is used to refer to Islamic clerics. DICTIONARY.COM, *Mullah*, <http://dictionary.reference.com/browse/mullah?s=t> (last visited Aug. 25, 2013).

<sup>79</sup> WAHAB & YOUNGERMAN, *supra* note 13, at 206.. For more information about Mullah Omar, see CNN, *Mullah Mohammed Omar – Fast Facts*, <http://www.cnn.com/2012/12/30/world/meast/mullah-mohammed-omar—fast-facts/index.html> (last updated Dec. 30, 2012).

<sup>80</sup> WAHAB & YOUNGERMAN, *supra* note 13, at 206.

<sup>81</sup> *Id.* at 207.

<sup>82</sup> *Id.*

and execute sophisticated military operations.<sup>83</sup> What the Taliban did not possess was the ability, or maybe even the interest, in actually governing. Mullah Omar, who had taken the title of emir al-muminin (commander of the faithful), was the ultimate authority for all religious and civil matters.<sup>84</sup>

Although originally some Afghans welcomed the fact that the Taliban restored order, it did not take long for many, including Massoud, to challenge the Taliban and its repressive policies, which included a ban on playing or listening to music, dancing, and watching TV; a requirement that women be covered from head to toe; a prohibition against women leaving their homes without a male relative; a requirement for men that their beards be of a minimum length; and a general ban on photographs of people or things.<sup>85</sup>

## II. POST-2001 AFGHANISTAN

### A. *Osama bin Laden*

Osama bin Laden was born into a wealthy Saudi family and lived in Saudi Arabia until 1979, when he went to Pakistan to support the Afghan mujahedeen in their fight against the Russians by funneling arms, money, and fighters from the Arab world into Afghanistan.<sup>86</sup> After the Russians withdrew from Afghanistan, bin Laden returned to Saudi Arabia where he worked in his family's construction business and helped establish an organization to aid veterans of the Afghan war.<sup>87</sup> When Saudi Arabia allowed the United States to station troops within its borders in 1991, bin Laden became an activist, protesting against the presence of Americans in

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<sup>83</sup> *Id.* at 210.

<sup>84</sup> *Id.* at 214.

<sup>85</sup> *Id.* at 218.

<sup>86</sup> See LAWRENCE WRIGHT, *THE LOOMING TOWER* 71, 94, 97 (Alfred A. Knopf ed., 2006).

<sup>87</sup> *Id.* at 145.

the birthplace of Islam.<sup>88</sup> As a result, Saudi Arabia expelled bin Laden in 1991.<sup>89</sup>

Between 1991 and 1994, bin Laden operated out of Sudan. During that time, bin Laden was credited with attempting to kill American soldiers in Yemen and with attacking American soldiers in Somalia.<sup>90</sup> In 1996, Sudan, experiencing pressure from the United States and Saudi Arabia, expelled bin Laden, and he subsequently moved back to Afghanistan. Between 1996 and 2001, bin Laden used his bases in Afghanistan to train almost 11,000 recruits.<sup>91</sup> In exchange for being allowed to operate out of the country, bin Laden provided Mullah Omar with money and special favors, including reportedly killing Massoud on September 9, 2001.<sup>92</sup>

Following the attacks on September 11, 2001, the United States demanded that the Taliban extradite bin Laden.<sup>93</sup> After Mullah Omar refused, the United States began bombing Afghanistan on October 7, 2001.<sup>94</sup> With the help of the Northern Alliance,<sup>95</sup> the Taliban was quickly defeated. On December 6, 2001, Mullah Omar, along with bin Laden, slipped into Pakistan.<sup>96</sup>

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<sup>88</sup> *Id.* at 157–59.

<sup>89</sup> *Id.* at 154, 161, 194–95.

<sup>90</sup> *Id.* at 165, 174, 178.

<sup>91</sup> WAHAB & YOUNGERMAN, *supra* note 13, at 220. *See also* WRIGHT, *supra* note 79, at 302.

<sup>92</sup> WAHAB & YOUNGERMAN, *supra* note 13, at 220–21. *See also* WRIGHT, *supra* note 79, at 354–55.

<sup>93</sup> WAHAB & YOUNGERMAN, *supra* note 13, at 224.

<sup>94</sup> *Id.* at 225–26.

<sup>95</sup> The term “Northern Alliance” is used to refer to the military wing of the Afghan government that was ousted by the Taliban and later fought against the Taliban. ABOUT.COM, *Taliban and the Northern Alliance*, <http://usgovinfo.about.com/library/weekly/aa092801a.htm> (last visited June 30, 2013) Many of the members of the Northern Alliance were part of the Mujahedeen that fought the Russians. *Id.* Until he was assassinated on September 9, 2001, Massoud led the Northern Alliance. *Id.*

<sup>96</sup> It is not clear whether Mullah Omar is alive or dead. Joshua Norman, *Dead? Alive? Who is Mullah Omar?*, CNN (May 24, 2011), [http://www.cbsnews.com/8301-503543\\_162-20065811-503543.html](http://www.cbsnews.com/8301-503543_162-20065811-503543.html) (last visited June 30, 2013).



### B. *The Bonn Agreement*

Because the United States had invaded Afghanistan without having a plan for replacing the Taliban, the United States asked the United Nations to broker a deal for a new government.<sup>97</sup> In accordance with this request, international leaders and a number of prominent Afghans met in Bonn, Germany, in December 2001, where they established the framework for a provisional government and distributed leadership roles within that provisional government.<sup>98</sup> Although the Pashtuns were underrepresented during the talks because of their ties to the Taliban,<sup>99</sup> a Pashtun, Hamid Karzai, was selected to head the provisional government.<sup>100</sup> Members of the Northern Alliance were given control of most of the ministries, and the former king was given an honorary role.<sup>101</sup>

### C. *The 2004 Constitution*

In 2002, a Loya Jirja (grand assembly) approved the Bonn Agreement and the installation of Hamid Karzai as interim president.<sup>102</sup> The next step was the drafting of the constitution. After the first nine-member drafting commission was unable to produce a draft, a second larger and more representative commission was appointed.<sup>103</sup> While this commission was able to prepare a draft, Karzai was unhappy with the draft, and it was not made public until five weeks before the 2003 Constitutional Loya Jirja,

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<sup>97</sup> BARFIELD, *supra* note 13, at 283.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 284.

<sup>101</sup> *Id.*

<sup>102</sup> As Barfield notes, the international community was concerned about process and it incorrectly believed that the Loya Jirja was the way that Afghans selected their leaders. *Id.* at 294–95. Although Loya Jirja were not often used, they have their roots in the Qur'an, which commands Muslims to shura, or consultation. GOV'T OF AFG., *Traditional Loya Jirga*, <http://jirga.gov.af/en> (last visited July 13, 2013).

<sup>103</sup> J. Alexander Their, *The Making of a Constitution in Afghanistan*, 51 N.Y.L. SCH. L. REV. 557, 566–67 (2006-07).

which finally convened in December 2003.<sup>104</sup> The 503 individuals who attended the Jirja represented various ethnic and political groups, with the exception of the Taliban, and included eighty-nine women.<sup>105</sup> After heated battles, the Jirja approved the constitution, the preamble to which, as translated into English, reads as follows:

We the people of Afghanistan:

- Believing firmly in Almighty God, relying on His divine will and adhering to the Holy religion of Islam;
- Realizing the previous injustices, miseries and innumerable disasters which have befallen our country;
- Appreciating the sacrifices, historical struggles, jihad and just resistance of all the peoples of Afghanistan, admiring the supreme position of the martyrs of the country's freedom;
- Comprehending that a united, indivisible Afghanistan belongs to all its tribes and peoples;
- Observing the United Nations Charter as well as the Universal Declaration of Human Rights;

And in order to:

- Strengthen national unity, safeguard independence, national sovereignty, and territorial integrity of the country;
- Establish an order based on the peoples' will and democracy;
- Form a civil society void of oppression, atrocity, discrimination as well as violence, based on rule of law, social justice, protecting integrity and

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<sup>104</sup> *Id.* at 568.

<sup>105</sup> BARFIELD, *supra* note 13, at 297–98.

human rights, and attaining peoples' freedoms and fundamental rights;

- Strengthen political, social, economic, as well as defense institutions;
- Attain a prosperous life and sound living environment for all inhabitants of this land;
- And, eventually, regain Afghanistan's appropriate place in the international family;

Have, herein, approved this constitution in accordance with the historical, cultural, and social realities, as well as requirements of time through our elected representatives in the Loya Jirga, dated January 3, 2004, held in the city of Kabul.<sup>106</sup>

Although one of Afghanistan's earlier constitutions, the 1923 Constitution, relied on the principle of complementarity, that is, that all cases should be decided in accordance with the principles of Shariah *and* the general civil and criminal laws,<sup>107</sup> the 2004 Constitution is based on the principle of repugnancy: no law can be contrary to the sacred religion of Islam.<sup>108</sup> The first three articles of the 2004 Constitution read as follows:

#### **Chapter 1: The State**

**Article 1:** Afghanistan shall be an Islamic Republic, independent, unitary, and indivisible state.

**Article 2:** The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan. Followers of other faiths shall be free within the bounds of law in the exercise and performance of their religious rituals.

