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Hannibal Travis

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FREEDOM OR THEOCRACY?: CONSTITUTIONALISM IN AFGHANISTAN AND IRAQ

By Hannibal Travis *

“Afghans are victims of the games superpowers once played: their war was once our war, and collectively we bear responsibility.”¹

“In the approved version of the [Afghan] constitution, Article 3 was amended to read, ‘In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam.’ ... This very significant clause basically gives the official and nonofficial religious leaders in Afghanistan sway over every action that they might deem contrary to their beliefs, which by extension and within the Afghan cultural context, could be regarded as ‘beliefs’ of Islam.”²

“The lopsided [electoral] victory by Iraq’s Shiite Muslim alliance gives it the biggest voice in shaping the nation’s new government and constitution.... Will Sharia, or Islamic law, become the main reference for national policy on divorce, censorship, the role of women in society, broadcasting and public morality, as many Shiite clerics and their followers insist?”³

INTRODUCTION

¶1 During the past four years, the United States has replaced two dictatorial regimes in majority Islamic countries with more democratic governments. These interventions enforced the “Bush doctrine,” the declaration of President George W. Bush after the murder of nearly 3,000 Americans by Saudi and Egyptian terrorists on September 11 that all states “harboring” or supporting terrorists would see their leaders deposed and pro-American ones installed.⁴ The Bush doctrine, its adherents plausibly argue, has profoundly advanced the cause of human rights in Afghanistan and Iraq. Specifically, it liberated Afghans and Iraqis from dictatorships with two of the worst human rights records in the world, replacing them with constitutional democracies ostensibly devoted to respecting individual rights.

¶2 Activists for human rights and religious freedom have been more critical concerning the United States’ role in the political processes of Afghanistan and Iraq. They argue that the paradoxical effect of President Bush’s policies is to have replaced two unstable, marginalized regimes with what may become enduring and universally recognized Islamic fundamentalist states, albeit with greater democratic credentials.⁵ The new constitutions of Afghanistan and Iraq have enshrined Islam as the official religion and source of legislation, which no social policies may contravene. This codification of religious fundamentalism was an inevitable byproduct,

some observers contend, of the delegation of the nation-building process in both countries to religious extremists who enjoyed devoted followings of armed militiamen.

¶13 This article explores this debate by analyzing legal developments in Afghanistan and Iraq, with a particular focus on Afghanistan's new constitution, ratified in early 2004 before the first post-Taliban elections were held. The Afghan constitution symbolizes the unmistakable liberation of Afghanistan's people from the despotic and even genocidal rule of the Taliban, but its many provisions requiring compatibility of government policy with an unwritten code of Islamic law may allow grave human rights violations to continue, and frustrate democratic demands for respect for international human rights standards and the country's civil law traditions. Accelerated judicial reform will be necessary to ensure that the provisions in the constitution for judicial review of laws for conformity to religious doctrine will not be utilized to implement theocratic rule, which is the result that many powerful Afghans, possessing armed militias used to intimidate their political opponents, are working towards.

¶14 Afghan modernizers and fundamentalists have enjoyed varying degrees of foreign support and intervention throughout the twentieth century. Depending on how the new constitution is interpreted, the past support of the U.S. and its allies to some of the most radical elements of the fundamentalist camp may have assured their enduring victory. Part I of the Article explores the historical context in which Afghanistan's new constitution was drafted and ratified, and the unique responsibility of the U.S. and the Soviet Union in creating that context. Part II traces the rise and fall of the Taliban theocracy, which murdered thousands of political opponents and religious minorities, and intensified the fundamentalist oppression of Afghans instituted after the fall of the communist Afghan regime. Part III describes how after the rout of the Taliban, the U.S. accepted Afghan fundamentalists into prominent positions from which they could control the process by which Afghanistan would draft and ratify its new constitution and develop a post-Taliban legal system. Part IV proposes some test cases for judging the implementation of Afghanistan's new constitution and judicial reform efforts from the perspective of democracy and individual rights, including new bans on blasphemy and political secularism that are ripe for systematic abuse, plans to revive fundamentalist punishments avoided by most modern states such as stoning and amputation, and the ongoing oppression and enslavement of Afghan women and girls.

¶15 The article concludes by drawing some parallels between the Afghan constitutional process and the ongoing process of transitioning Iraq from a nominally socialist dictatorship with a genocidal record into a so-called "Islamic democracy."⁶ Many Iraqis, and almost all residents of majority Kurdish areas of northern Iraq, report being better off as a result of the U.S.-led operation to remove Saddam Hussein from power.⁷ But as in Afghanistan, the Iraqi delegates handpicked by the U.S and the U.N. to draft a constitution have established Iraq as a religious state. At the behest of powerful fundamentalists with private armies, the drafters of the interim Iraqi constitution included language providing for judicial review of legislation for conformity to an unspecified, but probably fundamentalist, version of religious law. At the same time, more than 100,000 Iraqis have died violently since the war began; Iraqi fundamentalists are murdering and raping members of the indigenous Christian population at an accelerated pace, prompting tens of thousands to flee the country; and Iraqi women are facing new restrictions on their freedom of movement and dress, as well as deprivation of their rights in marriage and divorce. The actions and public statements of Iraq's most prominent religious leaders, to which the likely leaders of the new Iraq will defer if present trends continue, raise precisely the same sorts of concerns as the fundamentalist policies that have continued in Afghanistan.

HISTORICAL CONTEXT OF THE RISE OF THE TALIBAN THEOCRACY

Pre-Constitutional Afghanistan

¶16 Like many countries, Afghanistan had no written constitution prior to the twentieth century. The land was ruled either as a province of another empire, or independently by an Afghan monarch or local tribal leaders.⁸ For many centuries, the legal system had its basis in a combination of Sharia law⁹ and ancient customs such as the *jirga*, a council of tribal elders convened to settle important issues,¹⁰ and Pashtunwali, the Pashtun code of conduct emphasizing conservative family values and the seclusion of women from public view.¹¹ Around the turn of the 20th century, Afghanistan opened up to secular influences and women's rights by abolishing some forced marriages, raising the minimum marriageable age, liberalizing women's access to divorce and rights of inheritance, and prohibiting extravagant gifts to a bride's family that could be used in essence to purchase a girl from her parents.¹²

Constitutional Monarchy

¶17 The events leading up to and following the adoption of the first Afghan constitution would be repeated many times in Afghan history: a set of policies looking towards the future and the West infuriated fundamentalists, whose opposition was violently suppressed but eventually succeeded, with foreign intervention, in deposing the regime responsible for the new policies.

¶18 On April 9, 1923, Amanullah Khan, the Amir of Afghanistan, secured the ratification by a Loya Jirga of Afghanistan's first written constitution.¹³ The 1923 constitution set forth a blueprint for modernizing Afghanistan and assuring greater rights for Afghan women and religious minorities within the framework of Islamic governance. It guaranteed that all Afghan subjects would have "equal rights in accordance with Sharia and the laws of the state."¹⁴ Some Afghans interpreted this provision as entitling Afghan women to citizenship and equal rights.¹⁵ The constitution promised greater rights to religious minorities such as the Hazaras, who as Shia Muslims had been labeled as infidels and massacred and enslaved in the nineteenth century for this reason.¹⁶ It abolished torture, slavery, and forced labor¹⁷; created a legislature, although the Amir would appoint the Prime Minister and many of its members¹⁸; and decreed that followers of religions other than Islam, such as Hinduism and Judaism, were entitled to the protection of the state.¹⁹ Elementary education became compulsory for all Afghan "citizens."²⁰

¶19 Despite its modernizing aspirations, the 1923 constitution established what would be considered theocratic rule by contemporary standards. A "theocracy," literally speaking, would be the direct rule by a divine being on Earth²¹; this possibility having been disavowed by mainstream Christianity and Islam, most theocracies in fact consist of "government by priests or men claiming to know the will of God."²² By this definition, Afghanistan's 1923 constitution was theocratic by virtue of the authority it invested in men claiming to know the will of God. The constitution made the "sacred" and official religion of the state, and enshrined the King as the "servant and the protector of the true religion of Islam."²³ It instructed legislators to give "careful consideration" to the "requirements of the laws of Sharia."²⁴ Perhaps most importantly, it provided that in Afghan courts of justice, "all disputes and cases will be decided in accordance with the principles of Sharia and of general civil and criminal laws."²⁵ The judiciary, in this instance as in others, served as the key instrument of fundamentalist Islamic theocracy.²⁶

¶10 Taking on centuries-old customs, Amir Amnullah Khan introduced ambitious legislative reforms improving Afghan women's rights. The Amir declared that Afghan women would no

longer “be treated as second-class Muslims.”²⁷ In 1921, he enacted a Family Code banning child marriage, marriages between close relatives, excessive dowries, and the exchange of women as “blood money” in payment of interfamilial disputes.²⁸ He opened girls’ schools and sent women students abroad for higher education.²⁹ After 1923, the Amir introduced Afghanistan’s first civil code,³⁰ which abolished polygamy and marriages to all girls under the age of 18.³¹ His wife Soraya appeared unveiled in public and participated actively in politics, citing the example of women in the “early years of Islam.”³²

¶11 Not satisfied with the constitution’s gestures towards theocracy, and disappointed with King Amanullah’s record as the “protector” of Islam, Afghanistan’s religious elite quickly moved to overthrow and reverse his modernizing reforms. The head of a prominent religious family, which served as “king makers” in Afghan society,³³ immediately denounced the 1923 constitution as a “communist” document.³⁴ A rebellion reached the outskirts of the capital Kabul, and was only repelled when the Amir mobilized his new air force to strafe and bomb the advancing insurgents,³⁵ and then executed the revolt’s leaders.³⁶

¶12 Rebels having nearly toppled his regime, the Amir called a Loya Jirga to amend the 1923 constitution in several important respects designed to pacify Afghanistan’s religious elite.³⁷ One amendment made the Hanafi school of Islamic law the official religious rite of Afghanistan.³⁸ Additional concessions from the Amir included “watering down” the rights of women,³⁹ reintroducing torture when “in accordance with the rules of the Sharia,”⁴⁰ and allowing a Council of Islamic Scholars to “decide whether new laws were in accordance with Islamic law.”⁴¹

¶13 After Amir Amanullah became King of Afghanistan in 1926, he announced further sweeping reforms aimed at helping Afghan women.⁴² He endorsed expanding Afghan girls’ access to education, proclaimed his opposition to the compulsory veiling of women, and imposed Western dress within the capital of Kabul.⁴³ In response, Afghan religious leaders once again led conservative Afghan tribes in rebellion. Under siege, King Amanullah abdicated the throne in early 1929.⁴⁴ Historians tend to blame the King’s overhasty reforms for his downfall, especially those dealing with mandatory veiling, the seclusion of women, and forced and underage marriages.⁴⁵ But the West failed to support the King who admired its values, and Britain actively worked to overthrow him. Many Afghans and even the British press believed that the British Empire was behind Amanullah’s fall from power, given the Empire’s poor relations with him.⁴⁶

¶14 King Amanullah’s successors quickly overturned his reforms. But in doing so, they did not return Afghanistan to a pre-modern or pre-constitutional condition. Instead, they established an Islamic constitutional monarchy that, despite its theocratic aspects, also retained some of the 1923 constitution’s gestures towards reform.

¶15 A Loya Jirga in 1930 created Afghanistan’s next stable government and pronounced Nadir Shah as Afghanistan’s King.⁴⁷ The King promulgated the second Afghan constitution in 1931.⁴⁸ With a few minor changes, it endured as Afghanistan’s governing charter for more than 30 years.⁴⁹ Like the 1923 constitution, it embraced tradition while looking tentatively towards the future. On the side of tradition, it made the Hanafi school of Islam the state religion, established a requirement that all legislation conform to the Sharia, and gave religious authorities the power to review Afghan laws and governmental policies for correspondence to Sharia law.⁵⁰ But it also guaranteed compulsory elementary education, freedom of the press within the limits of the Sharia, and a limited role for democratically elected officials to participate in the drafting of legislation.⁵¹ Afghan women became eligible to vote in elections, although the authorities later declared this provision to be incompatible with Islamic law.⁵²

¶16 King Nadir Shah's government enforced Afghan women's obligation to wear the all-covering *burqa*, a tent-like covering that obscures the entire person and leaves only a mesh opening to see through.⁵³ The new King reinvigorated *purdah* (the Persian word for "curtain"), or the prohibition against women participating in public life or having contact with any men other than their husbands or those close relatives whom they are forbidden to marry.⁵⁴ In Afghanistan, these "restrictions severely limit women's activities, including access to education and employment outside the home. Many [women] are largely confined to their homes."⁵⁵

¶17 The King was assassinated in 1933,⁵⁶ leaving his throne to his 19-year old son Zahir.⁵⁷ King Zahir Shah would preside over the slow improvement of living conditions in Afghanistan for over 40 years after his father's death in 1933.⁵⁸ As Prime Minister, the King's first cousin Muhammed Daoud Khan strove to develop Afghanistan's economy by securing vast amounts of economic and military aid from the neighboring Soviet Union.⁵⁹ The U.S. also initiated several important development projects in Afghanistan, but declined to supply military aid.⁶⁰

¶18 In 1959, Prime Minister Daoud created a major cultural crisis when the wives and daughters of the Afghan royal family appeared unveiled for the first time since Amanullah's reign.⁶¹ Many religious leaders publicly condemned this display, but Daoud argued that Islam did not make the veiling and seclusion of women obligatory.⁶² Other educated women, particularly in Kabul, then began to abandon the veil, including growing numbers of nurses, midwives, and teachers.⁶³ In response, the more conservative mullahs provoked riots and acid attacks on unveiled women,⁶⁴ until Daoud had about 50 of them jailed and charged with treason and heresy.⁶⁵ Daoud's government quelled an armed uprising in Kandahar with advanced weaponry obtained from the Soviet Union.⁶⁶ Daoud finally released the mullahs from custody, and they brought the unrest to a halt, agreeing that each Afghan family would be allowed to decide for itself whether its women would practice *purdah*.⁶⁷

¶19 In the 1960s, Afghanistan's third constitution propelled the nation further towards democracy and respect for human rights, but like its 1923 model it would eventually fall to a combination of foreign intervention and the violent opposition of local radicals. This time, the communists and fundamentalists would divide the country between them.

¶20 King Zahir Shah set out to establish a constitutional monarchy that would provide for more democratic input and thereby build public support for the regime.⁶⁸ Despite Daoud's large victories in winning superpower development aid and ensuring greater participation for Afghan women in public life, the King successfully pressured him to resign as Prime Minister in 1963.⁶⁹ The next year, a Loya Jirga ratified a new constitution, drafted with French assistance.⁷⁰ Afghanistan's 1964 constitution "limited the monarch's absolute power through the creation of a parliament and the clear separation of powers."⁷¹ The King could no longer enact laws without the approval of both houses of parliament.⁷² But he retained broad executive powers, including the powers to declare war and command the army; to appoint the Prime Minister and one-third of the Afghan Senate, dissolve the parliament, and veto legislation; and to appoint the members of the Supreme Court.⁷³ The lower house of the Afghan parliament and one-third of the Afghan Senate would be elected to four-year terms by direct elections, subject to the King dissolving parliament and calling new elections at any time and for any cause.⁷⁴

¶21 The 1964 constitution loosened the requirements of previous Afghan constitutions that the state be governed in accordance with Sharia law.⁷⁵ Like the 1923 constitution, it recognized Islam as the "sacred" and official religion of Afghanistan.⁷⁶ But the 1964 constitution did not require that all Afghan laws conform to Sharia as such, stating that "there shall be no law repugnant to the basic *principles* of the sacred religion of Islam and the other values embodied in

this constitution.”⁷⁷ Similarly, the constitution no longer anointed the King as the “protector of the true religion of Islam”⁷⁸; instead it urged him to “protect the sacred *principles* of the religion of Islam.”⁷⁹ These references to general “principles” provided the legislature with greater leeway to enact laws that presented some tension with the tenets of Islamic law taken literally.⁸⁰ Finally, the 1964 constitution no longer gave Sharia equal status with Afghanistan’s “general civil and criminal laws,”⁸¹ but made it authoritative only where no statute existed in the area.⁸²

¶22 One victory for religious conservatives in the 1964 constitution would have important consequences in post-Taliban Afghanistan, and that is the empowerment of the judiciary to enforce the Hanafi school of Islamic Sharia jurisprudence as Afghan law. The Hanafi school is perhaps the least accommodating of the four major schools of Sharia law to the autonomy of women and children, as it has traditionally been construed to allow marriages to be contracted by a guardian on behalf of a minor child and to forbid women from securing a divorce under most circumstances.⁸³ The 1964 constitution stated that where no law existed in an area, “the provisions of the Hanafi jurisprudence of the Shariat of Islam shall be considered as law,”⁸⁴ and required Afghan court, to render justice in cases not controlled by the constitution or statutory law “by following the basic principles of the Hanafi jurisprudence of the Shariat of Islam. . . .”⁸⁵

¶23 Although many subsequent commentators have stressed that the 1964 Constitution granted greater rights to Afghan women,⁸⁶ the document did not make substantial advances in reforming women’s rights within the legal or judicial system. The 1964 constitution gave all Afghan “people” equal rights and obligations before the law, as the 1923 constitution had given all Afghan “subjects” equal rights and duties before the law.⁸⁷ Following the example of the 1923 constitution, women’s equality and most of the other rights recognized in the 1964 constitution, including the right to liberty, property, freedom of speech and association, education, and employment, could be limited by provisions of the law.⁸⁸ The 1964 constitution did innovate by granting Afghan women unprecedented opportunity to participate in government. Women won the right to vote in parliamentary elections, be elected to parliament, serve as members of government, and even become government ministers.⁸⁹ These rights became a reality for the first time in Afghan history, as women helped vote several of their number into parliament,⁹⁰ and a woman became Minister of Public Health in 1965.⁹¹

¶24 Ultimately, the 1964 constitution’s most enduring legacy may be that radical elements in Afghan society misused its freedoms to prepare the way for dictatorship and the deaths of countless Afghans. Afghan communists, some of whom had been barred from Kabul University or recalled from study or work in the U.S. for expressing their radical ideas, became free to organize.⁹² Although the Kabul area elected a few Afghan women and leftists as representatives in the first elections under the 1964 Constitution, the parliament as a whole was dominated by the rural landowners and conservative religious leaders who could afford the high costs of running for office,⁹³ which led many progressive young students and middle-class Afghans in Kabul to despair of democracy, and seek more radical solutions.⁹⁴ In 1965, Muhammed Taraki and Babrak Karmal founded the People’s Democratic Party of Afghanistan (PDPA), the Communist Party of Afghanistan “in all but name.”⁹⁵ The PDPA attracted a growing membership among young students and intellectuals in Kabul University and the urban Afghan middle class.⁹⁶ Afghan voters elected three PDPA members to the Afghan parliament in 1965, including Karmal.⁹⁷ The Principal of Kabul Teachers College, Hafizullah Amin, joined the PDPA and was elected to parliament in 1969.⁹⁸ Each of these three men – Taraki, Karmal, and Amin – would go on to assume the helm of dictatorial left-wing Afghan regimes.

¶25 Prominent Afghan fundamentalists lacked the public support necessary to be elected as such to the parliament as PDPA members were, but they organized disciplined cadres of followers during the 1960s and 1970s. The ideas of the Egyptian fundamentalist Sayyed Qutb, the “intellectual light” of the Muslim Brotherhood, “attracted particular interest” in the Kabul Sharia faculty,⁹⁹ which Kabul University opened in 1952.¹⁰⁰ Al-Aznar of University in Egypt, which had taken the Kabul Sharia faculty under its wing,¹⁰¹ was a center of the Muslim Brotherhood’s fundamentalist political activity.¹⁰² The head of the Kabul Sharia department, Professor Ghulam Muhammed Niazi, was deeply influenced by the Muslim Brotherhood’s campaign for Islamic fundamentalist rule while studying at al-Aznar University.¹⁰³ The fundamentalist program of the Muslim Brotherhood and its progeny of jihadist groups is, in brief, a holy war that would replace the corrupt monarchs of Muslim countries with Islamic states that would govern all aspects of life, strictly segregating men and women and providing “humanity a complete cure for all its ills.”¹⁰⁴

¶26 From his perch as professor of Sharia law, Professor Niazi led the fundamentalist movement in Afghanistan. He established cells in Kabul and Paghman dedicated to formulating strategy, and developed contacts with sympathetic government officials.¹⁰⁵ Joining Professor Niazi in his campaign for an Islamic revolution in Afghanistan were two other graduates of al-Azhar University, whose fundamentalism would determine the course of Afghan history for generations: Burhannudin Rabbani and Abdul Rasul Sayyaf.¹⁰⁶ Mr. Rabbani, who had translated the writings of Sayyed Qutb into the Afghan language of Dari,¹⁰⁷ succeeded Professor Niazi as Amir of the Islamic Association of Afghanistan in 1972.¹⁰⁸ Around this time, a young student leader at Kabul University named Gulbuddin Hekmatyar joined the Muslim Brotherhood¹⁰⁹ and shortly became famous for throwing acid in the faces of unveiled Afghan women.¹¹⁰ Rabbani, Sayyaf, and Hekmatyar would each go on to lead the fundamentalist revolt against the Afghan constitutional monarchy, then the Afghan communists, and finally against the Soviet occupation of Afghanistan. Eventually, each of them would govern entire mini-states, but none of them could ever quite manage to bring all of Afghanistan under his faction’s control.¹¹¹

Socialist and Communist Dictatorship

¶27 Despite Afghanistan’s slow but steady progress in promoting democratic input and women’s rights under Zahir Shah, Afghan leftists demanded immediate and sweeping change. But the socialist and communist ideology to which they turned sparked implacable opposition in Afghanistan’s conservative religious leaders, setting the stage for the decades-long struggle between Soviet-backed leftist governments and Pakistani-based fundamentalist *jihadi* fighters

¶28 With extremists organizing feverishly, the Afghan economy entered a tailspin in the early 1970s. Government corruption and a three-year drought from 1969 to 1972 brought on a famine that killed between 100,000 and 500,000 Afghans.¹¹² The Afghan famine provided an opening for former Prime Minister Daoud, still popular with the Afghan military,¹¹³ to overthrow the monarchy in 1973.¹¹⁴ Young officers trained in the Soviet Union executed the coup.¹¹⁵ Afghanistan became a republic, and Daoud its first President.¹¹⁶ Half of his cabinet ministers in were communists allied with the Parcham faction of the PDPA led by Babruk Karmal, and hundreds more communists entered government ministries and provincial officialdom.¹¹⁷

¶29 Daoud saw the fundamentalists as the greatest threat to a modern Afghanistan, so he arrested Professor Niazi and 200 other fundamentalist plotters in Kabul.¹¹⁸ By one account, this action began the war between leftists and fundamentalists that continued for almost 20 years, until the near-obliteration of the leftists and the communist movement after the dissolution of the

Soviet Union and the *mujahideen* victory in 1992.¹¹⁹ The fundamentalists who had fled to Pakistan from Daoud's mass arrests, including Rabbani and Hekmatyar, helped organized a holy war against Daoud's regime from their new base in Pakistan.¹²⁰ The most successful operation was an incursion from Pakistan into Afghanistan's Panjshir valley led by Ahmed Shah Massoud, who would become one of Rabbani's best commanders.¹²¹ The revolution failed, however, and the fundamentalist movement splintered into factions led by Rabbani and Hekmatyar.¹²²

¶30 The 1977 constitution granted President Daoud near-absolute powers, a common theme among Afghan regimes following the fall of the monarchy.¹²³ It was otherwise a profoundly leftist document, contemplating dramatic economic and judicial reforms.¹²⁴ All laws contrary to the "basic principles" of the religion of Islam remained unconstitutional,¹²⁵ and judges in the Afghan courts would decide cases before them not governed by statutory law according to Hanafi law.¹²⁶ But for the first time in Afghan history, the country's constitution specifically stated that "women and men," and not simply all Afghan "subjects" or "people," were entitled to equality before the law and protection against discrimination.¹²⁷ A unicameral legislature elected by all Afghans over the age of 18, half of which would be reserved for farmers and the working class, would draft legislation.¹²⁸

¶31 The 1977 constitution was never truly implemented, because even as it was being prepared, the Soviet Union became concerned that Daoud was being drawn into a pro-American stance with Saudi money, and began pressuring the divided Afghan communists to unite to overthrow him, which they did.¹²⁹ When Daoud issued an order for his communist opponents to be arrested, it triggered a revolution.¹³⁰

¶32 During its long reign, and despite massive foreign aid, the monarchy had done little to improve Afghanistan's standing as one of the poorest, least healthy, and worst educated countries in the world. In the late 1970s, even after some of Daoud's reforms, 50% of Afghan children died before reaching the age of five, 80% of Afghan children received no education, and "the per capita income, at \$157, was one of the lowest in the world."¹³¹

¶33 In April 1978, communist military officers turned Afghanistan's air force and tanks against the Daoud regime.¹³² The air force bombed the presidential palace, killing President Daoud and many members of his family.¹³³ The first decree of the leaders of the revolution bestowed ultimate authority on the head of the PDPA, Nur Muhammed Taraki.¹³⁴ Another decree gave men and women equal rights, prohibited forced marriages, established a minimum marriageable age of 16 for girls, and reduced the bride price to a low fixed minimum amount to discourage the widespread sale of young Afghan girls by their parents.¹³⁵ "The Government called for women to enjoy freedom, to dress as they please, work in the civil service, armed forces and other institutions and enjoy other equal rights."¹³⁶ Taraki's regime introduced universal education for boys and girls and a campaign against illiteracy, and enacted a "far-reaching redistribution of land" from large landlords to peasants.¹³⁷

¶34 President Taraki's government rapidly lost control of the country to anti-regime forces, which in early 1979 led several Afghan provinces in open rebellion, including Nuristan and Hazarajat.¹³⁸ Iranian fundamentalists, fresh from establishing the Iranian theocracy under Ayatollah Ruhollah Khomeini, inspired a revolt in the large Afghan city of Herat close to the Iranian border,¹³⁹ drawing on outrage there against the government's efforts to promote Afghan women's literacy.¹⁴⁰ An army officer named Ismail Khan organized a mutiny of the Afghan armed forces in the Herat area.¹⁴¹ In response, the government bombed the city and waged a devastating assault with tanks and helicopters, killing up to 20,000 people and razing many

buildings.¹⁴² These events prompted Prime Minister Amin, who had gained influence over the Afghan security services, to seize power, killing his former comrade Taraki.¹⁴³