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<sup>106</sup> THE CONSTITUTION OF AFGHANISTAN Jan. 26, 2004, pmb. *available at* <http://www.afghanembassy.com.pl/cms/uploads/images/Constitution/The%20Constitution.pdf>.

<sup>107</sup> Astri Suhrke & Kaja Borchgrevink, *Negotiating Justice Sector Reform in Afghanistan*, 51 no. 2 CRIME, LAW & SOC. CHANGE 211, 217 (2009).

<sup>108</sup> *Id.* at 221.

**Article 3:** No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.<sup>109</sup>

Chapter Seven of the 2004 Constitution creates the judicial branch of the government.<sup>110</sup> Within that chapter, Article 116 states that “[t]he judiciary shall be an independent organ of the state of the Islamic Republic of Afghanistan.” It then goes on to create a “Supreme Court, Courts of Appeal, as well as Primary Courts whose organization and authority shall be regulated by law.”<sup>111</sup> Article 117 states that the Supreme Court will have “nine members who are appointed by the president for a period of ten years with the approval of the Wolesi Jirga [House of the People] with observance of the provisions of last paragraph of the Article 50 and Article 118 of this Constitution.”<sup>112</sup>

The draft of the constitution submitted to President Karzai contained a provision that would have created a separate constitutional court.<sup>113</sup> Like the constitutional courts in other countries,<sup>114</sup> this court would have been independent and would have had jurisdiction to resolve all constitutional disputes,<sup>115</sup> for example, whether there is a conflict between the statement in the Preamble that states that Afghanistan observes the United Nations Charter, the Universal Declaration of Human Rights, and the tenets of Islam. This provision was removed before the draft was submitted to the Loya Jirja, in part because of fears that a constitutional court would assume powers similar to those exercised by Iran’s Guardian Council, which must approve all proposed legislation and has been empowered since 1991 to

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<sup>109</sup> THE CONSTITUTION OF AFGHANISTAN, *supra* note 106.

<sup>110</sup> *Id.* at art. I-III.

<sup>111</sup> *Id.*

<sup>112</sup> The Wolesi Jirga is the lower house of the National Assembly. *See id.* at art. 82.

<sup>113</sup> JOHN DEMPSEY & J. ALEXANDER THEIR, U.S. INST. OF PEACE, RESOLVING THE CRISIS OVER CONSTITUTIONAL INTERPRETATION IN AFGHANISTAN, at 2 (Mar. 2009), available at [http://www.usip.org/files/resources/USIP\\_0309\\_2.PDF](http://www.usip.org/files/resources/USIP_0309_2.PDF).

<sup>114</sup> *See e.g.*, CONSTITUTIONAL COURT OF SOUTH AFRICA, <http://www.constitutionalcourt.org.za/site/home.htm> (last visited July 13, 2013).

<sup>115</sup> DEMPSEY & THEIR, *supra* note 113, at 2.

reject or accept all candidates for parliament and the presidency.<sup>116</sup> Instead, Article 121 gives some of the powers usually given to a constitutional court to the Supreme Court: “At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their accordance with the law.”<sup>117</sup> However, Article 157, which is located within the chapter setting out miscellaneous provisions, states that “[t]he Independent Commission for supervision of the implementation of the Constitution shall be established in accordance with the provisions of the law. Members of this Commission shall be appointed by the President with the endorsement of the House of People.”<sup>118</sup>

Initially, it appeared as if there was agreement that the Supreme Court had the power to interpret the constitution. Between 2004 and 2007, the Supreme Court decided several cases in which it did just that.<sup>119</sup> However, that agreement ended when, in 2007, the National Assembly invoked Article 157 and passed a law creating the Independent Commission for the Supervision of the Implementation of the Constitution (ICSIC).<sup>120</sup> Although President Karzai vetoed the law, the National Assembly overrode that veto and passed the law despite a decision from the Supreme Court determining it was unconstitutional.<sup>121</sup> Under the law, the ICSIC would be comprised of seven commissioners who would have the power to interpret the

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<sup>116</sup> *Id.*

<sup>117</sup> THE CONSTITUTION OF AFGHANISTAN, *supra* note 106, at art. 121.

<sup>118</sup> *Id.* at art.154. See also INT’L CRISIS GRP., AFGHANISTAN: THE LONG, HARD ROAD TO THE 2014 TRANSITION 13 (Oct. 8, 2012), available at <http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/236-afghanistan-the-long-hard-road-to-the-2014-transition.pdf>.

<sup>119</sup> DEMPSEY & THEIR, *supra* note 113, at 3.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* For an English translation of the law, see Sari Kouvo, *Six Years Late, the Constitutional Commission is Formed; But Will It Take on President and Parliament?*, AFG. ANALYST NETWORK, July 3, 2010, <http://www.afghanistan-analysts.org/six-years-late-the-constitutional-commission-is-formed-but-will-it-take-on-president-and-parliament>.

constitution “on the request of the President, the National Assembly, the Supreme Court, and the Executive.”<sup>122</sup> In 2010, the National Assembly approved five commissioners; it has not, however, approved the last two, and, as a result, it is not clear whether the ICSIC has been legally constituted.<sup>123</sup> So far, the ISCIS has published only two advisory opinions: one pertaining to the US-run prison at Bagram, and a second condemning the burning of copies of the Qur’an at the prison.<sup>124</sup>

Thus, as of the publication of this article, the conflict between the Afghanistan Supreme Court and the ICSIC has not been resolved.<sup>125</sup> In addition, judges whose terms have already expired hold two of the nine positions on the Supreme Court, and the terms of three other judges are due to expire in August of 2013.<sup>126</sup>

#### *D. The State System, the Informal System, and the Taliban System*

While the Afghanistan Constitution mentions only one legal system, three legal systems operate in Afghanistan: a state system, an informal system, and, in the areas controlled by the Taliban, a Taliban system.

##### **1. The State System**

The 2004 Constitution created a state system similar to those used in western countries. It is comprised of the police, courts, judges, prosecutors, and the prison service.<sup>127</sup> Although these actors are supposed to work

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<sup>122</sup> INT’L CRISIS GRP., *supra* note 110, at 4–5; Kouvo, *supra* note 113. As currently drafted, the law uses the word “and,” which suggests that request must come from the President, the National Assembly, the Supreme Court, *and* the Executive. Given the tensions between these groups, it seems more likely that the drafters should have used “or” The request could come from the President or the National Assembly, or the Supreme Court, or the Executive. (emphasis added).

<sup>123</sup> Kouvo, *supra* note 121.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> INT’L CRISIS GRP. *supra* note 118, at 14.

<sup>127</sup> Ali Wardak, *State and Non-State Justice Systems in Afghanistan: The Need for Synergy*, 14 U. PA. J. L. & SOC. CHANGE 411, 413 (2011). *See also* OVERSEAS DEV.

together, they often do not. A judge from the Kunduz province described what happened in one case:

The main problem for the court is lack of proper cooperation from the Police Department...For example, once the police captured 17 pounds of heroin in a truck. The drug was carefully stored among the fruit cartons. There were two people in the car, the driver and a passenger. After initial investigation, the police released the driver without consulting with the district prosecutor's office and sent the passenger, who was from Jalalabad, to the court. When we investigated the case, we found out that the passenger was beaten very badly. On the other hand, he totally denied all charges and accused the driver as the real smuggler. We sent a letter to the police department, demanding the re-arrest of the driver. The police simply refused and wrote back a very illogical answer: we will arrest the driver when he is ready to be arrested. Then we had to close the case because of lack of evidence.<sup>128</sup>

While this lack of coordination is a problem, an even bigger problem is corruption.<sup>129</sup> In working with the professors and students in mock trial exercises, I was at first amused by their comments about how they would bribe the prosecutor, the judge, or one of the jurors. I thought that they were just having fun with the exercises. However, during subsequent conversations, I learned that most Afghans believe that, at least at the level of the primary courts, which is the Afghan court of original jurisdiction, there is widespread corruption.

Unfortunately, they are correct. A 2010 study conducted by the United Nations Office on Drugs and Crime found that Afghans paid the equivalent of \$2.5 billion US dollars, or 23 percent of the Afghan gross national

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INST., AFGHANISTAN'S POLITICAL AND CONSTITUTIONAL DEVELOPMENT (Jan. 2003), available at <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5888.pdf>.

<sup>128</sup> Notes from the Interview with the Judge (2013) (on file with author).