¶35 In July 1979, U.S. President Jimmy Carter signed a National Security Directive authorizing secret American aid to the Pakistan-based rebellion against the Afghan government.¹⁴⁴ President Carter's National Security Adviser advised him at the time that this aid would likely result in a Soviet invasion, and later boasted of "drawing the Russians into the Afghan trap."¹⁴⁵ On December 27, 1979, Soviet forces in and around Kabul captured the main government ministries, neutralized key Afghan army units, and fanned out to other major Afghan cities such as Herat and Kandahar.¹⁴⁶ Soon the Soviet occupying army reached 85,000 men.¹⁴⁷ Before the Red Army's defeat almost another 700,000 men would follow.¹⁴⁸

¶36 The Soviets installed PDPA founder Babruk Karmal as President of Afghanistan. Karmal promulgated a new constitution in 1980 that purported to establish the rule of the Afghan people and recognize a similar list of individual rights as those recognized in previous constitutions.¹⁴⁹ The constitution no longer enshrined Islam as a bulwark of the government's legitimacy.¹⁵⁰ All political parties other than the PDPA were outlawed.¹⁵¹ With the Red Army occupying the nerve centers of Afghan society, moreover, the Soviet leadership, rather than the PDPA or the Afghan people, was the real power in Afghanistan during the 1980s.¹⁵²

¶37 Karmal and his Soviet handlers reaffirmed and expanded the efforts of Daoud and Taraki regimes before them to promote greater equality for Afghan women. The communists "officially sanctioned a wider public role for women, whose status improved."¹⁵³ By 1985, 65% of the students at Kabul University were women, and Afghan women worked in most government agencies, social organizations, factories, the national airline, and the health care sector.¹⁵⁴ By the time the communists lost power, "women accounted for 70 percent of teachers, 50 percent of government workers, and 40 percent of medical doctors."¹⁵⁵ Women worked as police officers, members of the military, and journalists.¹⁵⁶ Afghan women increasingly appeared unveiled in public, as their counterparts in Soviet Central Asia had done decades previously.¹⁵⁷ Communist reforms intruded into Afghan family life when the communists banned the purchase and sale of young girls as wives, and provoked rage by demanding that fathers allow their daughters to learn to read.¹⁵⁸ The regime's family courts were "mostly presided over by female judges" and protected women's rights in marriage and divorce and to equitable child custody and support.¹⁵⁹

¶38 Whatever hope existed for true equality between Afghan women and men, rich and poor, was lost in the genocidal war between Soviet and Afghan communist forces and the fundamentalist insurgents backed by the Western and wider Islamic worlds.¹⁶⁰ Both sides abandoned laws and constitutions in a common descent into wanton violations of human rights.

¶39 U.S. President Ronald Reagan and Pakistani dictator Zia ul-Haq directed billions in American military aid for the *mujahideen*, mostly to "the more extreme Sunni fundamentalist faction led by Gulbuddin Hekmatyar."¹⁶¹ Hekmatyar used the money to organize a tightly disciplined faction for the day when he would "impose an authoritarian Islamic state that would sequester women and punish Moslems who don't practice their faith."¹⁶² With great violence, his party forced Afghan women refugees in Pakistan to bury themselves in *burqas*.¹⁶³ Several Afghan women were murdered in Pakistan simply for failing to cover their hair.¹⁶⁴

¶40 Saudi Arabia favored the armies of Abdul Rasul Sayyaf,¹⁶⁵ whose party "recruited thousands of fighters from Arab countries."¹⁶⁶ Like Hekmatyar, Sayyaf had little indigenous support in Afghanistan, but grew powerful because of the prolific Saudi money and foreign weaponry at its disposal.¹⁶⁷ In 1980, Sayyaf recruited a number of "Afghan Arabs" to the Afghan cause,¹⁶⁸ including Osama bin Laden, who was working with the CIA at the time.¹⁶⁹ The

CIA supported Pakistani efforts to “recruit radical Muslims from around the world” to fight in Afghanistan.¹⁷⁰ Over 35,000 radicals from Muslim countries, mostly Arabs, signed up to fight in the “holy war,”¹⁷¹ and 65,000 had “direct contact” with the war.¹⁷² Over 12,000 Arabs and others received training in “bomb-making, sabotage and urban guerrilla warfare” in camps the CIA helped build.¹⁷³ These Arab fighters would develop into the *al Qaeda* terrorist organization and become the military backbone of the Taliban movement.¹⁷⁴

¶41 By 1987, the communists and fundamentalists had killed more than one million Afghans by some estimates,¹⁷⁵ and had driven another seven million from their homes.¹⁷⁶ The Soviets carpet bombed major Afghan cities such as Herat and Kandahar into ruins, wiped half of Afghanistan’s villages off the map, and destroyed much of the country’s farmland.¹⁷⁷ Nevertheless, the Afghan resistance continually replenished its dead with new recruits from the millions of refugees in Pakistan and Iran, and armed them with fresh infusions of American and Saudi aid.¹⁷⁸ The *mujahideen* gained control of up to 90% of the countryside and became “immensely wealthy” by making it the world’s second largest opium producing land.¹⁷⁹

¶42 Although the scale of the bombing and shelling of Afghan cities and towns posed the greatest threat to human rights, the *mujahideen*’s fundamentalist policies promised to overturn decades of progress towards including Afghan women in public life. During the 1980s, women rarely walked the streets in rebel-controlled regions of Afghanistan.¹⁸⁰ “Those who leave their homes wear the chador [or *burqa*], a voluminous shroud covering the wearer from head to toe, and may only survey the world through a 4-by-4-inch rectangle of netting extending from the tip of the nose to the eyebrows.”¹⁸¹ In Pakistani refugee camps run by the rebels, women were denied access to areas containing men, and prohibiting from seeing male doctors.¹⁸² (When the Taliban continued these policies, the U.S. cited them to help justify the war.¹⁸³)

¶43 In 1987, the new Soviet leader Mikhail Gorbachev decided to withdraw entirely from Afghanistan.¹⁸⁴ The Soviets planned to leave the country to Najib Allah, the former head of the Afghan secret police, who had taken over from Karmal as the Afghan communist leader in 1986.¹⁸⁵ Najib Allah convened a Loya Jirga in 1987 to signal the moderation of the communist regime’s policies. The 1987 constitution it passed once again enshrined Islam as the sacred religion of Afghanistan and provided that no law could be contrary to its “principles” and the other values in the constitution.¹⁸⁶ It guaranteed equal rights to men and women and among religious minorities in a similar manner to previous constitutions,¹⁸⁷ and provided for a number of individual rights to be defined in accordance with the law.¹⁸⁸ The ruling communist PDPA party lost its majority of seats in parliament after elections held in 1988 pursuant to the new constitution, and a member of Daoud’s pre-communist government became Prime Minister.¹⁸⁹ Najib Allah even reserved seats in parliament for *mujahideen* leaders, and invited them to lay down their arms and participate in a mixed government, an offer that they refused.¹⁹⁰

¶44 The Soviets completed their withdrawal from Afghanistan in 1989.¹⁹¹ The day after the last troops had returned, Gorbachev proposed a cease-fire between the communists and fundamentalist parties to U.S. President George H.W. Bush, with the two superpowers agreeing to halt shipments of weapons until democratic elections under U.N. supervision could be held.¹⁹² The Bush administration and the Afghan rebels refused to negotiate, with the result that for years, the *mujahideen* supplied by the U.S. continued devastating rocket attacks on Afghan towns and cities, killing up to 40 people in each blast.¹⁹³

¶45 Nevertheless, the Afghan communist regime of Najib Allah survived, sustained by a combination of rebel infighting and billions of dollars in Soviet military aid.¹⁹⁴ Najib Allah convened a Loya Jirga in 1990, promising to achieve national reconciliation and moderate the

communist face of the Afghan government. The resulting 1990 constitution proclaimed Afghanistan a multi-party state to be governed according to laws in conformity with the principles of Islam, including the right to own and inherit property pursuant to Sharia law.¹⁹⁵ The commanding heights of the economy remained state property, but private investment was allowed, at least in theory.¹⁹⁶ The National Assembly, selected by a mixture of direct elections and appointments as under previous constitutions, approved laws prior to the President's signature,¹⁹⁷ with a Constitutional Commission exercising limited review.¹⁹⁸

Fundamentalist Rule

¶46 As many had predicted, the victory of the Afghan rebels brought civil war, fundamentalist outrages, and thousands of atrocities against civilians. The "Islamic revolution" triumphed in Kabul in April 1992.¹⁹⁹ The military defense of Kabul unraveled due to the collapse of the Soviet Union in 1991 and the defection of Afghan communist military commander Rashid Dostum to the rebels in March of 1992.²⁰⁰ But after the communist regime fell, the war continued. With no communists left to fight, the *mujahideen* leaders were left to wage a bitter struggle for power among themselves,²⁰¹ as Najib Allah had predicted in 1990.²⁰²

¶47 The *mujahideen* perpetrated frequent massacres and "indiscriminate killing," as well as "rape, torture and looting."²⁰³ Joined by General Dostum's tanks, Hekmatyar's forces finished the job of destroying Afghanistan's housing stock and architectural heritage by rocketing the Afghan capital Kabul into ruins.²⁰⁴ Almost 20,000 Afghans were killed or injured during the fighting in 1993.²⁰⁵ In 1994, the United Nations reported that Kabul, spared the type of bombing to which Kandahar had been subjected by the Soviets, had become "the most destroyed city in Afghanistan."²⁰⁶ The warring factions killed about 50,000 Kabulis²⁰⁷ and committed many "medieval atrocities."²⁰⁸

¶48 The victorious fundamentalist armies subjected Afghan women to some of the worst treatment in Afghan history.²⁰⁹ The State Department reported that the *mujaheddin* were responsible for "innumerable cases of rape."²¹⁰ Human Rights Watch described 1992-1995 as the worst period in Afghan history, replete with "mass rapes" and the indiscriminate slaughter of civilians.²¹¹ *Mujahideen* fighters kidnapped many Afghan women for purposes of sexual slavery, as a "method of intimidating vanquished populations and of rewarding soldiers."²¹²

¶49 While the soldiers of the victorious rebel armies ran wild, discipline was reserved for Afghan women. In 1994, the Supreme Court of the Islamic state of Afghanistan issued a series of rulings requiring a woman to "wear a full-body veil"²¹³ and stating that she "must not leave her house without her husband's permission," and "must not look at strangers."²¹⁴ Other courts issued rulings ordering that women be stoned to death for adultery or other crimes.²¹⁵

¶50 The "valiant and courageous Afghan freedom fighters"²¹⁶ also persecuted religious minorities viciously.²¹⁷ On February 11 1993, the military forces of President Burhanuddin Rabbani and his ally Abdul Rasul Sayyaf occupied a Kabul suburb populated largely with minority Shia Hazaras. Their armies killed "up to 1,000 civilians", beheading old men, women, children and even their dogs, stuffing their bodies down the wells.²¹⁸

¶51 Finally, Afghanistan under *mujahideen* rule became known for training and harboring international terrorists. Ramzi Yousef, who masterminded the 1993 World Trade Center bombing, had fought under the command of Abdul Rasul Sayyaf, the junior partner in Rabbani's *mujahideen* government.²¹⁹ The U.S. government issued a report in the 1990s in which it cited Saudi-backed *mujahideen* commander Sayyaf for "continuing to harbor and train potential

terrorists.”²²⁰ Sayyaf’s faction maintained close contact throughout the 1990s with Osama bin Laden, and welcomed him back to Afghanistan in 1996.²²¹

RISE AND FALL OF THE TALIBAN THEOCRACY

The Atrocities and Tyranny of the Taliban

¶52 Almost three years after the fall of the communist government, the *mujahideen* had failed to establish an effective central government or national judicial system.²²² Instead of establishing law and order, their forces were killing, raping, and looting at will, and had “blocked food and medical supplies desperately needed by [the Afghan] people.”²²³ An estimated 100,000 Afghans died in Kabul alone prior to the Taliban takeover in 1996.²²⁴ All told, about 400,000 Afghan civilians died in the civil wars and humanitarian disasters of the 1990s.²²⁵

¶53 In early 1994, according to their own legend, a group of former *mujahideen* fighters and Islamic students, or Taliban, joined together to fight the “Muslims who had gone wrong,” and started by freeing young boys and girls from local warlords who had kidnapped them for rape.²²⁶ As the future President of Afghanistan, Hamid Karzai, testified before Congress, the “Taliban emerged when Afghans were desperately looking for a savior,” and their “emergence was supported by the majority of the Afghan people” who hoped that they would “end the bloodshed” and bring “peace and stability.”²²⁷ The Taliban selected Muhammed Omar as their leader, a village mullah from a backward area of southern Afghanistan who had fought in the American-backed *jihad* against the post-Soviet Afghan government of Najib Allah.²²⁸

¶54 The U.S. and its allies in Pakistan and Saudi Arabia initially supported the Taliban movement.²²⁹ Their critical military, financial, and diplomatic aid to the Taliban transformed a ragtag gang of fighters into a sophisticated army with tanks, artillery, bombers, and an intelligence capability.²³⁰ With fresh infusions of foreign financing and manpower for each new offensive, the Taliban defeated every major *mujahideen* commander. The Taliban captured Kandahar in 1994 largely by bribing local commanders with over \$1.5 million probably provided by Saudi Arabia via Pakistan.²³¹ They doled out more cash to buy control of Uruzgan and Zabul provinces,²³² and occupied Herat with tens of thousands of Pakistani recruits and “arms, ammunition, and vehicles provided by Pakistan and Saudi Arabia.”²³³ In 1996, Saudi and Pakistani intelligence orchestrated the triumph of the Taliban revolution by helping ensure the fall of Kabul and Jalalabad.²³⁴ As many as 8,000 more residents of Kabul died in the fighting and the ensuing Taliban atrocities.²³⁵ In response, many of the *mujahideen* leaders whose factions had opened the way for the Taliban revolution by abusing the Afghan population for years formed the Northern Alliance.²³⁶ But angered by the looting and routine violence against civilians that had characterized *mujahideen* rule, some Kabul residents initially welcomed the Taliban, even after thousands of Kabulis died in the battle for the city.²³⁷