<sup>129</sup> Wardak, *supra* note 127, at 415.

product, in bribes in 2009.<sup>130</sup> In urban areas, Afghan citizens report most of the bribes are paid to police officers, custom officers, judges, and municipal officers, in that order.<sup>131</sup> In rural areas, citizens report most bribes are paid to prosecutors, judges, custom officers, and police officers.<sup>132</sup>

Because of the corruption and other obstacles, for example, the time that it takes to resolve a dispute and the cost of travel, most Afghans do not use the country's judicial system.<sup>133</sup> Instead, they rely either on the long-established village-based dispute resolution processes, or, in areas in which the Taliban has a strong presence, the Taliban's legal system.<sup>134</sup>

## 2. The Informal System<sup>135</sup>

Until you have been there, it is hard to appreciate the impact that geography has on Afghanistan. Even though Afghanistan is often thought of as an important stop on the Silk Road, today there are relatively few roads.<sup>136</sup> In fact, few would think about trying to drive from Kabul, which is

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<sup>130</sup> *Id.* (citing UNITED NATIONS OFFICE ON DRUGS & CRIME, CORRUPTION IN AFGHANISTAN: BRIBERY AS REPORTED BY THE VICTIMS 25 (2010), available at <http://www.unodc.org/documents/data-and-analysis/Afghanistan/Afghanistan-corruption-survey2010-Eng.pdf>); The Associated Press, *\$3.9B Spent on Afghanistan Bribery in 2012; U.N. Says Frequently Falling, but Cost of Bribes up Sharply*, CBS NEWS (Feb. 7, 2013), [http://www.cbsnews.com/8301-202\\_162-57568132/\\$3.9b-spent-on-afghanistan-bribery-in-2012-u.n.says-frequency-falling-but-cost-of-bribes-up-sharply/](http://www.cbsnews.com/8301-202_162-57568132/$3.9b-spent-on-afghanistan-bribery-in-2012-u.n.says-frequency-falling-but-cost-of-bribes-up-sharply/).

<sup>131</sup> Wardak, *supra* note 127, at 416.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 418.

<sup>134</sup> *Id.*

<sup>135</sup> For a more complete discussion of the informal justice system, see U.S. AGENCY FOR INT'L DEV., AFGHANISTAN RULE OF LAW PROJECT: FIELD STUDY OF INFORMAL AND CUSTOMARY JUSTICE IN AFGHANISTAN AND RECOMMENDATION ON IMPROVING ACCESS TO JUSTICE AND RELATIONSHIPS BETWEEN FORMAL COURTS AND INFORMAL BODIES (2005), available at [http://pdf.usaid.gov/pdf\\_docs/PNADF590.pdf](http://pdf.usaid.gov/pdf_docs/PNADF590.pdf)

<sup>136</sup> CENT. INTELLIGENCE AGENCY, *The World Factbook: Country Comparisons: Roadways*, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2085rank.html?countryName=Afghanistan&countryCode=af&regionCode=sas&rank=86#af>.



in the center of the country, to Herat in the west.<sup>137</sup> A flight over the country reveals its center is mountainous, with only a few small villages in isolated valleys.<sup>138</sup>

Additionally, different tribal groups dominate each region in Afghanistan. Most of the people in the south and the east are Pashtuns,<sup>139</sup> and most of the people in the north and the west are Tajiks.<sup>140</sup> Other groups include the Hazara, who are mostly in the central part of Afghanistan, and the Uzbek (9 percent), Aimak (4 percent), and Turkmen (3 percent).<sup>141</sup>

Given Afghanistan's geography and various tribal and ethnic groups, it is not surprising that historically most disputes were resolved locally and that practices and decisions would vary from village to village and even from district to district.<sup>142</sup> However, almost all of these systems rely on jirgas (Pashtun) or shuras (Tajik), which are made up of respected members of the community and which base their decisions on the customary law of the area in which they operate.<sup>143</sup> Perhaps out of necessity, most of these jirgas and shuras place an emphasis on reconciliation and keeping the peace within their communities.<sup>144</sup> As Wardak notes, while the State system relies on retributive justice, the jirgas and shuras rely on restorative justice.<sup>145</sup>

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<sup>137</sup> Although there have been a number of projects designed to improve the roads, there are still a number of unexploded land mines, and robberies are common. *International Travel Information*, U.S. DEP'T OF STATE, [http://www.travel.state.gov/travel/cis\\_pa\\_tw/cis/cis\\_1056.html#traffic\\_safety](http://www.travel.state.gov/travel/cis_pa_tw/cis/cis_1056.html#traffic_safety) (last visited June 26, 2013).

<sup>138</sup> CENT. INTELLIGENCE AGENCY, *supra* note 5.

<sup>139</sup> *Id.* It is estimated that 42 percent of Afghans are Pashtun. *Id.* Most of the Pashtun people speak Pashtu. *Id.*

<sup>140</sup> *Id.* It is estimated that 27 percent of Afghans are Tajik. *Id.* Most Tajiks speak Dari. *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> U.S. AGENCY FOR INT'L DEV., *supra* note 135, at 5.

<sup>143</sup> Wardak, *supra* note 127, at 418; U.S. AGENCY FOR INT'L DEV., *supra* note 135, at 7.

<sup>144</sup> Wardak, *supra* note 127, at 418.

<sup>145</sup> *Id.* While "retributive justice" focuses on punishing the individual or group that did a particular act, "restorative justice" seeks to repair the harm done. *See id.* at 415. In a system that relies on restorative justice, the decision makers use a balance approach, holding the person or persons who committed the act accountable while at the same time trying to meet the needs of the victim or victims. *Id.* *See also* RESTORATIVE JUSTICE ONLINE, <http://www.restorativejustice.org/> (last visited Aug. 26, 2013).

Those serving on jirgas and shuras do not receive any compensation and are considered to be the impartial representatives of those involved in the dispute. Those involved in the dispute place their trust in the members of the councils to resolve the dispute in a way that is in the best interests of both those involved as well as the larger community.<sup>146</sup> The effectiveness of a particular jirga or shura rests on the reputations of those who serve on it.<sup>147</sup>

Although most Afghans give higher marks to the informal justice systems than they do to the State system, the informal justice systems are not without problems. From the Western perspective, jirgas and shuras are problematic because those who serve on them often lack knowledge about the provisions set out in the Constitution and other positive law.<sup>148</sup> In most instances, jirgas or shuras apply customary law, which is often synonymous with Shariah law as it is practiced in that community.<sup>149</sup> As a consequence, the jirgas or shuras may use “baad,” which involves the giving of a girl or woman to another family as a way to resolve a dispute or as payment for a debt.<sup>150</sup> In addition, while occasionally women serve on a jirga or shura, most of the time they do not. The failure to include women in jirga and shura reinforces the belief of some Afghans that women are inferior to men and may indicate there is no one on the councils who can ensure the rights of women are protected.<sup>151</sup> Finally, some Afghans have stated that local

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<sup>146</sup> See U.S. AGENCY FOR INT’L DEV., *supra* note 135, at 3–8.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Wardak, *supra* note 127, at 420. See also Jean MacKenzi, *Afghan Women Trapped in Tribal Court System*, HUFFINGTON POST (Mar. 8, 2012), [http://www.huffingtonpost.com/2012/03/08/afghan-women-trapped-in\\_n\\_1332179.html](http://www.huffingtonpost.com/2012/03/08/afghan-women-trapped-in_n_1332179.html); Wahida Paykan, *Afghan Girls Suffer for Sins of Male Relatives*, INST. FOR WAR & PEACE REPORTING (Apr. 3, 2009), <http://iwpr.net/report-news/afghan-girls-suffer-sins-male-relatives>.

<sup>151</sup> See Wardak, *supra* note 127, at 419. However, as Wardak notes, “the exclusion of women from participation in jirgas and shuras are not inherent characteristics of these

commanders, warlords, and other powerful government officials sometimes interfere with a jirga or shura, and that community institutions have been weakened by decades of war and economic conditions worsened by droughts.<sup>152</sup>

### 3. The Taliban

In the absence of a working formal or informal justice system, it appears the Taliban is once again filling the void. Even though most Afghans still fear the Taliban, in some areas they turn to it to settle grievances.<sup>153</sup> In one of the few stories about “Taliban judges,” Afghans told an NPR reporter that “the militants — unlike the country’s official court system — get things done quickly and without asking for bribes.”<sup>154</sup> Later in the report, Judge Mullah Nasrat Ramani, a graduate of Kabul University, states the following.<sup>155</sup> “We are mobile judges. Sometimes we go to the people, and sometimes they come to us. We don’t have a courtroom, and we’re not official. But we are sanctioned by the Taliban leadership to carry out justice using Islamic law.”<sup>156</sup>

Another story published in the April 15, 2013, issue of *Newsweek*, describes a case involving a land dispute between a returning refugee who

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non-state justice institutions; they are the characteristics of Afghan patriarchal society.”  
*Id.* at 420.