¶55 The Taliban persecuted the Shia Muslims, who then made up as much as 20% of the Afghan population, even more brutally than had the *mujahideen* under Rabbani and Sayyaf.²³⁸ A mutiny in Mazari-Sharif opened the door to Taliban occupation of that city; although 3,000 Taliban died in an uprising that followed, the Taliban retook the city in 1998, backed by Pakistani intelligence officers and even Pakistani troops.²³⁹ The victorious Taliban slaughtered up to 8,000 civilians in a frenzy of killing and rape directly mostly at the Shia Hazara.²⁴⁰ The Hazara holdout of Bamiyan was the last major city to fall, with more mass murders of Shias the result, including of hospital patients roused from their beds.²⁴¹ The post-Taliban governor of

Bamiyan has estimated that 20,000 Shias and others died in this way.²⁴² Iran mobilized its army to intervene against the massacres and systematic rape of Shias, but backed down under pressure from the U.N. Security Council.²⁴³ The genocidal killing continued into 2001, as Pakistan continued to deliver military aid to the Taliban in violation of U.N. sanctions.²⁴⁴

¶56 The Taliban aimed to install a government and legal system that would revive a life like pious Muslims had lived “1,400 years ago.”²⁴⁵ The Attorney General of the Taliban declared: “The Constitution is the Sharia so we don’t need a constitution.”²⁴⁶ The Taliban believed that the principal purpose of the anti-Soviet *jihad* had been the establishment of Sharia law,²⁴⁷ and indeed that is how the *mujahideen* leaders who had been fighting for Sharia from bases in Pakistan even prior to the communist coup in 1978 explained their war at the time.²⁴⁸

¶57 Saudi Arabia, the primary backer of the Taliban along with Pakistan, served as the model for the Taliban state.²⁴⁹ Saudi Arabia is a fundamentalist monarchy, whose constitution demands allegiance to its founding King and his “children’s children” in the name of religion.²⁵⁰ Its government tortures members of religious minorities and its religious police administer beatings to women who reveal their faces, hair, or bodies in public.²⁵¹ The Saudi government helped create the Taliban, encouraged them to give refuge to bin Laden, and tutored them in theocracy.²⁵² The Saudi Ministry for the Propagation of Virtue and the Prevention of Vice trained a similar Taliban agency in enforcing Saudi-style laws, including the near-total covering of women.²⁵³

¶58 The resulting system of Taliban law involved severe criminal sanctions, enforced with great capriciousness and corruption, against any activities viewed as sinful or otherwise harmful. The Taliban’s prohibitions addressed activities prohibited by religious tradition as harmful to the person (drugs and alcohol, gambling, and usury); sexuality and Western fashions (music and dancing, British or American hairstyles, the shaving of men’s beards, women’s high-heeled shoes, and fashion magazines); “idolatry” (photographs, paintings, statues, and sorcery); and other relatively harmless activities that might lead to gambling or distract from prayer (television, sports, kite-flying and the keeping of birds as pets).²⁵⁴ Proving the old adage that the law often falls behind advances in technology, however, the Taliban did not prohibit use of the Internet until July 2001, half a decade after banning kite-flying in 1996.²⁵⁵

¶59 The mode of enforcement of the Taliban’s prohibitions proved as uncompromising as the bans themselves. Torture by various methods was routine and vicious under the Taliban.²⁵⁶ Violations of the Taliban dress code and inappropriate male-female contact were cause for being beaten black and blue with clubs or rifle butts.²⁵⁷ Implementing Taliban law required stoning adulterers and amputating the hands of criminals, medieval punishments which had been abandoned by most Muslim countries.²⁵⁸

¶60 While Afghan men suffered conscription into the Taliban army,²⁵⁹ bitter fighting in the north of the country,²⁶⁰ imprisonment or murder for their religious or political affiliation,²⁶¹ and denial of virtually any access to entertainment or unrelated members of the opposite sex, they enjoyed some ability to go to school, find a job, and travel. The Taliban kept Afghan women, by contrast, largely shuttered indoors.²⁶² Upon taking power in Kandahar in 1994, the Taliban forbade the education of girls and the employment of most women outside of their homes.²⁶³ After becoming the rulers of most of Afghanistan in 1996, the Taliban’s religious police decreed that women must wear all-covering *burqas*, which many Afghan women could not even afford (as they cost about two months’ wages), effectively sentencing them to house arrest.²⁶⁴ The Taliban ordered women to stay in their homes as much as possible, ended the rudimentary

female education and employment that the *mujahideen* had allowed to continue,²⁶⁵ and allowed women to see only female doctors, while banning women from practicing medicine.²⁶⁶

Building a New Afghan Government

¶61 The Bush administration, in response to the terrorist attacks of September 11, 2001, demanded that the Taliban cease harboring Osama bin Laden and the *al Qaeda* terrorist organization, and threatened war and the destruction of their government if they refused. But the Taliban declined to hand over bin Laden, the Saudi terrorist leader and *mujahideen* fighter suspected of masterminding or inspiring the 9/11 attacks; bin Laden had contributed about \$100 million to the Taliban by that time.²⁶⁷ A Taliban spokesman, however, indicated that the regime would hand bin Laden over for trial, provided that the U.S. provided evidence of his responsibility for the 9/11 attacks, which the U.S. had provided only to its “key allies.”²⁶⁸

¶62 On October 7, 2001, the U.S. began bombing *al Qaeda* terrorist targets and Afghan military, electricity, and communications facilities.²⁶⁹ Special forces units on the ground provided the targeting coordinates for U.S. aerial bombing, which destroyed the Taliban tanks and troops that had held off the Northern Alliance opposition for years.²⁷⁰ Hundreds of Taliban conscripts and hardcore troops died in the fighting, including many prisoners of war summarily executed by Northern Alliance gunfire or suffocation in sealed truck containers.²⁷¹ Thousands of Afghan civilians died in the U.S. bombing raids and the ground operations that mopped up after them.²⁷² Whole families were cut down, sometimes as a result of apparently indiscriminate bombing based on inaccurate or misleading information.²⁷³

¶63 Driving the Taliban before them, the luminaries of the anti-Soviet *jihād* retook their former positions in Herat,²⁷⁴ Bamiyan,²⁷⁵ and Kandahar,²⁷⁶ the prize of Kabul going to the forces of former President Rabbani, now led by Ahmed Shah Massoud’s successor Muhammad Fahim.²⁷⁷ Former *mujahideen* deputy foreign minister Hamid Karzai, leader of the largest Pashtun tribe, entered Afghanistan after September 11 to raise a Pashtun rebellion against the Taliban, joining Gul Agha Shirzai in taking Kandahar.²⁷⁸

¶64 The occupation of Kabul by the Northern Alliance created a political crisis for the U.S. and the U.N., which had urged their forces to hold back from taking the city until a broad-based government could be formed. Under pressure from the U.S. and other nations, Northern Alliance commanders and other Afghan military factions agreed to participate in U.N.-sponsored talks held in Bonn, Germany. Almost two dozen Afghan delegates, mostly drawn from the Northern Alliance and the circle around former King Zahir Shah, signed an accord called for the creation of an Interim Authority to rule Afghanistan until a Transitional Authority government could be selected in a Loya Jirga six months later, and a “fully representative government” freely elected two years after that.²⁷⁹ Although loyalists to the former King Zahir Shah initially voted that he return to power, the U.S. and U.N. secured the delegates’ agreement to appoint Pashtun anti-Taliban leader Hamid Karzai as Chairman of the Afghan Interim Authority.²⁸⁰

¶65 Over 1,000 elected and 700 selected delegates to the June 2002 Emergency Loya Jirga established the Islamic Transitional Authority of Afghanistan²⁸¹ and elected Hamid Karzai as its President.²⁸² Despite the support of a majority of delegates at one point, the former King of Afghanistan Mohammad Zahir Shah withdrew his name from consideration for the presidency, prompting Human Rights Watch to accuse the U.S. of “‘brazen’ interference in the loya jirga, [which was] promoted as the birth of Afghani democracy.”²⁸³ Some delegates also objected that *mujahideen* commanders who had killed innocent Afghan civilians were wielding too much

control over the Afghan political process. “We were told that this loya jirga would not include all the people who had blood on their hands,” said one delegate to applause.²⁸⁴

Warlord Theocracy and Human Rights Violations

¶66 Bonn’s aspirations for government under law and with respect for human rights have yet to be realized throughout Afghanistan. Of course, the Karzai administration inherited a miserable and barely functioning country from the Taliban and Northern Alliance forces who had controlled it through 2001: average life expectancy was only 40 years, 70% of Afghans were malnourished, more infants died in childhood and more mothers died in childbirth than in almost any other country ever recorded in human history, and millions of children had been orphaned in the various wars since 1978.²⁸⁵ But none of these poor health statistics can justify the sorts of human rights violations that have occurred in Afghanistan since the Taliban’s fall.

¶67 The Karzai government began as “an island in a sea of uncompromising warlords” who field large militias outside the framework of the Afghan National Army and exercise totalitarian theocratic powers.²⁸⁶ Most rural areas and even major cities are not under the firm control of the central government, especially at night.²⁸⁷ According to a member of the Afghanistan Independent Human Rights Commission, “trials do not take place in accordance with law. In provinces, warlords are the law, the judge, the government.”²⁸⁸

¶68 Abdul Rasul Sayyaf, a Wahhabi fundamentalist sent to Afghanistan in the 1980s by Saudi Arabia to promote its ideology,²⁸⁹ controls much of Kabul province.²⁹⁰ The governor of Kabul province and many of the city’s police and intelligence officials are loyal to him, his troops patrol western Kabul, and even President Karzai himself is reportedly “often forced to bow to [his] demands.”²⁹¹ International peacekeepers in Kabul “have publicly accused ... troops under his control of being responsible for a series of murders, abductions and extortion incidents in that sector of the city, aided by a cadre of loyalists in the police department.”²⁹² Following mainstream Saudi ideology,²⁹³ his forces “continue to enforce strict Islamic social codes including restrictions on women’s education and dress.”²⁹⁴ Sayyaf’s forces have tortured villagers and old people for such crimes as listening to music.²⁹⁵ He views any attempt to question his authority as a form of blasphemy, and had two newspaper editors arrested on blasphemy charges and sentenced to death for criticizing his tactics.²⁹⁶

¶69 The authorities in Kandahar, Afghanistan’s second largest city, continue to implement the rural Pashtun traditions that the Taliban proclaimed to be requirements of Islam.²⁹⁷ Young girls are forced into marriage under pain of imprisonment; one received a five-year sentence for refusing to go along with an arranged marriage.²⁹⁸ The police jailed another woman for refusing to enter into a marriage with a man to whom she had been promised by her parents when she was only two years old.²⁹⁹ Kandahar’s post-Taliban legal officials imprisoned a woman who escaped after being held as a sex slave for seven years; she had been sold for about \$200 during Taliban times to a man who raped her repeatedly.³⁰⁰ Because of cases like these, the head of a major nongovernmental organization working in Afghanistan reported that she could “see no change for most women” in Kandahar since the Taliban lost power.³⁰¹

¶70 In the north, a campaign of ethnic cleansing against Pashtuns has raged. Soldiers and armed militia in northern Afghanistan have rounded up and shot dozens of Pashtun men at a time, raping many Pashtun women and young girls, a crime that can lead to the murder of its victim by members of her own family in conservative rural Afghanistan.³⁰² The militia of former communist commander General Dostum raped whole families of women, including girls as

young as 10.³⁰³ A U.N. official called the abuses against ethnic Pashtuns “systematic and wide scale.”³⁰⁴ Thousands of Pashtuns fled their homes, some living in caves to keep warm.³⁰⁵

¶71 For most of the past four years, a “hardline Islamist” ruled Herat, a historically more liberal city near the Iranian border that is widely viewed as a litmus test for human rights after the Taliban.³⁰⁶ The security forces of Governor Ismail Khan borrowed a page from neighboring Iran, which Khan called “the best model of an Islamic country in the world,”³⁰⁷ using beatings and torture to silence political opponents, journalists and human right activists.³⁰⁸ Women complained that his regime resembled that of the Taliban,³⁰⁹ as their mode of dress was confined to two options: *burqas* or full-body veils (known as *chadoris*) that expose only the face.³¹⁰ The police in Herat ordered that 10 forced gynecological examinations be conducted every day to test the chastity of girls or women arrested on suspicion of immoral conduct.³¹¹ Although President Karzai promoted Ismail Khan from Governor to the Ministry of Mines in September of 2004, he continued to field a militia, and thousands of petty warlords with similar ideologies continue to hold power in their respective fiefdoms.³¹²

¶72 The principal engine of theocratic tendencies on a national basis has been the Afghan courts, the policies of which have been indistinguishable in some respects from the Taliban’s. As a respected religious scholar among *mujahideen*, Sayyaf persuaded Afghan transitional president Hamid Karzai to declare Afghanistan an “Islamic” state after the Loya Jirga, and to ensure that “Afghanistan’s justice system will be based on the Koran and Sharia law.”³¹³ Sayyaf, the Northern Alliance’s “No. 2 political leader,” threatened guerilla war against the government if his demands were not met.³¹⁴ Foremost among these demands is gender apartheid.³¹⁵