<sup>152</sup> *Id.* at 421.

<sup>153</sup> Soraya Sarhaddi Nelson, *Taliban Court Filing Justice Vacuum in Afghanistan*, NPR (Dec. 16 2008), <http://www.npr.org/templates/story/story.php?storyId=98261034>. See also, *Taliban Courts More Popular Than ‘Corrupt’ Karzai Government in Afghanistan*, THAINDIAN NEWS (Dec. 30, 2009), [http://www.thaindian.com/newsportal/world-news/taliban-courts-more-popular-than-corrupt-karzai-government-in-afghanistan\\_100296471.html](http://www.thaindian.com/newsportal/world-news/taliban-courts-more-popular-than-corrupt-karzai-government-in-afghanistan_100296471.html); Tom A. Peter, *Leery of Courts, Afghans Seek Taliban Justice*, ARMY TIMES, (Mar. 7, 2012), <http://www.armytimes.com/news/2012/03/gannett-leery-of-courts-afghans-seek-taliban-justice-030712/>.

<sup>154</sup> Nelson, *supra* note 153.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* See also Ahmad Shafi, *Afghan Justice: A Brief Trial, A Lengthy Sentence*, NPR (May 17, 2012), [http://www.npr.org/2012/05/17/152833532/afghan-justice-a-brief-trial-a-lengthy-sentencecom/s/Newsweek/c5cab60bd7a45d4a6b493fc0ba1ffcfc/com.newsweek.20130412/14\\_nb\\_reporter\\_14.html](http://www.npr.org/2012/05/17/152833532/afghan-justice-a-brief-trial-a-lengthy-sentencecom/s/Newsweek/c5cab60bd7a45d4a6b493fc0ba1ffcfc/com.newsweek.20130412/14_nb_reporter_14.html).

wanted to reclaim land he asserted belonged to his family and another powerful family:

The tension nearly ended in violence last year as Khan, his uncles, and the Ahmedzais took up arms and prepared for battle. ‘There was a real danger of bloodshed,’ says the 33-year-old Khan, who runs a medical laboratory in the provincial capital, Gardez. Khan quickly ruled out taking his case to the official government courts, which he says are corrupt and plodding. But he didn’t want to risk a shootout, so instead he decided to take the land feud to the Taliban’s Islamic court. The Ahmedzais agreed, saying they had no objection to submitting their claim to the Taliban’s court. ‘Taliban courts are easier, more transparent, and quick, and stand on Islamic law,’ says Khan. ‘If a Taliban judge is found to be corrupt, he will be beheaded.’

The Taliban may not be popular, but their courts seem to be. Even a senior adviser to Afghan President Hamid Karzai admits that many Afghans prefer Taliban courts to the government’s legal system. And a member of Parliament from Zabul province, Qadar Qalatwal, agrees, saying local government courts are simply hopeless. ‘The local government is drowning in corruption so no one trusts the justice system,’ he says.<sup>157</sup>

There are, however, stories that horrify both those in the West and in Afghanistan. For example, in August 2010, Afghan authorities released a video showing a couple being beheaded after a Taliban court found them guilty of adultery, and in April 2013, the news media reported that members of the Taliban had abducted two truck drivers and then, without the benefit of anesthesia, amputated a hand and a foot of each driver.<sup>158</sup> One of the drivers is quoted as saying, “There was no mullah, no judge, nobody,” he

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<sup>157</sup> Sami Yousafzai & Ron Mo Reau, *Taliban Justice*, NEWSWEEK (Apr. 12, 2013), [http://contentviewer.adobe.com/s/Newsweek/c5cab60bd7a45d4a6b493fc0ba1ffcf/com.newsweek.20130412/14\\_nb\\_reporter\\_14.html](http://contentviewer.adobe.com/s/Newsweek/c5cab60bd7a45d4a6b493fc0ba1ffcf/com.newsweek.20130412/14_nb_reporter_14.html).

<sup>158</sup> Humayun Hadid & Johannes Dell, *Summary Amputations: Taliban Justice in Afghanistan*, RAWA NEWS (Apr. 27, 2013), <http://www.rawa.org/temp/runews/2013/04/27/summary-amputations-taliban-justice-in-afghanistan.html>.

says. “There were only Taliban. They were all laughing and making fun while they did this. They never listened to what we had to say.”<sup>159</sup>

#### *E. Rule of Law Projects*

It is unclear how many initiatives have been undertaken in Afghanistan with the goal of “promoting the rule of law.” Although Italy took the lead in providing assistance to the justice sector after the fall of the Taliban, a number of other countries, including the United States, also initiated projects.<sup>160</sup> Most agree, though, that the judicial system is still not working despite ten years of aid. As the International Crisis Group wrote in 2010, “Afghanistan’s justice system is in a catastrophic state of disrepair. The majority of Afghans still have little or no access to judicial institutions.”<sup>161</sup>

Several reasons exist for this failure. First, as of 2004, there were relatively few judges trained in secular law or Islamic law.<sup>162</sup> The first Chief Justice of the Supreme Court of Afghanistan, Faisal Ahmad Shinwari, had no experience as a judge and had not studied secular law.<sup>163</sup> While most

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<sup>159</sup> *Id.*

<sup>160</sup> Ali Wardak, *State and Non-State Justice Systems in Afghanistan: The Need for Synergy*, 33 U. PA. J. INT’L L. 1145 (2012); Suhreke & Borchgrevink, *supra* note 100, at 220. See also INT’L CRISIS GRP., REFORMING AFGHANISTAN’S BROKEN JUDICIARY (Nov. 17, 2010), available at <http://www.crisisgroup.org/~media/files/asia/south-asia/afghanistan/195%20reforming%20afghanistans%20broken%20judiciary.pdf>.

<sup>161</sup> Nick Grono, Deputy President of the Int’l Crisis Grp., Rule of Law and the Justice System in Afghanistan (Apr. 28, 2011), available at <http://www.crisisgroup.org/en/publication-type/speeches/2011/rule-of-law-and-the-justice-system-in-afghanistan.aspx>.

<sup>162</sup> Suhreke & Borchgrevink, *supra* note 107, at 219.

<sup>163</sup> See INT’L CRISIS GRP., *Afghanistan: Judicial Reform and Transitional Justice* (Jan. 28, 2003), available at <http://www.crisisgroup.org/en/regions/asia/south-asia/afghanistan/045-afghanistan-judicial-reform-and-transitional-justice.aspx>; Carlotta Gall, *Afghan Lawmakers Review Court Nominees*, N.Y. TIMES (May 17, 2006), [http://www.nytimes.com/2006/05/17/world/asia/17afghan.html?\\_r=0](http://www.nytimes.com/2006/05/17/world/asia/17afghan.html?_r=0). As might be expected, the decisions of this court reflected the backgrounds of those making them. During Shinwari’s term, the Supreme Court sought to ban a candidate who questioned whether polygamy was in keeping with the spirit of Islam; called for an end to cable television service in the country; upheld the death penalty for two journalists convicted of blasphemy for saying the Islam being practiced in the country was reactionary; banned

current members of the Supreme Court are well educated,<sup>164</sup> many of the primary court judges are not.<sup>165</sup>

Second, western donors focused on exporting their own systems of justice.<sup>166</sup> They introduced laws based on western laws,<sup>167</sup> helped build and furnish courthouses, and offered training to judges and prosecutors.<sup>168</sup> What they did not do is seek out experts from other Muslim countries, for example, Turkey or Saudi Arabia, or even consult with each other.<sup>169</sup> As a consequence, many of the projects did not reflect the tenets of Islam or

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women from singing on television; and ruled that a girl, given as a bride when she was nine years old, could not get a divorce from her abusive husband, notwithstanding a law that makes it illegal for girls under 16 to marry. Scott Baldauf, *The West Pushes to Reform Traditionalist Afghan Courts*, RAWA NEWS (Feb. 21, 2006), <http://www.rawa.org/court.htm>.

<sup>164</sup> The chief justice, Abdul Salam Azimi. Azimi, received his Masters degree in Shariah and Law from Al-Azhar University in Egypt, studied comparative law at George Washington University, worked for the University of Nebraska helping to develop educational opportunities for Afghans living in Pakistan, and played a significant role in drafting the 2004 constitution. *Biography of Chief Justice*, SUPREME COURT OF ISLAMIC REPUBLIC OF AFG., <http://supremecourt.gov.af/en/page/616> (last visited July 13, 2013). The other eight justices, Mohammad Qasem Hashemzai; Abdul Rashid Rashed; Gholam Nabi Nawai; Bahuddin Baha; Zamen Ali Behsudi; Mohammad Qasem; Mohammad Alim Nasimi; and Mohammad Omar Barakzai, are also well educated. *Biography of Supreme Court Members*, SUPREME COURT OF ISLAMIC REPUBLIC OF AFG., <http://supremecourt.gov.af/en/page/619> (last visited July 13, 2013).