¶73 Sayyaf prevailed upon President Karzai to appoint as Chief Justice of Afghanistan’s Supreme Court Fazal Hadi Shinwari, a fundamentalist member of Sayyaf’s political party who is not even trained in Afghan constitutional or statutory law.³¹⁶ Shinwari has “called for Taliban-style punishments and brought back the Taliban’s dreaded Ministry for the Promotion of Virtue and Prevention of Vice,” which “deploys squads to stop public displays of ‘un-Islamic’ behaviour among Afghan women.”³¹⁷ A list of laws and policies being enforced in Afghanistan reads like the Taliban’s handbook: women cannot speak in private with men, young people can be arrested if they marry without their parents’ consent,³¹⁸ women are forbidden to travel without supervision of a male family member, married women are denied the ability to attend high school, education of women together with men is banned, and women are restrained from singing in public.³¹⁹ Most women remain confined to their homes as many Afghan men, backed by the judiciary, continue to treat women “according to the old Taliban ways.”³²⁰

¶74 Shinwari’s influence stretches far beyond the Supreme Court. He has “appointed most of Afghanistan’s current judiciary -- mostly clerics in rural areas -- as well as many of the country’s provincial governors, especially near Kabul.”³²¹ He used this power to appoint Afghans with only informal religious training and little experience to the bench, including almost 130 of his political allies to the Afghan Supreme Court,³²² while women judges with decades of experience in the Afghan judiciary were denied posts.³²³ As a result, the Afghan courts are “dominated by religious conservatives who have more in common with the Taliban than with Karzai.”³²⁴

¶75 The U.S. promised that an Afghan commission on judicial reform would rein in Mr. Shinwari’s theocratic excesses. But due to the fundamentalists’ control over the political process, judicial reform long stood at a standstill, even backsliding into increasing control by extremists.³²⁵ The Judicial Reform Commission was dissolved in 2002, “reportedly obstructed by religious hard-liners.”³²⁶ The Supreme Court is itself violating the constitution by being packed with too many justices.³²⁷ Moreover, little or nothing has been done to ensure that

judges are qualified, that criminal defendants have access to defense attorneys, that lawyers have access to books containing the laws currently in effect, or that endemic corruption ends.³²⁸ Prison conditions are horrifying, and torture is common.³²⁹ Far from secular reformists gaining ground, Sayyaf himself is said to be next in line to be Afghanistan's Chief Justice.³³⁰

THE NEW AFGHAN CONSTITUTION

The Constitution Drafting Process

¶76 The Bonn agreement provided for a Constitutional Commission to draft a new constitution for review and adoption by a Constitutional Loya Jirga to be convened by October 2003.³³¹ President Karzai appointed a nine-member Constitutional Drafting Commission, which included two women,³³² and a 35-member Constitutional Review Commission, which included seven women.³³³ President Karzai appointed Vice President Nematullah Shahrani, a prominent conservative, to head both commissions, a signal to many that the constitution would establish a national religion and mandate strict religious law.³³⁴

¶77 Past Afghan constitutions failed to ensure national unity and long-term stability, partially because the population as a whole felt excluded from the drafting process.³³⁵ To involve the Afghan people in the framing of their constitution, the Afghan government and international community planned to submit the draft document to a broadly representative Constitutional Loya Jirga, which was held in December 2003.³³⁶ In addition, the U.N. helped organize a public consultation process to include thousands of ordinary Afghans.³³⁷ Still, most rural Afghans never heard of the constitutional process underway in their country until it was already over.³³⁸

The Ideological Battle for the Future of Afghanistan

¶78 Given the decades-old struggle within Afghan society between secularists and fundamentalists, the role of religion in the new constitution was bound to be contentious. Fundamentalists such as Rabbani and Sayyaf used their representatives on the Constitutional Commission and the Supreme Court to fight for a constitutional mandate of theocracy.³³⁹ Experts warned that these leaders wanted their "conservative interpretation of Sharia law incorporated into the next Afghan Constitution."³⁴⁰ International human rights activists, on the other hand, advocated a constitution that respected religious difference and closed the door on the totalitarian fundamentalism that killed so many Afghans in the 1990s. A commission of human rights activists and Islamic law scholars recommended that the new constitution shy away from mandating one man's version of Sharia or Islam, and retain instead the flexibility of the 1964 constitution's requirement of governance in conformity with the "basic principles of Islam."³⁴¹ Amnesty International and Human Rights Watch recommended other improvements to the draft constitution in terms of religious freedom and due process.³⁴²

¶79 Afghan activists also demanded strong protection for women's rights. Afghanistan's Deputy Minister for Women's Affairs argued for an express ban on all forms of discrimination against women and a clear requirement of universal education of Afghan women.³⁴³ A conference convened in Kandahar of women leaders from across Afghanistan went further, demanding an "Afghan Women's Bill of Rights" that included equal representation in parliament and the Constitutional Loya Jirga, compulsory education through high school with opportunities for higher education, full property and inheritance rights and participation in economic life, access to modern health services and reproductive care, freedom to decide whom to be married

to, enforcement of criminal laws against violence and sexual abuse, and an end to the exchange of women as compensation for crimes by one family against another (known as *Bad*).³⁴⁴

¶80 The draft constitution, unveiled to the public in early November 2003, proclaimed Afghanistan an Islamic state with a national religion.³⁴⁵ Under the draft, no law could be “contrary to the sacred religion of Islam,”³⁴⁶ Afghan judges must rule in accordance with the provisions of the conservative Hanafi school of jurisprudence of Sharia law,³⁴⁷ the justices of the Supreme Court must swear to rule in accord with the “provisions” of religion, the President must swear an oath to safeguard religion, and the nation’s educational curriculum would be religious in nature.³⁴⁸ These articles represented a significant departure from the 1964 constitution, which required Afghan law to be consistent merely with the general “principles” of Islam rather than a government official’s view of what the “religion” itself provides.³⁴⁹ Under the new draft, “anything that is against Islam could not go forward,” because conservatives forces were empowered to “say virtually whatever they want is against Islam.”³⁵⁰

¶81 The draft constitution’s almost complete silence on women’s rights proved to be its most disappointing and even embittering flaw in the eyes of many activists for women’s rights and the rule of law. The draft guaranteed women almost 17% of the seats in the Afghan Senate,³⁵¹ but it did not explicitly guarantee women equal rights with men or prohibit discrimination against women, even though similar provisions are contained in several constitutions of majority Islamic countries in the Middle East, the Central Asian former Soviet republics, and South Asia.³⁵² Nor did it provide Afghan women with rights of equal access to employment, education, and health care, or with any protections against forced marriages, family violence, and sexual abuse.³⁵³ Instead it provided all Afghan “citizens” with equal rights and protection against discrimination,³⁵⁴ without stating clearly that women are citizens.³⁵⁵ For these reasons, a Gender and Law Working Group convened by the Ministry of Women’s Affairs prepared a number of recommended amendments to the draft constitution, including an anti-discrimination clause, guarantees of equal rights and full citizenship for women; an end to forced marriages and trafficking in women; and a provision outlawing slavery and “slave-like practices.”³⁵⁶

The Afghan Constitution: Freedom or Theocracy?

¶82 On January 4, 2004, the 1,500 Afghan delegates to the Constitutional Loya Jirga (CLJ) ratified the new constitution. The changes to the initial draft reflected a series of hard-fought compromises negotiated among several factions and hundreds of individuals. World leaders, including the President of Afghanistan, the representative of U.N. Secretary-General to Afghanistan, the U.S. Ambassador to Afghanistan, and the U.S. President, immediately hailed the new constitution as a triumph for human rights. President Karzai called it “the most enlightened in that part of the world.”³⁵⁷ The U.S. Ambassador to Afghanistan praised the document as “one of the most enlightened constitutions in the Islamic world.”³⁵⁸

¶83 The Afghans who participated in the constitutional drafting process, and the international community, crafted a charter for their country that stands as an unqualified improvement over the Taliban’s unwritten code of theocratic oppression. Among other improvements, the constitution remedied the draft’s failure to enshrine women’s rights. It now provides that: “Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited. [¶] The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law.”³⁵⁹ This clause revives precedents in the 1977 and 1987 constitutions that specifically guaranteed that Afghan women would enjoy equal rights before the law and protection against discrimination.³⁶⁰ Moreover, the new constitution envisions a level of participation by Afghan

women in their country's parliament that surpasses any historical precedent in that country, or indeed in most other countries. On paper, women are guaranteed over 25% of the seats in the lower house of parliament, and almost 17% of the upper house.³⁶¹

¶84 But a close examination of the tight relationship the constitution establishes between religious doctrine and the judiciary reveals that the claim that the new constitution is the most "enlightened" in the region, even in the entire Islamic world, is implausible. Although women are equal "before the law," the intention of the Afghan courts and many of the constitution's drafters is that the laws will treat them very differently in many respects, and deny them many liberties available to men. And while they may be ensured a say in parliament, their ability to pass laws improving women's plight in their country will be strictly limited by a veto power the constitution grants to radical fundamentalists in the Afghan judiciary. The constitution also omits elementary protections available to women in other countries where they have not been subjected to the kind of treatment suffered in Afghanistan for many years, such as a ban on slavery and slave-like practices, or a requirement that both parties consent to a marriage.³⁶²

¶85 Many Afghans and international human rights groups have accordingly tempered their praise of the constitution. They have expressed fears that several provisions could be used to enforce medieval interpretations of Islamic Sharia law, suppress religious expression and political speech, and perpetuate Afghan laws and customs that ruthlessly oppress Afghan women. An agenda to accommodate a fundamentalist future for Afghanistan permeated the CLJ, and prevented the new constitution from realizing the promises of the U.S. and U.N. that Afghanistan would henceforth abide by international human rights standards. The warlords and fundamentalist leaders, who issued death threats against more moderate Afghan men and women to deter them from participating in or even attending the CLJ, prevailed on several critical issues that the assembly addressed.³⁶³ Their death threats and vote buying ensured that the "majority" of CLJ delegates were tied to the "warlord controlling the province they came from."³⁶⁴ Nor did the intimidation end at the doors of the CLJ. The chairman of the CLJ, a former *mujahideen* leader, announced that female delegates should not "try to put yourself on a level with men. Even God has not given you equal rights, ... because under his decision two women are counted as equal to one man."³⁶⁵ The chairman called for delegates who circulated a petition proposing the removal of the word "Islamic" from the name of the country to be "identified and punished" as infidels, an offense worthy of the death penalty during Afghanistan's recent history.³⁶⁶

¶86 At the CLJ, the warlords that have ruled most of Afghanistan since the fall of the Taliban succeeded in transforming a clause providing that no law could be contrary to the religion of Islam "and the values of this Constitution" into one that says that "no law can be contrary to the beliefs and provisions of the sacred religion of Islam."³⁶⁷ Afghan experts and human rights activists regard the new clause as much more subject to abuse by fundamentalists who seek to impose Taliban-like theocratic rule, because the "provisions" of Islam were precisely what the Taliban claimed to be enforcing. Female CLJ delegates and human rights activists therefore view this provision as introducing a strict version of Sharia law by the "back door."³⁶⁸ The "beliefs and provisions" clause means "that Islamic law is the supreme law of the land," and its content will inevitably be left for a Supreme Court staffed by "hard line Shariah jurists" to interpret.³⁶⁹ Under the new constitution, the Supreme Court, whose Chief Justice has consistently pushed for a theocratic state in which his interpretation of Islam would hold sway,³⁷⁰ "can review compliance with the Constitution of laws, legislative decrees, international treaties, and international conventions, and interpret them, in accordance with the law."³⁷¹ The constitution grants the Supreme Court, which the Chief Justice has packed with many

sympathetic judges who lack training in Afghanistan's civil and secular laws, the "power to reject virtually any law or treaty as un-Islamic."³⁷²

¶87 While failing in some respects to adequately protect human rights, the new constitution doesn't do enough to prohibit Taliban and other war criminals from keeping or winning government posts, and using them to impose fundamentalist rule. Such efforts had precedents in Nazi Germany and Imperial Japan,³⁷³ and would be revived in post-Saddam Hussein Iraq. The new constitution bars only those actually "convicted" of crimes against humanity from becoming President, a Minister, or member of the National Assembly or Supreme Court.³⁷⁴ The ineffectiveness of this provision results from the fact that despite "the enormous scale of war crimes, crimes against humanity and other serious human rights violations committed in Afghanistan, ... no one has yet been tried by a competent court for crimes committed during the long years of conflict in the country."³⁷⁵ Rather than convening trials, in late 2003 coalition forces "released the Taliban's foreign minister from custody, and prominent Afghan officials ... invited him and other Taliban to run for office in the upcoming elections, something that millions of Afghan women are still too afraid to do."³⁷⁶ After the Karzai government took office, "many former Taliban officials [were] sitting in the same government positions they held when Mullah Mohammad Omar was still in charge."³⁷⁷ Other Taliban officials have been wooed with "the offer of a place in the government."³⁷⁸ Amnesty International thus declared the constitution's efforts to deny power to war criminals "meaningless."³⁷⁹

¶88 In several other respects, implementation of the rights guaranteed in the constitution seems a distant dream. Shortly after the new constitution was adopted, U.N. Secretary General Kofi Annan's special envoy to Afghanistan warned that "there is no rule of law in this country yet."³⁸⁰ The Afghan Independent Human Rights Commission received complaints of hundreds of murders in 2003, most blamed on government officials and militia commanders.³⁸¹ The Commission has found that "innocent people are put in jail for a very long time and for no reason."³⁸² There is no sign of these practices having been put to an end by the adoption of the new constitution.³⁸³

TEST CASES FOR THEOCRACY UNDER THE SIXTH AFGHAN CONSTITUTION

¶89 Theocracy is a recurring problem in human history because the corruption and deprivations of government by mere men make their countrymen long for a morally infallible ruler. But when political leaders use their military power to promote their own intolerant beliefs, the result has often been mass slaughter and widespread atrocities against members of other faiths, as occurred in the Crusades,³⁸⁴ counter-Reformation Europe,³⁸⁵ the European colonies of the New World³⁸⁶ and Africa,³⁸⁷ the Ottoman Empire during and after World War I,³⁸⁸ post-colonial India and Pakistan,³⁸⁹ and Sudan since 1989.³⁹⁰ But even mass killings have failed to preserve many theocracies from persistent rebellions led by subjects who chafe under the human rulers' arrogant misrepresentation of their own narrow views as the mandate of heaven.

¶90 In the same way, the Taliban, and before them the fundamentalists among the *mujahideen*, forced Shia Muslim Afghans and secularists either to suffer repression or to take up arms against their rulers, which massacred them in return. In the near future, Afghans may be driven into a similar bind by theocratic policies promulgated under cover of constitutional legitimacy. Whether this happens may depend on the success of the warlords and the fundamentalists who dominate the Afghan judiciary in imposing fundamentalist policies that are as damaging to human rights as those that provoke so much opposition in neighboring Iran that mass killings and systematic torture have been deemed necessary to quell it.

Outlawing Secular Political Parties

¶91 A significant challenge to Afghans, especially women, seeking to implement their right to participate in parliamentary elections will be possible legal restrictions that could be used to silence political parties represent ethnic or religious minorities, secularists, or women. The new constitution bans political parties whose aims are “contrary to the principles of [the] sacred religion of Islam,” as well as those that primarily appeal to members of an underrepresented ethnic, linguistic or religious group.³⁹¹ Afghan authorities understand the “principles” of Islam to include precepts of Sharia law “agreed upon by the major schools of jurisprudence (fiqh)”; as a result, any political party that “calls for full equality before the law of women and men could by this reasoning be defined as contrary to Islamic principles.”³⁹² A key test case for the constitution will therefore be whether the political parties clause will be misused in this way.

Curtailing Political Debate

¶92 Another important test of the Afghan constitution’s ability to provide for peaceful and democratic change will be whether it protects freedom of speech and debate. The new constitution restricts free expression that intrudes upon religious sensitivities.³⁹³ A prominent member of Afghanistan’s Supreme Court has declared that: “In the constitution there is an article that says things that go against Islam are not allowed.”³⁹⁴ The Supreme Court has ordered two prominent journalists and the former Minister of Women’s Affairs to stand trial on spurious charges of blasphemy after they criticized Afghanistan’s warlords.³⁹⁵ Blasphemy is still an offense that is potentially subject to the death penalty under Afghan penal laws, and fundamentalist Afghans frequently issue death threats against people charged with it.³⁹⁶ The Supreme Court actually sentenced the two reporters to death, and a female writer was also sentenced to be executed, although none of these sentences has been carried out yet.³⁹⁷ Such prosecutions could represent a serious threat to the development of Afghan democracy.

Persecuting Religious Minorities

¶93 Particularly under the Taliban but throughout Afghan history, the country’s rulers have oppressed and murdered religious minorities, especially Shia Muslims among the Hazaras. The new constitution provides that “[f]ollowers of other religions are free to exercise their faith and perform their religious rites within the limits of the provisions of law.”³⁹⁸ But as with many other aspects of the constitution, whether and to what extent religious minorities will be protected depends on what the “provisions of law” limiting religious freedom may be. The Chief Justice of the Supreme Court has declared that: “The Islamic government, according to sharia, is bound to punish those who get involved in anti-Islamic activities.... We can punish them for propagating other religions - such as threaten them, expel them and, as a last resort, execute them, but only with evidence.”³⁹⁹ The Chief Justice believes that there are three ways to deal with adherents of minority religions: “One, is you politely invite him to join the Muslim faith. Two, if he refuses, insist that they obey the laws of Islam. And three, if he rejects that, [the Chief Justice] says, ‘I have no choice’ and points to the sword above his desk, and says, ‘behead him.’”⁴⁰⁰ The Chief Justice has also warned that anyone who preaches or describes Christianity to Afghans may face the death penalty.⁴⁰¹ If these statements are translated into legal doctrine, the constitution’s protection of religious freedom may prove to be very weak.

Enforcing Medieval Punishments

Stoning for Adultery

¶94 The Chief Justice of the Afghan Supreme Court has made clear that he wants to see “adulterers whipped or stoned to death, the hands of robbers amputated and murderers publicly executed.”⁴⁰² Although the Old Testament of the Bible contemplates the stoning of adulterers and other criminals, the Qur’an does not, and most modern states have abandoned the practice.⁴⁰³ Resuming the stoning of adulterers, as a local district court did when it ordered an Afghan woman to be stoned to death in late April 2005, would make Afghanistan’s laws even more theocratic than those of neighboring Iran, which abandoned the stoning of adulterers in 2002 after sentencing two women to be stoned to death the previous year.⁴⁰⁴ President Karzai has repeatedly insisted that Afghanistan will be governed by Sharia law, which many Afghans understand to provide for stoning in cases of adultery.⁴⁰⁵ Aides to Karzai have insisted that stoning will not be resumed on President Karzai’s watch, and the Constitution provides the President with the authority to reduce and pardon penalties, but only “in accordance with law.”⁴⁰⁶ But Karzai does not necessarily control what goes on in all of Afghanistan, and there is no guarantee that Karzai will always be President to veto court-ordered stonings. And because the Supreme Court is ultimately vested with the power to interpret the law and verify compliance with Islam, the Chief Justice may override a Karzai pardon in an emotionally or politically charged case.⁴⁰⁷ A renegade warlord, fundamentalist politician, or Supreme Court power grab could therefore return Afghanistan to the days of torturing and killing women under the pretext of piety.

Amputating Hands for Theft

¶95 The Chief Justice has pronounced that “a hand being chopped for theft” is necessary for “obvious and justified reasons - ridding society of crime.”⁴⁰⁸ Even President Karzai has expressed qualified support for the idea, noting that there are “strict rules” governing such punishments and it “is extremely, extremely difficult in the real interpretation of Sharia to cut off somebody’s hand. The hand-cutting part is only applicable, only applicable, if the society has been provided with all the means of work and earning and making a life.”⁴⁰⁹ This is somewhat reassuring, at least in those cases where President Karzai remains in control and convinced that “all the means of work” were not available to a defendant. But warlords, the Supreme Court, and future presidents may not be so gentle. Although amputation may seem preferable to some compared to life imprisonment under constant threat of rape, the sentence meted out to petty thieves in the U.S. under some circumstances,⁴¹⁰ its revival would raise serious questions about Afghanistan’s compliance with its international treaty obligations.⁴¹¹

Discriminating Against Women

¶96 Virtually every world religion elevates men to the position of lordship over women, placing most forms of religious fundamentalism on a collision course with equal rights and full participation by all citizens in a democratic government.⁴¹² Like their fundamentalist counterparts in other nations, many powerful leaders in post-Taliban Afghanistan have a record of holding Afghan women to a far higher standard of pious conduct than men are expected to obey. Afghan women must shoulder most of the burden of preventing lust and extramarital sex,

by donning *burqas* and denying themselves access to most public spaces.⁴¹³ They must submit to marriages against their will and not of their choosing, even under circumstances in which men would be free to refuse. The continuation of such practices will prove all the promises of equal rights for Afghan women before the law to be illusory.

The *Burqa* and Forced Covering

¶97 All of us remember how the U.S. condemned the *burqa* as the ultimate symbol of the oppression of women under the Taliban and the terrorists' ideology of "hate." A State Department press release issued during the Afghan war called the *burqa* an "infamous and intolerable" form of torturing and imprisoning women in a "voluminous, tent-like full-body outer garment that covers [women] from head to toe."⁴¹⁴ Despite all the pain and discomfort it may cause, the allies of the U.S. in Afghanistan are still requiring women under their power to wear the *burqa*. Although American television gleefully reported that Afghan women had thrown out their *burqas* when the Taliban left,⁴¹⁵ Afghan warlords are still requiring them to wear it.⁴¹⁶ Most women still wear the *burqa*, not so much out of fidelity to their religious faith and the requirements of the Qur'an – which does not even mention veils, let alone *burqas* – but because they are forced to do so by the dictate of local warlords or the fear of marauding militiamen.⁴¹⁷ "In post-Taliban Afghanistan, women have been raped for daring to think they could now go without the *burqa*."⁴¹⁸ Future Afghan governments will decide whether the *burqa* is part of the "beliefs and provisions of Islam," or on the contrary is incompatible not only with Islam but with the international human rights treaties to which Afghanistan is a party. The issue will likely be resolved by the Afghan courts, which extreme fundamentalists like Sayyaf and his allies on the Supreme Court look poised to control for the indefinite future.⁴¹⁹

Involuntary Seclusion of Women

¶98 Women in Afghan society remain burdened by laws and practices that keep them out of the public sphere. Religious leaders with no legal training act as judges, imprisoning young people for such crimes as dating, falling in love, or marrying without parental permission.⁴²⁰ A woman may commit a crime simply by having a conversation or being seen in public with an unrelated man.⁴²¹ The former governor of Herat announced on radio and television that the police and Department of Vice and Virtue "must stop men and women who are unmarried from walking together on the street" and "are obliged to beat them."⁴²² This iron curtain of male-female segregation is hardly compatible with the full participation of women in a "broad-based and representational" government, which the U.S. has defined to include women.⁴²³

Forced and Underage Marriage

¶99 More than two years after the Taliban fell, Afghan women are still being denied their rights in marriage and to divorce under both international and Islamic law, much more often than women in many other Islamic countries are. In July 2002, for example, almost 800 women per day applied for divorces to the judicial authorities of the Afghan government.⁴²⁴ But instead of being granted their divorces, some were imprisoned, including a dozen women subjected to forced marriages under the Taliban.⁴²⁵ The judiciary continues to apply its version of the Hanafi school of Islamic law to deny women the right to divorce under most circumstances, granting

relief from forced marriages only in “rare” cases.⁴²⁶ Women who run away from home without their husband’s permission can be sentenced to several years in prison.⁴²⁷

¶100 Teenage girls are still routinely forced into marriages with men they have never met, often much older than they are. About 50% of Afghanistan’s marriages are compulsory.⁴²⁸ Afghan families often sell their daughters for excessive dowries equivalent to thousands of dollars, in a country where the average income is about \$200.⁴²⁹ Many young women have resorted to setting themselves on fire to escape this contemporary form of slavery.⁴³⁰ Over 100 Afghan women died of self-immolation in the first ten months of 2004.⁴³¹ Afghanistan’s high rate of forced marriages is fueling this unprecedented epidemic of fiery suicides.⁴³² Although President Karzai has declared that there “can’t be any worse oppression” than forced marriage, the Afghan government contributes to it by imprisoning girls and women married against their will, if and when they flee.⁴³³ Girls and women have no legal alternative to suicide, as they are arrested and jailed for fleeing child marriages or abusive families.⁴³⁴ A jailer in Kabul told a reporter that: “If a girl in Afghanistan runs off with a boy or tries to escape from her family, that is a crime.”⁴³⁵ Moreover, Afghan tribal councils continue to resolve criminal cases “by ordering that the alleged perpetrator provide the family of the alleged victim with a young girl or girls, usually below the legal marriage age, in order to compensate for the alleged crime.”⁴³⁶ The girl “is then forcibly married to a male member of the victim’s family.”⁴³⁷ Thus, the Afghan criminal justice system “is more likely to violate the rights of women than to protect and uphold them.”⁴³⁸ The U.S. has tolerated these policies of the government and warlords it funds and helped gain power, even though it cited the “high rates of depression and suicide among Afghan women” as a reason to go to war against the Taliban.⁴³⁹

¶101 International law recognizes forced marriage as a form of slavery to which Afghanistan must put an end if it aspires to membership in the community of civilized nations. For example, a treaty that Afghanistan signed on to in 1966⁴⁴⁰ obliged States parties to abolish slave-like practices in which a “woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any person....”⁴⁴¹ Likewise, the Universal Declaration of Human Rights states that women and men have equal rights before, during and after marriage,⁴⁴² and that “[m]arriage shall be entered into only with the free and full consent of the intending spouse.”⁴⁴³ Finally, Afghanistan’s international obligations under the Convention on the Elimination of Discrimination Against Women are to guarantee that women have “the right to choose a spouse freely” and enjoy “the same rights and responsibilities in marriage and at the time of termination of marriage.”⁴⁴⁴

¶102 Marriages of very young Afghan girls are a particularly grave problem. Young girls are still routinely promised in marriage to bring in an income to a poor family, or to satisfy a financial or “blood” debt.⁴⁴⁵ As a consequence, many young girls are pressured into marriages in their early teens and even as early as seven.⁴⁴⁶ The practice is not restricted to Afghanistan, but is common in rural parts of India and Africa.⁴⁴⁷

¶103 The minimum marriageable age in Afghanistan is 16 by statute.⁴⁴⁸ However, the courts refuse to enforce this law.⁴⁴⁹ Nearly two years after the Taliban fell, Amnesty International reported one case in which a court refused to take any action on a criminal complaint against a 48 year old to whom an eight-year old girl had been forcibly married.⁴⁵⁰ This court may simply have been implementing government policy, for the Deputy Chief Justice of the Afghan Supreme Court has claimed that the “only source of legislation in Afghanistan is Islamic shariah law,”⁴⁵¹ which some jurists interpret to allow a “father to contract binding marriages for both his sons and his daughters so long as they are minors (up to the age of nine or onset of menstruation for girls

and puberty, up to age fifteen at the latest, for boys).⁴⁵² Although some jurists maintain that a girl may repudiate such a marriage upon attaining puberty by application to the court, social conditions tend to vitiate this right.⁴⁵³

¶104 International law condemns child marriages in the same breath as other forced marriages. Very young girls cannot be said to give their free and full consent to a marriage as required by the Universal Declaration of Human Rights.⁴⁵⁴ Theoretically, therefore, Afghan courts could find further support in that treaty for enforcing their domestic law against child marriages.⁴⁵⁵ But the new constitution's deference to religious law make it more likely that the courts will rule that the prohibitions on child marriage in international law and Afghan statutes are invalid because they contradict a fundamentalist view of the "beliefs and provisions" of Islam.⁴⁵⁶ Such a ruling would further diminish Afghan girls' and women's prospects for true "liberation."