<sup>165</sup> Suhrke & Borchgrevink, *supra* note 107, at 220.

<sup>166</sup> As Suhrke and Borchgrevink note, “The inclination of Western donors to fasten onto its own legal tradition with the texture of Afghan law was hardly surprising. It reflected the ideological division between Islam and the West that had justified the US-led intervention in the first place.” Suhrke & Borchgrevink, *supra* note 107, at 214.

<sup>167</sup> While Italy has help build, or rebuild a number of court facilities, some of its projects have been controversial. Suhrke & Borchgrevink, *supra* note 100, at 213. A prime example is a project in which an Italian magistrate (with the help of consultants from the United States) drafted a code of criminal procedure for Afghanistan that was based on the Italian code. *Id.* Because the Italian magistrate did not consult with Afghan officials, those officials asked President Karzai to reject the draft. *Id.* The Italian government, however, threatened to withdraw funding for related projects unless the draft was approved. *Id.*

<sup>168</sup> Wardak, *supra* note 160, at 1148.

<sup>169</sup> Suhrke & Borchgrevink, *supra* note 107, at 220.

Afghan cultures, and those sponsoring the projects sometimes worked at cross purposes.

As a result, most rule of law projects have had little impact<sup>170</sup> and, arguably, what impact they have had has been negative. For instance, on June 11, 2013, a suicide bomber targeted employees of the Supreme Court of Afghanistan as they were leaving work, killing seventeen and injuring many more.<sup>171</sup> The Taliban claimed responsibility for the attack, stating that their fighters “had taken down judges who obey Western powers.”<sup>172</sup>

### III. THE ULEMA<sup>173</sup>

While Afghanistan’s Muslims<sup>174</sup> do act as a single body with a set structure or hierarchy, there are shura e ulema, or religious councils, that operate at the national, provincial, and district levels.<sup>175</sup> At the national level, there are instances in which the National Ulema Council<sup>176</sup> has supported one of President Karzai’s policies, for example, the Karzai government’s policy that growing poppies is un-Islamic, and there are times when Karzai has supported a declaration made by the Council.<sup>177</sup>

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<sup>170</sup> RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM* 5 (2012).

<sup>171</sup> *Afghanistan Supreme Court in Kabul Targeted in Car-Bomb Attack; At Least 17 Dead*, CBS NEWS (Jun. 11, 2013), [http://www.cbsnews.com/8301-202\\_162-57588695/afghanistan-supreme-court-in-kabul-targeted-in-car-bomb-attack-at-least-17-dead/](http://www.cbsnews.com/8301-202_162-57588695/afghanistan-supreme-court-in-kabul-targeted-in-car-bomb-attack-at-least-17-dead/).

<sup>172</sup> *Id.*

<sup>173</sup> In Arabic, “ulema” is spelled “ulama.” MERRIAM-WEBSTER, *Ulema*, <http://www.merriam-webster.com/dictionary/ulema> (last visited Aug. 26, 2013).

<sup>174</sup> 80 percent are Sunni Muslim and 19 percent are Shia Muslim. CENT. INTELLIGENCE AGENCY, *supra* note 5.

<sup>175</sup> Suhrke & Borchgrevink, *supra* note 107, at 221.

<sup>176</sup> The National Ulema Council is funded by the government. *Judicial Power and Branches*, AFG. LANGUAGE & CULTURE PROGRAM, <http://larc.sdsu.edu/alcp/resources/afghanistan/government/judicial-power-and-branches> (it is on the first page) (last visited Aug. 26 2013). The head of the Council is the former Chief Justice of the Afghanistan Supreme Court, Fazl Hadi Shinwari. *Id.*

<sup>177</sup> Suhrke & Borchgrevink, *supra* note 107, at 221–22.

A prime example of the latter involves a declaration made by the National Ulema Council in March 2012.<sup>178</sup> Some of the statements made at the beginning of that declaration are consistent with the 2004 Constitution's granting of equal rights to men and women. The following is one English translation of that part of the declaration:

Unlike other civilizations and societies of the present and the past, the sacred religion of Islam – in recognition of the fundamental role of women in nurturing the society – offers women many civil and social rights, and human dignity and honor.

In the centuries before Islam, and among human civilizations and nations, women were deprived of any kind of human and social rights. They were treated as cheap property and were even buried alive. But by the advent of the globe-illuminating sun [that was] the sacred religion of Islam, many rights were given to women according to nature, such as:

- A. The right to property, ownership and commerce
- B. The right to inheritance according to the principles of the sacred Shariah of Islam
- C. The right to mehr [very roughly, dower], which is exclusively the woman's [property] and no one has the right to take it without her consent. All other practices known as toyana, shareeb, etc. do not have a basis in the Shariah.
- D. The right to choose a spouse according to her own will. Forcibly marrying an adult woman is not allowed, although consultation with the guardians – which is a religious rule – is practiced
- E. Women, like men, have dignity and are beings with freedom; therefore, exchanging a woman for someone's blood (badal), or for [establishing] peace, or exchanging a woman for

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<sup>178</sup> *Afghan Concern Over 'Guidelines for Women,'* BBC NEWS (Mar. 6, 2012), <http://www.bbc.co.uk/news/world-asia-17272935>; Sari Kouvo, *A Slippery Slope: What Happened to Women's Rights in March 2012?*, AFG. ANALYST NETWORK (Apr. 6, 2012), <http://www.aan-afghanistan.org/index.asp?id=2642>.



another's dower are haram (forbidden under Islamic law) and prohibited under the Shariah.<sup>179</sup>

The declaration does, though, contain other provisions that limit the rights of women:

F. Women cannot be inherited. Similarly, there are many other rights, granted to a woman under the religion of Islam, which are observed. But, where a Muslim woman has many rights, [she also] has duties and obligations, such as:

- Adherence, in faith and action, to the orders and prohibitions of Islam's sacred Shariah
- Complete adherence and observance of the hijab [according to the Shariah], which protects the dignity and personality of the woman
- Avoiding mingling with stranger men in various social situations, such as education, shopping, the office and other affairs of life
- In consideration of the clarity of verses 1 and 34 of Surah an-Nisa' [of the Qur'an], men are fundamental and women are secondary; also, lineage is derived from the man. Therefore, the use of words and expressions that contradict the sacred verses must be strictly avoided.
- Respecting [the orders] about the multiplicity of wives (polygamy), which are in accordance with clear orders of the Qur'an
- Avoiding travel without a [Shariah-sanctioned] mahram (male companion)

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<sup>179</sup> *English Translation of Ulema Council's Declaration About Women*, AFG. ANALYSIS (Mar. 4, 2012), <https://afghanistananalysis.wordpress.com/2012/03/04/english-translation-of-ulema-councils-declaration-about-women/>.

- Adherence to the clear orders of Muhammad's Shariah in case of divorce

It needs to be said that teasing, harassment and beating of women without a Shariah-compliant reason, as set forth clearly in the Glorious Qur'an, is prohibited. Afghanistan's Ulema Council requests the judicial and law-enforcement organs of the country to punish, in accordance with Muhammad's Shariah and national laws, the perpetrators of any kind of assault from persons against women.<sup>180</sup>

While the declaration does not have the force of law, President Karzai endorsed it, stating "The clerics' council of Afghanistan did not put any limitations on women. . . It is the Shariah law of all Muslims and all Afghans."<sup>181</sup> A few days later, in his speech for International Women's Day, Karzai stated that the Western media had misinterpreted his earlier statement, and he asserted that Afghan women enjoy their Constitutional rights.<sup>182</sup>

As might be expected, many, both inside and outside of Afghanistan, have criticized Karzai for his support of the declaration, stating the President is giving up rights that women have gained in the last ten years in an attempt to appease the Taliban in hopes that it will agree to some type of peace agreement.<sup>183</sup> Additionally, activists have criticized the international community for its failure to condemn the declaration, noting that "[n]one of the key international actors – the United States, the United Nations or the

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<sup>180</sup> *Id.*

<sup>181</sup> *Hamid Karzai Backs Clerics' Move to Limit Afghan Women's Rights*, THE GUARDIAN (Mar. 6, 2012), <http://www.guardian.co.uk/world/2012/mar/06/hamid-karzai-afghanistan-womens-rights>; *Afghan President Backs Strict Guidelines for Women*, CBS NEWS (Mar. 6, 2012), [http://www.cbsnews.com/8301-202\\_162-57391568/afghan-president-backs-strict-guidelines-for-women/](http://www.cbsnews.com/8301-202_162-57391568/afghan-president-backs-strict-guidelines-for-women/); Kouvo, *supra* note 178.

<sup>182</sup> Kouvo, *supra* note 178.

<sup>183</sup> *Id.* See also Sean Carberry, *The Afghan Battle of a Law to Protect Women*, NPR (Feb. 20, 2013), <http://www.npr.org/2013/02/20/172491435/the-afghan-battle-over-a-law-to-protect-women>.

European Union – made direct references to the National Ulema Council’s statement in their International Women’s Day messages.”<sup>184</sup>

Equally troubling is the Ulema Council’s November 28, 2012, request to President Karzai to create a new Dar al-Ifta, an institute made up of Islamic scholars that would have the power to issue fatwas that are legally binding.<sup>185</sup> To date, Karzai has not publically responded to the request. According to Siamak Heravi, a spokesperson, Karzai must first consider the constitutional implications of the request: “[The request] needs consideration because the work of a Dar al-Ifta and the Afghan Supreme Court may overlap. The clerics know this, so they left it for the president to consider. This issue will be discussed more in the future. But as for now, no decision has been made.”<sup>186</sup>

#### IV. WHAT I SAID AND WHAT ELSE I MIGHT HAVE SAID

I need to begin this section by emphasizing that the professors who drafted the letter set out at the beginning of this article are Pashtuns who teach Shariah law at two of Afghanistan’s most conservative universities. Other Afghan professors, and particularly professors who teach secular law at some of the country’s more liberal universities, would disagree with many of the statements set out in the letter. For example, while the professors from Shariah faculties want the United States to leave

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<sup>184</sup> Kouvo, *supra* note 178. For a copy of Ambassador Crocker’s message, see *Ambassador Crocker Statement on International Women* (Mar. 8, 2012), <http://kabul.usembassy.gov/wd-st.html>. See also *Point of View in Afghanistan on Ulema Council’s Statement on Women*, RELIEF WEB (Mar. 19, 2012), <http://reliefweb.int/report/afghanistan/points-view-afghanistan-ulema-councils-statement-women>.

<sup>185</sup> Ron Synovitz & Ahmad Shebar, *Afghan Clerics Want Power to Issue Legally Binding Fatwas* (Nov. 28, 2012), <http://www.rferl.org/content/afghanistan-ulema-council-fatwas-clerics-constitution/24783981.html#hash=relatedInfoContainer>. See also *National Ulema Council Seeks More Executive Power*, TOLO NEWS (Nov. 24, 2012), <http://www.tolonews.com/en/afghanistan/8464-national-ulema-council-calls-seeks-executive-power>.

<sup>186</sup> Synovitz & Shebar, *supra* note 185.

Afghanistan, other professors want the United States to stay. In particular, women who study and teach law are worried that, once the United States leaves, they will not be allowed to finish their degrees, or they will be forced out of their teaching positions.

*A. Should All Westerners Study Shariah law?*

One of the points that came up regularly in my conversations with the professors was the need for Westerners to study Shariah law. Thus, one of the first statements made in their letter “that all American law professors should study Islamic, or Shariah,<sup>187</sup> law and that they should learn about Islamic law from Islamic scholars” did not take me by surprise. Although not all US law professors need to learn about Shariah law, I agree that more of us should.

There are good reasons for doing so. First, according to a 2009 study, Islam is the second largest religion in the world, with 1.57 billion adherents.<sup>188</sup> Second, much of the United States’ foreign policy decisions relate to or affect countries in which the majority of the population is Muslim.<sup>189</sup> As a consequence, at least some of us need to know enough about Islam and Shariah law so that we can distinguish facts from fabrications and mainstream beliefs from those on the fringe. If we are going to do what the professors ask and take an active role in making suggestions that will help solve the world’s problems, we need to

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<sup>187</sup> When Muhammad first used the term in the 620s, shariah (also spelled Sharia and Shari’a) “conveyed the idea of a direct path to water – a route of considerable importance to a desert people –and at a time when no one systematically differentiated between the world that was and the world that ought to be. . . .” Sadakat Kadri, *HEAVEN ON EARTH: A JOURNEY THROUGH SHARI’A LAW FROM THE DESERTS OF ANCIENT ARABIA TO THE STREETS OF THE MODERN MUSLIM WORLD* 12 (2012).

<sup>188</sup> *MAPPING THE GLOBAL MUSLIM POPULATION: A REPORT ON THE SIZE AND DISTRIBUTION OF THE WORLD’S MUSLIM POPULATION*, THE PEW FORUM (Oct. 2009), <http://www.pewforum.org/uploadedfiles/Topics/Demographics/Muslimpopulation.pdf>.

<sup>189</sup> See Juan Cole, *Islamophobia and American Foreign Policy Rhetoric: The Bush Years and After*, in *ISLAMOPHOBIA: THE CHALLENGE OF PLURALISM IN THE 21ST CENTURY* 127–40.] (eds. John L. Esposito & Ibrahim Kalin 2011).

understand the histories, the religions, and the legal systems of the countries that our policies impact.

*B. Why Does the West Object to Afghanistan Applying Islamic Law?*

A more difficult conversation related to the professors' fifth point: the question about why those of us in the West do not want Afghanistan to apply Islamic law.

Although I probably should have expected the question, I was taken by surprise, both by the question and by the sincerity with which it was asked. Consequently, instead of responding, I sidestepped it, asking the professors about the National Ulema Council's March 2012 declaration. Did the professors think that some of the statements about women violated the Afghanistan Constitution? When one of the professors answered that the Constitution needed to be read in light of the provisions of the Holy Qur'an, the others nodded their approval. I then asked if that meant women did not have the same rights as men. While I understood the answer to be yes, it was framed in terms of the individual's path to Allah. According to the professors, the path to Allah, or the Shariah, was different for men and women. The Council's statements should be read as providing guidance to women about how to comply with the Qur'an. The bottom line is that I did not answer the question.

Since returning from Afghanistan, I have asked a number of people the professors' question of why we don't want Afghanistan to apply Islamic law. Some have answered that the issue is not whether Afghanistan is an Islamic state; instead, the issue is whether Afghanistan harbors terrorists. Others, mostly women, expressed concern over the fact that some of the tenets of Islam, at least as interpreted by some Muslims, violate the human rights of women and children and, maybe, even men. Only a few have talked about what has been labeled Islamophobia, the fear of Muslims or

their politics or culture.<sup>190</sup> And finally, only a few talked about the separation of church and state.

Had I been less cautious, I would have made all four points, and I probably would have started with the last one. As someone who was born, raised, and educated in the United States, I have internalized the value that individuals should have the freedom to choose their religion or to choose not to practice a religion. In addition, or as a consequence, I believe that government and religion serve different purposes and should operate in different spheres. It was not until I talked to the professors that I began to understand the extent to which some Afghans viewed government as simply a tool for helping individuals navigate the path to Allah. As the professors explained, the role of government and the judicial system is not so much to help individuals and groups negotiate their relationships with each other, but to help guide them to Allah. That insight resulted in my own “ah ha” moment and also helped me understand why I was uncomfortable at such a fundamental level with the idea of an Islamic state.

Discussing the second point, that the way some individuals interpret the Qur’an violates women’s and children’s human rights, I wish that I had been more direct. However, as a practical matter, I was a guest in the professors’ country, and the professors always treated me with respect. Instead of expressing any kind of disapproval when I told them that I had walked to the market and to my guesthouse by myself, they asked whether I had purchased anything and, if I had, whether I had paid a fair price. There

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<sup>190</sup> *Islamophobia*, DICTIONARY.COM, <http://dictionary.reference.com/browse/islamophobia> (last visited July 13, 2013). In its August 30, 2010, issue, Time Magazine’s cover story was titled “Islamophobia: Does America Have a Muslim Problem?” Bobby Ghosh, *Islamophobia: Does America Have a Muslim Problem*, TIME (Aug. 30, 2010) <http://www.time.com/time/magazine/article/0,9171,2011936-1,00.html>. According to the article, the intolerance against Muslims has deepened in the last few years: “Although the American strain of Islamophobia lacks some of the traditional elements of religious persecution — there’s no sign that violence against Muslims is on the rise, for instance — there’s plenty of anecdotal evidence that hate speech against Muslims and Islam is growing both more widespread and more heated.” *Id.*

was, however, no doubt that a separate set of rules existed for Afghan women and western women.

I do regret not talking more explicitly about the reports I have read describing violence against women, the practice of giving young girls as payment for a debt (baad), and the way women are treated if they report a rape. Further, it more than bothers me that some men use the Qur'an to justify violence against women. I should have said more.

However, even if I had spoken more bluntly, I doubt my words would have changed anyone's mind. As we know from our own experiences, religious beliefs are usually deeply held, and when reinforced by culture, are resistant to change.<sup>191</sup> I do hope, however, that my presence demonstrated that women can teach, practice law, and travel alone without disgracing either themselves or those with whom they interact.