AN IRAQI THEOCRACY?

¶105 Despite many differences, there are important similarities between the situations in Iraq and Afghanistan.⁴⁵⁷ Both Iraq and Afghanistan are majority Muslim countries, with populations of similar sizes, occupied by the U.S. and its coalition allies as a result of their complicity in international terrorism.⁴⁵⁸ As in Afghanistan, regime change in Iraq has ended the rule of a vicious tyrant. Like Mullah Omar, Saddam Hussein presided over mass murder on a systematic basis (although in Iraq this occurred with support from most of the U.N. Security Council, not under conditions of international isolation as in Afghanistan). And similar struggles are underway in both countries between religious fundamentalists, who would implement a medieval version of religious law, and reformers who seek to modernize and secularize their society so as to guarantee the rights of women and ethnic or religious minorities.

From the Ba'ath to a Religious State

¶106 Any discussion of human rights in Iraq's recent history must begin with the crimes committed by Saddam Hussein over the past few decades with the cooperation and support of several foreign powers. Saddam's Ba'ath Arab Socialist party seized power in a U.S.-backed coup in 1963,⁴⁵⁹ and summarily executed thousands of Iraqi intellectuals identified as suspected leftists on lists provided by the CIA.⁴⁶⁰ After taking the helm of the Ba'ath party in 1979, Saddam launched two wars, against Iran in 1979 and Kuwait in 1990, which claimed the lives of more than 600,000 Iraqis.⁴⁶¹ In the late 1980s and early 1990s, Saddam's military put down Iranian-backed rebellions from the Kurdish and Shi'a communities in Iraq,⁴⁶² killing 100,000 to 200,000 people.⁴⁶³ In order to commit these crimes, Saddam's government secured massive financial and military support from an array of foreign powers, including the Soviet Union, France, China, Saudi Arabia, Kuwait, and the U.S.⁴⁶⁴

¶107 Despite the disastrous wars, rebellions, and crimes against humanity under Saddam's rule, Iraq's population increased by almost five million people from 1980 to 1990.⁴⁶⁵ Life expectancy increased by almost 14 years on average between 1975 and 1990, as the government helped ensure that 90% of the population had access to safe drinking water and modern facilities for sanitation and health care.⁴⁶⁶ The 1991 Gulf War reversed much of this progress, as the U.S. deliberately bombed water purification, sewage, and electricity facilities,⁴⁶⁷ and lobbied for comprehensive economic sanctions to be imposed by the U.N. Security Council which eventually led to the deaths of one million Iraqis,⁴⁶⁸ including 500,000 Iraqi children.⁴⁶⁹

¶108 Expressing outrage at Iraq's poor human rights record,⁴⁷⁰ floating questionable assertions about the threat its unconventional weapons and ties to *al Qaeda* posed to international peace and security,⁴⁷¹ and rejecting Iraq's offers to allow U.S. military access to suspected weapons sites and to hold free elections,⁴⁷² the Bush administration decided to invade the country and depose Saddam Hussein.⁴⁷³ The war claimed the lives of up to 60,000 Iraqi soldiers,⁴⁷⁴ along with about 100,000 innocent Iraqi civilians as of September 2004.⁴⁷⁵ The Iraqi death rate more than doubled,⁴⁷⁶ as the rates of disease, malnutrition, and infant mortality soared.⁴⁷⁷ War and looting destroyed Iraq's hospitals and water infrastructure along with most public buildings.⁴⁷⁸ The unemployment rate for Iraqis doubled to 60 percent,⁴⁷⁹ the remains of the water and sanitation systems collapsed,⁴⁸⁰ and more than 3,000 schools were bombed, looted, or otherwise destroyed.⁴⁸¹ Hundreds of thousands of people became homeless.⁴⁸²

¶109 The Iraqi government appointed by the multinational forces enshrined religion as the basis of the new Iraq. After the end of "major combat operations," the U.S. established a Coalition Provisional Authority (CPA) and an Iraqi Governing Council (IGC) to manage the country. The U.S. handed 60% of the seats on the Iraqi Governing Council to Shia Muslims with long-standing ties to the theocrats in Iran. These council members subsequently used their power to promulgate fundamentalist laws for the country, repealing more secular laws guaranteeing women's equality that had been enforced by the previous regime.⁴⁸³ Article 7 of Transitional Administrative Law (TAL), which is intended to serve as an interim Iraqi constitution until a more permanent one can be ratified in late 2005,⁴⁸⁴ states that: "Islam is the official religion of the State and is to be considered a source of legislation. No law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this Law may be enacted during the transitional period."⁴⁸⁵ According to a prominent commentator on religious freedom, every Arab state whose constitution establishes an official religion in this way has an abysmal record of respecting civil and political rights; such clauses are used to implement "state-coerced Islamization, discrimination and even state-sanctioned persecution of religious minorities, as, for example, in Iran, Saudi Arabia and Sudan."⁴⁸⁶ The clause mandating compliance with all laws with the requirements of Islam goes beyond what previous Iraqi constitutions contemplated in fusing religion and the state, and hands religious fundamentalists veto power over the political development of the country.⁴⁸⁷ In effect, it establishes religious scholars as the authorities on what Iraq's supreme law provides, outlaws secular government, and threatens to create a theocracy in Iraq.⁴⁸⁸

¶110 The public statements of the Iraqi fundamentalist leaders most likely to implement the TAL confirm that its provisions make theocracy a distinct possibility. Iraq's interim prime minister virtually declared allegiance to Ayatollah Ali Hussein al-Sistani, describing him as standing at the "forefront" of all of the country's other religious authorities on the occasion of the handover of sovereignty from the CPA.⁴⁸⁹ The alliance of Ayatollah Sistani and the Supreme Council for the Islamic Revolution in Iraq resembles the movement of Ayatollah Khomeini of Iran in that it demands that fundamentalist religious law be used to deny equal rights to women and religious minorities.⁴⁹⁰ The alliance receives large donations from the spiritual capital of Iran and uses them to maintain private armies, along with a website detailing the characteristics of the planned fundamentalist state.⁴⁹¹ Although Ayatollah Sistani has promised to be less active in politics than Ayatollah Khomeini believed that clerics should be, the latter also made reassuring statements to the West about democracy, religious freedom, and women's rights, behaving quite differently once securely in power.⁴⁹² The Iraqi Ayatollahs have been even less

moderate in tone than Khomeini, in some respects⁴⁹³; they openly “use religion in order to assume power,” in the words of the former head of the IGC.⁴⁹⁴

¶111 In the January 2005 election, a coalition of Iraqi Shia fundamentalist parties claimed about half of all votes, and promptly declared that religious law would be implemented.⁴⁹⁵ The coalition will control more than 130 seats in the 275-member Iraqi National Assembly charged with drafting a permanent constitution.⁴⁹⁶ Its architect and inspiration, Ayatollah Sistani, has pledged that the coalition will insist upon making Islam the sole source of legislation in the permanent constitution and prohibiting any law that is contrary to his version of Islam.⁴⁹⁷ The close ties of leading Iraqi politicians to the Iranian theocracy do not bode well for Iraqi freedom. With opposition to the Iranian government’s most conservative religious policies reportedly widespread,⁴⁹⁸ some elements in the country’s leadership have resorted to torturing and executing thousands to maintain power.⁴⁹⁹ Should Iraq follow the lead of its larger neighbor, a similar drama may play out for decades to come, as it has in many other theocracies known to history.

Iraqi Women Face Intensified Discrimination

¶112 Although like the Taliban, Saddam Hussein’s government implemented extremely brutal policies against women, it also had a better record on women’s equality in some respects than some of its Arab neighbors. The Iraqi Ba’ath party started out as a more secular, forward-looking party towards women, and by 2002 Iraqi women could exercise more control over their mode of dress, education, employment, and entertainment than in neighboring countries such as Saudi Arabia, Iran, or Kuwait.⁵⁰⁰ Iraqi women made up 38% of Iraq’s doctors,⁵⁰¹ enrolled in primary school 50% more often than Saudi women,⁵⁰² and worked as teachers and professors 50% more often than Saudi women.⁵⁰³ But after suffering a crisis of legitimacy after the Gulf War in 1991, Saddam’s regime turned to violent anti-woman policies in an effort to build support for the regime among religious and tribal conservatives. Iraq amended its Penal Code to exempt men who murder female family members in the name of family honor, after which Iraqi men murdered over 4,000 female relatives.⁵⁰⁴ Under the pretext of ending prostitution, pro-government paramilitary *Fedayeen* killed over 200 women tied to the political opposition.⁵⁰⁵

¶113 Women suffered along with many other Iraqis as a result of the war to oust Saddam. A breakdown of law and order after the fall of Iraq’s government resulted in the rapes of hundreds of Iraqi women.⁵⁰⁶ Violent deaths of men, women and children tripled.⁵⁰⁷ Young girls are being sold into slavery.⁵⁰⁸ Many women are too afraid even to leave their homes, let alone participate actively in developing a secular government that respects the equal rights of its citizens.⁵⁰⁹

¶114 Women’s minimal representation in the post-Saddam Hussein Iraqi government has proved inadequate to protect their interests. Although women make up more than 50% of Iraq’s population, the Bush administration gave them only two out of 25 seats on the IGC, less than 10% of the available seats.⁵¹⁰ Despite many trained Iraqi women lawyers, only 15 out of the thousands of people given judgeships by the CPA were women.⁵¹¹ Not one of the Iraqi lawyers hand-picked by the U.S. to draft a new constitution was a woman,⁵¹² a record of total exclusion that was all the more surprising because Afghanistan, with a far worse record on women’s participation in public life, had many women involved in its constitutional drafting process.

¶115 Iraqi women judges and lawyers have decried the increased influence of religious fundamentalists on the IGC and other Iraqi institutions. They expressed outrage when the IGC announced reforms to Iraqi family law that would refuse women the right to divorce in most cases and automatically deny mothers custody of children who reached the age of religious

instruction (nine years old).⁵¹³ They objected that the new laws would “allow anyone who calls himself a cleric to open an Islamic court in his house and decide about who can marry and divorce and have rights.”⁵¹⁴ “This will send us home and shut the door, just like what happened to women in Afghanistan,” one Kurdish woman lawyer declared.⁵¹⁵ Even a member of the IGC recognized “that the law of the tyrant Saddam was more modern than this new law.”⁵¹⁶ Although even more extreme laws have been enforced in Afghanistan, Iraqi women have enjoyed more educational and professional opportunities than in many other large Arab or Muslim countries, and have not yet become accustomed to the levels of violence and disrespect inflicted upon Afghan women. Eventually their protests prompted the CPA to drop the law reform plan.⁵¹⁷

¶116 With the passage of the TAL and the commencement of a constitutional drafting process expected to be dominated by the Ayatollahs and their private armies, Iraqi women may be out of the frying pan, and into the fire. Although the TAL guarantees women equal rights before the law and a non-binding goal of 25 percent of seats in the Iraqi legislature, these provisions may be meaningless if, under Article 7 of the TAL,⁵¹⁸ Ayatollah Sistani and other Iraqi fundamentalists get to exercise veto power over Iraq’s laws and legal system in the name of the “tenets of Islam.”⁵¹⁹ Among the Taliban-like laws Ayatollah Sistani would like to see implemented are bans on: women showing their faces or most parts of their bodies in public; girls or women who are virgins getting married without their father’s or grandfather’s permission; wives leaving their houses without their husband’s permission; men and women dating or having a conversation in a private place; and even simple entertainments such as music, dancing, and chess.⁵²⁰ He would permit a father or grandfather to arrange the marriages of his children before puberty, and even before the age of nine.⁵²¹

¶117 While the Kurdish parties that have controlled northern Iraq since 1991 are promoted in the U.S. media as a more moderate alternative to the Shia religious parties, their policies towards women have also been extremely harsh. The Kurdish region they led passed a law allowing men to kill their wives for disobedience, an offer that an estimated 550 men accepted between 1991 and 1994.⁵²² An Iraqi women’s rights activist blamed the Kurdish nationalist parties for complicity in more than 8,000 “honor killings” of women since they gained control over northern Iraq.⁵²³ Like the Afghan warlords after the Taliban, the policies of these leaders may perpetuate the oppression of women.