My third and fourth points are related. Some do not want Afghanistan to apply Islamic law because they reject or fear any religion other than their own. I suspect, however, that the more common concern is one based on the perceived connection between Islam and terrorism. People worry that, as an Islamic state, Afghanistan will do what Mullah Omar did and harbor al-Qaida leaders, allowing them to use Afghanistan as a base for planning terrorist attacks against the United States. That could happen, particularly given how angry some Afghans are over the night raids and the United States' continued presence in Afghanistan.

While I am by no means an expert, I know that not all countries in which Islam is the official religion present a threat to the United States. For example, Islam is the official religion in Saudi Arabia, and Saudi Arabia is a long-time friend of the United States,<sup>192</sup> despite the fact that Saudi Arabia

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<sup>191</sup> In 2009, President Karzai issued a decree banning violence against women. Carberry, *supra* note 183. To date, however, the male-dominated Parliament has not made that decree permanent. *Id.*

<sup>192</sup> *U.S. Relations with Saudi Arabia*, U.S. DEP'T OF STATE, BUREAU OF NEAR E. AFFAIRS (June 29, 2012), <http://www.state.gov/r/pa/ei/bgn/3584.htm>.

denies its citizens, and in particular women, many basic rights.<sup>193</sup> Saudi Arabia has also been aggressive in punishing those associated with al-Qaida.<sup>194</sup> I also know that, in 2011, the United States government estimated there were al-Qaida affiliates in more than seventy countries,<sup>195</sup> and recent events illustrate the influence of these groups in Yemen, Sudan, and parts of northern Africa.

The bottom line is that Afghanistan is an Islamic state and will be for the foreseeable future. As American citizens, we need to accept that fact. Acceptance does not mean, however, that we should not speak out against violence and particularly violence against women and children. We need to use our influence, both as individuals and as a nation, to promote peace, which in turn should help improve economic conditions, which might provide more opportunities for all citizens. However, when violence against women or children occurs, we must focus the spotlight on it.

### *C. Does The United States Practice What it Preaches?*

Of the statements the professors made in their letter, the ones I found most troubling were the ones about the United States' failure to practice what it preaches. It was hard for me to hear the statements suggesting the United States makes decisions based not on principles of democracy, but on the basis of religion and that, as individuals living in the southern and eastern parts of Afghanistan, the professors did not know who the terrorists were: the Taliban or the United States and NATO forces. It was also hard for me to read statements like the following one, from the International

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<sup>193</sup> *World Report 2012: Saudi Arabia*, HUMAN RIGHTS WATCH, <http://www.hrw.org/world-report-2012/world-report-2012-saudi-arabia> (last visited June 30, 2013).

<sup>194</sup> Gerald Butt, *Saudi Arabia's al-Qaeda Challenge*, BBC News (Sept. 8, 2012), <http://www.bbc.co.uk/news/world-middle-east-19517476>.

<sup>195</sup> John Rollins, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy*, CONG. RESEARCH SERV. (Jan. 25, 2011), available at <http://fpc.state.gov/documents/organization/156542.pdf>.



Crisis Group, an independent NGO funded by a variety of governments and non-governmental groups:

Extrajudicial actions by the U.S. and its coalition partners against Afghan citizens have also distorted the justice system and are fuelling the insurgency. U.S. and NATO actions must conform to national and international laws, including an end to arbitrary detentions. There should be no expectation that Afghan officials and institutions will realign the justice system to conform to international norms until U.S. and NATO allies adjust their own policies and practices.<sup>196</sup>

In the classes I taught on US criminal law, we discussed a number of principles, including constitutional provisions related to unlawful searches and seizures, the right to a speedy trial, and the right to counsel. At the time, the professors listened and asked questions but did not ask me about the United States' practices in Afghanistan. It was not until they began drafting the letter that the professors talked to me about their belief that the United States did not itself practice the rule of law.

In the discussion accompanying the letter's drafting, the professors focused on two points. The first and most emotional topic was the practice of United States and NATO forces' soldiers entering their homes at night. The second was the practice of arresting individuals and holding them indefinitely without the filing of charges or a trial.

It is no secret that United States and NATO forces conduct night raids. What I did not fully understand until I talked with the professors is how these raids violate religious and cultural beliefs and practices. Even in fairly liberal families living in Kabul, a man who is not a close family member cannot enter a room in which there are Afghan women. For example, during evenings at an Afghanistan home, I could be in a room with both the men and women, but my male counterpart could not. He was required to stay in the garden with one of the sons while I socialized with men, women, and

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<sup>196</sup> INT'L CRISIS GRP., *supra* note 160, at iii.

children in the house. Having an American male enter a house in which there are women is deeply offensive.<sup>197</sup>

Because such raids are so offensive, they quickly became a source of conflict between President Karzai and the United States, particularly once General Petraeus took control and increased the number of raids.<sup>198</sup> While on April 8, 2012, Afghanistan and the United States signed a memorandum of understanding that specified that special operations, including night raids, had to be approved by Afghanistan and conducted according to Afghan law,<sup>199</sup> there are reports that such raids continue.<sup>200</sup> In March 2013, Afghans reported several night raids by US and NATO forces in which civilians were killed,<sup>201</sup> prompting demonstrations and yet another warning from the National Ulema Council.<sup>202</sup>

The second point the professors made involves allegations that the US detains Afghans without trial for indefinite periods. In response to such allegations, on March 9, 2012, the United States and Afghanistan signed an agreement that gives the United States the power to veto the transfer of some detainees, provided that the United States would transfer control of its

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<sup>197</sup> See Nick Paton Walsh, *U.S. Afghanistan Sign Key "Night Raid" Deal*, CNN (Apr. 8, 2012), <http://edition.cnn.com/2012/04/08/world/asia/afghanistan-night-raids/index.html>; INT'L SEC. ASSISTANCE FORCE, *ISAF Issues Guidance on Night Raids in Afghanistan* (Mar. 5, 2010), <http://www.isaf.nato.int/article/isaf-releases/isaf-issues-guidance-on-night-raids-in-afghanistan.html>.

<sup>198</sup> Thom Shanker, *Despite Gains, Night Raids Split U.S. and Karzai*, N.Y. TIMES (Nov. 15, 2012), <http://www.nytimes.com/2010/11/16/world/asia/16night.html>.

<sup>199</sup> Jim Garamone, *U.S.-Afghan Pact Shows Relationship's Evolution, Official Says*, U.S. DEP'T OF DEFENSE (Apr. 9, 2012), <http://www.defense.gov/news/newsarticle.aspx?id=67875>.

<sup>200</sup> *US Forces Stab Afghan Teen to Death in a Night Raid in Heart Province*, PRESS TV (July 28, 2012), <http://www.presstv.ir/detail/2012/07/28/253135/us-forces-stab-to-death-afghan-teen/>.

<sup>201</sup> Rob Norland, *Objections to U.S. Troops Intensify in Afghanistan*, N.Y. TIMES (Mar. 16, 2013), <http://www.nytimes.com/2013/03/17/world/asia/objections-to-us-troops-intensify-in-afghanistan.html>; *U.S.-Led Troops Kidnap Afghan Civilians in Nocturnal Operation*, PRESS TV (May 20, 2013), <http://www.presstv.ir/detail/2013/05/20/304501/us-night-raids-target-afghan-civilians/>.

<sup>202</sup> PRESS TV, *supra* note 201.

main detention facility in Bagram within six months.<sup>203</sup> The transfer occurred on September 10, 2012.<sup>204</sup> However, on November 18, 2012, President Karzai issued a statement in which he alleged US forces had captured and were holding Afghans in violation of the March pact.<sup>205</sup> His statement was, apparently, based on a September 17, 2012, decision by an Afghani judicial panel ruling there was no basis in Afghan law for holding Afghan citizens without a trial.<sup>206</sup> In response, the United States has argued it cannot risk the release of some high-value detainees to the notoriously corrupt Afghan court system.<sup>207</sup>

At the time I worked with the professors, I knew about the agreement between the United States and Afghanistan relating to night raids, and about the agreement to transfer control of the detainee facility at Bagram to Afghans. I also knew that the “rules of war” are different from rules of law. Nonetheless, the conversation left me deeply troubled. As I write this, I continue to see myself in the dark of an Afghani home when NATO or United States troops come in with guns raised in the middle of the night. I also wonder why, during our classes on the US criminal system, the professors did not challenge me on the fact that a country that believes in the rule of law holds individuals indefinitely without trial.

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<sup>203</sup> Mirwais Harooni, *Afghanistan and U.S. Sign Prison Transfer Deal*, REUTERS (Mar. 9, 2012), <http://www.reuters.com/article/2012/03/10/us-afghanistan-usa-prisoners-idUSBR E8280BU20120310>; *U.S. to Hand Over Afghan Prisons, Including Jail Where Korans Were Burned*, ABC NEWS (Feb. 25, 2012), <http://abcnews.go.com/International/us-hand-afghan-prisons-including-koran-burning-prison/story?id=15884015>.

<sup>204</sup> *U.S. Transfers Bagram Prison to Afghanistan*, VOICE OF AMERICA (Sept. 12, 2012), <http://www.voanews.com/content/us-afghanistan-prison/1504726.html>.

<sup>205</sup> *Karzai: U.S. Refusal to Hand over Afghan Detainees a ‘Serious Breach’ of Agreement*, CNN (Nov. 19, 2012), <http://edition.cnn.com/2012/11/19/world/asia/afghanistan-bagram-prison-transfer/index.html>.

<sup>206</sup> Heidi Vogt, *Afghans Reject US Favored Administrative Detention*, BOSTON.COM (Sept. 17, 2012), <http://www.boston.com/news/world/asia/2012/09/17/afghans-reject-favored-administrative-detention/HGrQUoFtEdlIR2QbLmG4QI/story.html>.

<sup>207</sup> *Id.*

As someone trained to make arguments, I can defend both sides of the issue. On the one hand, having been attacked, the United States had an interest in finding those who planned, financed, and committed that attack. When the Taliban refused the United States' request to expel bin Laden, the United States had a "right" to go after him. Moreover, only three countries—Pakistan, Saudi Arabia, and the UAR—recognized the Taliban as Afghanistan's legitimate government.<sup>208</sup> In attacking the Taliban, the United States was acting not only to protect its interests, but also to protect the interests of the Afghan people. Unfortunately, in military actions, it is not always possible to apply the rule of law.

On the other hand, even if the initial attack was justified, the West should have withdrawn militarily once Afghanistan had an interim government, providing only economic assistance. In addition, the West should have led by example in providing that assistance, respecting the right of Afghans to choose their own form of government and practice their religion.

What makes such arguments so hard is that I now know people on both sides. I know members of the United States military who have served multiple tours of duty in Afghanistan, at a high cost not only to themselves, but also to their families and friends. I also know Afghans whose family members have had their homes raided. While I would like to find someone to blame, at this point all I can do is apologize. I should have done what the professors urged and taken a more active role.

#### *D. Should the US Leave Afghanistan?*

Not all Afghans view the American presence in Afghanistan in the same way. Some welcomed the United States' attack and are worried about what will happen when American soldiers leave. Among those in this group are individuals who fled Afghanistan during the Taliban rule, seeking refuge in

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<sup>208</sup> *Afghanistan*, INFOPLEASE.COM, <http://www.infoplease.com/ipa/A0107264.html?pageno=3> (last visited June 30, 2013).

Iran or Pakistan. Between 2002 and 2005, more than 2.5 million Afghans left Iran and Pakistan and returned to Afghanistan.<sup>209</sup> Others criticize the United States both for the way in which it attacked Afghanistan and for its decision to stay in Afghanistan. First, they argue that punishing an entire country for Mullah Omar's decision to allow Osama bin Laden to stay in Afghanistan was a disproportionate response. Second, they criticize the methods that the United States used in its attacks. Even though the United States did not keep "body counts,"<sup>210</sup> those who have researched the issue estimate that between 1,000 and 1,300 Afghan civilians were killed between October 7, 2001, and January 1, 2002.<sup>211</sup>

As a practical matter, it seems the longer that the United States is in Afghanistan, the more we are seen as "the enemy." As one American official has stated, insider attacks by Afghan security forces on their Western allies became "the signature violence of 2012."<sup>212</sup> The increase in the number of insider attacks "has provided the clearest sign yet that Afghan resentment of foreigners is becoming unmanageable . . ." <sup>213</sup> While the professors still welcome economic aid, in particular assistance in developing Afghanistan's infrastructure, they want the military out. As they told me, the longer the Americans stay, the more powerful the Taliban becomes.

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<sup>209</sup> *Afghan Returns from Pakistan Cross 2.5 Million Mark*, UNITED NATIONS HIGH COMM'R FOR REFUGEES (July 21, 2005), <http://www.unhcr.org/cgi-bin/texis/vtx/news/openssl.htm?id=42dfb0f44>.

<sup>210</sup> CRAWFORD, *supra* note 10, at 2.

<sup>211</sup> *Daily Casualty Count of Afghan Civilians Killed by U.S. Bombing*, PUBPAGES, <http://pubpages.unh.edu/~mwhero/dossier> (last visited June 30, 2013).

<sup>212</sup> Matthew Rosenberg, *An Afghan Soldier's Journey from Ally to Enemy of America*, N.Y. TIMES (Jan. 3, 2013) [http://www.nytimes.com/2013/01/04/world/asia/afghan-soldiers-journey-from-friend-to-killer-of-americans.html?hp&\\_r=0](http://www.nytimes.com/2013/01/04/world/asia/afghan-soldiers-journey-from-friend-to-killer-of-americans.html?hp&_r=0).

<sup>213</sup> *Id.*

## V. CONCLUSION

I went to Afghanistan so that I could see at least a little of the country that so dominates the news. I want to thank the professors and staff who showed me their cities and invited me into their homes, and to the program administrators who arranged the trips to the Panjshir Valley, to a military base (Camp Phoenix), and to the United States Embassy in Kabul.

Despite the adrenaline rush that such trips produce, now that I am home my thoughts keep going back to the letter, to the reports chronicling the killing of NATO and US troops and innocent Afghans, to the wars that the Afghan people have endured during the last thirty-five years, and to thoughts about what might happen to the people I have come to know once US and NATO forces leave.

While I am deeply troubled by the fact that many Afghan women cannot leave their homes without a male relative and that, when they do, they must wear a chador<sup>214</sup> and hijab<sup>215</sup> or a burqua, I also spent time with families in which it was clear that husbands and wives and brothers and sisters loved and respected each other. While corruption has made a few Afghans rich, for most Afghans, even without war, Afghanistan is a hard place to live, both for men and for women.

Thus, my predictions for the future of Afghanistan are bleak. First, it seems that history is repeating itself. As the professors told me “Afghanistan has always defeated those that have tried to control it.” After invading Afghanistan, both the British and the Russians had to negotiate “safe passage” out of the country. Our current situation may not be all that different. I also fear what happened after the Russians left will happen again. Following the Russian withdrawal, internal fighting continued for seven years, destroying much of Kabul and only ending when the Taliban took control. Given the sharp divisions among the various ethnic and tribal

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<sup>214</sup> A chador is a long black robe.

<sup>215</sup> A hijab is a scarf that covers a woman’s head and neck.

groups, it seems unlikely that the elections scheduled for 2014 will result in a lasting coalition government.

Second, as the US and NATO forces leave, so too will much of the money that fuels the Afghan economy. Moreover, if security worsens, NGOs are likely to leave and there will be less foreign aid and investment. In the short term, this decrease in funding means that things are likely to get much harder for the typical Afghan. While Afghanistan does have vast mineral deposits,<sup>216</sup> I worry about the competition for those deposits from both the East and the West and that, because of corruption, the Afghan people will not benefit from the wealth taken from their lands.

Third, many of Afghanistan's well-educated and more liberal individuals are already leaving the country or making plans to leave.<sup>217</sup> Depending on whom you ask, this departure is either good or bad. From a "western" perspective, it is bad: It makes it less likely that Afghanistan will develop economically, and it makes it less likely that the Afghan government will protect the rights of women and children. From the point of view of the many of the ulema, it is good in that it reduces challenges to true Islam.

I hope that I am wrong. I also hope that I, and other law professors in the United States, will do what the Afghan professors have urged us to do, which is take a more active role in making suggestions that will help promote world peace. While I suspect that our suggestions will not always be those that the professors would want us to make, we can urge our government to develop a better understanding of Islamic law and the impact

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<sup>216</sup> James Risen, *U.S. Identifies Vast Mineral Riches in Afghanistan*, N.Y. TIMES (June 13, 2010), [http://www.nytimes.com/2010/06/14/world/asia/14minerals.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/06/14/world/asia/14minerals.html?pagewanted=all&_r=0); David Alexander, *Afghan Mineral Wealth Could Top \$1 Trillion: Pentagon*, REUTERS (June 14, 2010), <http://www.reuters.com/article/2010/06/14/us-afghanistan-minerals-idUSTRE65D0OH20100614>.

<sup>217</sup> Abid Amiri, *Why Are Afghans Leaving Afghanistan*, ABID AMIRI (Jan. 31, 2013), <http://abidamiri.wordpress.com/2012/02/14/719/>; Shahpoor Saber, *Young Afghans Leaving in Doves*, INST. FOR WAR & PEACE REPORTING (Jan. 7, 2011), <http://iwpr.net/report-news/young-afghans-leaving-doves>.

of our government's policies on those who do not share our core beliefs. I also hope that, even when it is hard, we practice what we preach.