Iraqi Christians Flee Fundamentalist Atrocities

¶118 A key difference between Iraq and Afghanistan is that the former has a large population – estimated at one to two million persons – of Christians, including the Assyrians, the indigenous population of Iraq.⁵²⁴ Since the fall of Saddam Hussein’s regime, the one million Christian Assyrians in Iraq have suffered continued tyranny, garbed in religious fervor rather than Ba’ath Arab nationalism.⁵²⁵ Ayatollah Sistani’s legal rulings dictate that Jews and Christians are unclean,⁵²⁶ and consistent with this “unclean” status, Iraqi fundamentalists have subjected their Christian countrymen to postwar reprisals worthy of Germany just before Kristallnacht: Iraqi Christians are being murdered in the dozens, several of their number are kidnapped and raped each week, and many of their large businesses have been looted and burned.⁵²⁷ Schoolteachers employed by the Iraqi state are preaching religion in class and forcing Christian girls to wear veils.⁵²⁸ Armed bands of religious fanatics “roam the streets..., exacting their brand of what they call God’s law.”⁵²⁹ Conditions are so bad that a few even recall Saddam’s old regime as being preferable.⁵³⁰ Over 45,000 Iraqi Christians who survived Saddam have fled Iraq since the war.⁵³¹

¶119 While many Iraqi Christians hoped that the 2005 election would guarantee them proportional representation in the Iraqi National Assembly that will draft a permanent constitution, hundreds of thousands of Christian voters were denied the right to vote because their designated polling centers never opened on election day, or had no ballots.⁵³² Voter turnout was only 17% in and around the Mosul area in Nineveh province, the Assyrian Christian homeland.⁵³³ “Quite a significant number of Christians in the Mosul area were denied ballot boxes and ballots,” the Iraqi deputy prime minister admitted.⁵³⁴ The result is that Christians will be underrepresented in the constitutional drafting process.⁵³⁵

CONCLUSION

¶120 Referring to the liberation of Afghanistan and Iraq from dictatorship, President George W. Bush declared, “No President has ever done more for human rights than I have.”⁵³⁶ President Bush has stated that the American invasions of Afghanistan and Iraq have freed these countries from their long histories of oppression, established or nearly established democratic rule, and liberated women to participate equally in politics and society.

¶121 Although both nations are as close to democracy and respect for individual rights as they have been in many years, the elevation of Iranian-style theocrats to many of their key leadership positions remains a serious obstacle along the path to the promised freedom. The political reality in Afghanistan and Iraq is too often that austere U.S.-backed fundamentalists control thousands of armed militiamen with tenuous allegiance to the central government, and exploit these private armies to distort the legal and political development of their countries towards theocracy. These militia commanders and their allies have wantonly violated the human rights of women and religious and ethnic minorities. Despite their many abuses, no comprehensive effort to disarm these private armies is underway, or perhaps even possible, in either country.⁵³⁷

¶122 A more complex understanding of the history of Afghanistan and Iraq, both before and after the intervention of the U.S.-led coalitions, is critical to assessing the impact of the Bush doctrine on human rights and respect for international law. An appreciation of the atrocities of the Taliban and Saddam Hussein is indispensable to such an assessment. At the same time, the influence bestowed upon fundamentalist warlords and their allies in Afghanistan has resulted in the continuing oppression of the Afghan people, and challenges the Bush administration’s simple narrative of a liberation from the Taliban resulting in equal rights for women and democracy for all. Likewise, the central role of fundamentalist politicians and militia leaders in post-Saddam Iraq should temper the triumphal attitude that followed the capture of Baghdad.

¶123 Considering the mounting human and financial cost of U.S. military operations, which could probably save tens of millions of lives per year if devoted to international health care spending, more thorough study of human rights justifications for U.S. military interventions is critical.⁵³⁸ The historical record of U.S. “liberation” of other countries, while impressive, is mixed. German-occupied Europe, Japan, South Korea, and Bosnia have all enjoyed remarkable advances in human rights, democratic governance, women’s rights, and economic growth since the U.S. and its allies toppled or repelled dictatorial regimes.⁵³⁹ But American colonization, military occupation and political intervention have failed to produce lasting freedom in many Third World countries more similarly situated to Iraq and Afghanistan. A number of countries have actually experienced worsening human rights situations and even genocide, sometimes with the direct involvement of the U.S. military, since the U.S. intervened in their internal affairs.⁵⁴⁰ Compared to these current and former American political protégés, the cause of women’s equality has fared better in many respects in several other Third World countries that have not

experienced American military occupation or political control.⁵⁴¹ In light of the poor results of many prominent interventions in the Third World, the Bush administration's optimistic projections for its reconstruction efforts appear to be premature at best, and warrant more careful scrutiny given their large and rising costs in terms of loss of life and economic devastation.

¶124

When the fundamentalist policies of many post-Taliban Afghan warlords or Iraqi religious parties are raised as objections to U.S. support for these forces, the typical response is to compare these U.S. allies favorably to the Taliban or Saddam Hussein.⁵⁴² But many Afghans and Iraqis may wonder why the practices of Afghan warlords and Iraqi fundamentalists are not instead compared unfavorably to international human rights standards or even to the existing practices of neighboring countries such as present-day Lebanon or Tajikistan, where discrimination against women and religious minorities is less often practiced. For them, the right question is not whether Afghan warlords are better than the Taliban or the Ayatollahs better than Saddam Hussein, but whether the future Afghan and Iraqi governments will be so much better that regime change will have justified the death and maiming of thousands of civilians in the invasion and occupation of their lands.⁵⁴³ The answer will only be revealed after several decades have passed, and the fate of U.S.-imposed "Islamic democracy" is known to history.

* Assistant Professor of Law, Florida International University College of Law, August 2005. E-mail: htravis@post.harvard.edu. The author thanks the many human rights activists with whom he discussed the issues addressed in this Article, especially the activists with Women for Afghan Women and the Assyrian Democratic Movement.

¹ Charles Norchi, *Whose War Is It Now?*, N.Y. TIMES, Mar. 21, 1994, at A17.

² Amin Tarzi, *Hurdles in Implementing the New Afghan Constitution*, RADIO FREE EUROPE/RADIO LIBERTY, Feb. 8, 2004, at <http://rferl.com/reports/afghan-report/2004/02/5-050204.asp>.

³ John Daniszewski, *Shiites Walk Softly in New Landscape*, L.A. TIMES, Feb. 14, 2005, at A1.

⁴ See, e.g., Karen DeYoung, *Allies Are Cautious On "Bush Doctrine"*, WASH. POST, Oct. 16, 2001, at A01; Robin Wright, *Iraq Occupation Erodes Bush Doctrine*, WASH. POST, June 28, 2004, at A01. Although the Bush doctrine has thus far been employed only against Afghanistan and Iraq, 15 out of the 19 hijackers on September 11 were from Saudi Arabia, and their Afghan-based organization, *al Qaeda*, has been funded to the tune of \$500 million by Saudi Arabia, not Iraq. See Robert Baer, *The Fall of the House of Saud*, THE ATLANTIC MONTHLY, May 2003, available at <http://foi.missouri.edu/evolvingissues/fallhouseofsaud.html>.

⁵ See, e.g., *A Threatened Afghanistan*, N.Y. TIMES, July 15, 2004, at A22, available at <http://www.nytimes.com/2004/07/15/opinion/15THU1.html>; Sonali Kolhatkar, *Special Report: Afghan Women Continue to Fend for Themselves*, FOREIGN POLICY IN FOCUS, Mar. 2004, at <http://www.fpi.org/papers/2004afghanwom.html>; Meena Nanji, *Afghanistan Women Stifled, with West's Permission*, L.A. TIMES, Jan. 7, 2004, at A9; Bruce Fein, *Constitutional Tempest in Iraq*, WASH. TIMES, Mar. 30, 2004, at A19, available at <http://washingtontimes.com/commentary/20040329-085445-5772r.htm>; Christina Asquith, *Fundamentalists Rush in*, CHRISTIAN SCI. MONITOR, Mar. 30, 2004, at 11, available at <http://www.csmonitor.com/2004/0330/p11s02-legn.html>; Nina Shea, *Specify the "Tenets"*, NATIONAL REVIEW ONLINE, Mar. 3, 2004, at <http://www.nationalreview.com/comment/she200403040845.asp>.

⁶ For an account of the view of a prominent U.S. official involved in the political reconstruction of Iraq that Islamic democracy is incompatible with the separation of religion and the state, see Steve Schifferes, *US "Should Back Islamic Iraq"*, BBC News Online, Apr. 25, 2003, at http://news.bbc.co.uk/2/hi/middle_east/2976993.stm; Terence P. Jeffrey, *Ayatollah I, First Amendment 0*, ONLINE HUMAN EVENTS, Dec. 10, 2003, at <http://www.humaneventsonline.com/article.php?id=2577>.

⁷ See *Key Findings: Nationwide Survey of 3,500 Iraqis*, USA TODAY, Apr. 30, 2004, available at <http://www.usatoday.com/news/world/iraq/2004-04-28-gallup-iraq-findings.htm>.

⁸ See Martin Ewans, *Afghanistan: A Short History Of Its People And Politics* 12, 15-17, 42-70 (2002); Willem Vogelsang, *The Afghans* 36, 114-35, 176-212, 217-227, 245-62 (2002).

⁹ Sharia law is generally understood to mean a loose system of uncodified laws that the supreme deity of Islam, Allah, revealed to humanity in various passages of the Islamic holy book the Qur'an, and in the sayings and deeds of the Prophet Muhammad. See Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 Geo. Wash. Int'l L. Rev. 695, 721 (2004); *Sudan: A Country Study* (Helen Chapin Metz ed., 1991), at http://lcweb2.loc.gov/frd/cs/sudan/sd_glos.html.

¹⁰ See AHMED RASHID, *TALIBAN* 83, 95 (2000); United Nations High Commissioner for Refugees (UNHCR),

Update of the Situation in Afghanistan and International Protection Considerations, 4, ¶ 3 (July 2003), at <http://www.proasyl.de/texte/mappe/2003/80/2.pdf>. Traditionally, civil and criminal disputes in southern and eastern Afghanistan were settled either pursuant to the Sharia or the Pashtun way, the latter involving submission of the dispute to a *jirga* of tribal elders who could order the money, property, or even family members (especially virgin girls) of the offender to be handed over to the victim as “blood money.” See *The Customary Laws of Afghanistan* THE INTERNATIONAL LEGAL FOUNDATION 4-8 (2002), at http://www.theilf.org/ILF_cust_law_afgh_10-15.doc. “Generally, girls are preferred to money, because when the girls are wedded to the victim’s family, kinship and blood sharing will transform the severe enmity into friendship.” *Id.* at 11 (emphasis omitted).

¹¹ See *id.*; Niloufer Qasim Mahdi, *Pukhtunwali: Ostracism and Honor Among the Pathan Hill Tribes*, 7 *ETHOLOGY AND SOCIOBIOLOGY* 295-304 (1986), available at <http://www.bepress.com/context/gruterclassics/article/1036/viewcontent>.

¹² See Mariam Nawabi, *Women’s Rights in the New Constitution of Afghanistan* at 8 (2003), at <http://www.cic.nyu.edu/pdf/E22Womens%20RightsFullVersionNawabi.pdf>; Huma Ahmed-Ghosh, *A History of Women in Afghanistan: Lessons Learnt for the Future*, 4 *J. INT’L WOMEN’S STUD.* 3 (May 2003), available at <http://www.bridgew.edu/SoAS/jiws/May03/Afghanistan.pdf>.

¹³ Loya Jirga (or Great Council in the Pashto language) is an institution that has served in Afghan history as a mechanism for involving the Afghan people in decisions of great historic significance by calling an assembly of tribal elders and national leaders to reach an accord. See G. Rauf Roashan, *Loya Jirga: One of the Last Political Tools for Bringing Peace to Afghanistan*, INSTITUTE FOR AFGHAN STUDIES (July 30, 2001), at <http://www.institute-for-afghan-studies.org/AFGHAN%20CONFLICT/LOYA%20JIRGA/LoyaJirgaLastToolDrRoashan.htm>.

¹⁴ AFG. CONST. OF 1923, art. 16, available at http://www.institute-for-afghan-studies.org/Constitutions/king_amanullah/THE%20CONSTITUTION%20OF%20AFGHANISTAN%20APRIL%201923.htm.

¹⁵ See VOGELSANG, *supra* note 8, at 279.

¹⁶ See Masouda Gizabi, *Testimony to the Congressional Human Rights Caucus on the Post Taleban Era: Human Rights and the Role of Women in Afghanistan* (Dec. 18, 2001), available at <http://lantos.house.gov/HoR/CA12/Human+Rights+Caucus/Briefing+Testimonies/Testimony+from+Masouda+Giza+bi.htm> (“Towards the end of nineteenth century, about 62% of [the Hazara] people were massacred. The survivors were sold into slavery and expelled out of the country.”); Mir Hekmatullah Sadat, *Afghan History: Kite Flying, Kite Running and Kite Banning*, LEMAR AFTAAB AFGHANMAGAZINE.COM, June 2004, at http://www.afghanmagazine.com/2004_06/articles/hsadat.shtml (“In 1891 . . . , Amir Abdur Rahman continued the policy of offering Sunnis and tribesmen the title of ‘ghazi’ (infidel killer) for his conquest of Hazarajat. The result was the destruction of the Hazara tribal system, annexation of Hazara personal property and land, and the enslavement Hazaras to be sold in the Kabul bazaar. What ensued was the massive migration of Hazaras to Quetta and Mashad, currently in Pakistan and Iran, respectively.”).

¹⁷ See Afg. Const. of 1923, art. 10.

¹⁸ See *id.*, art. 26, 28.

¹⁹ See *id.*, art. 2.

²⁰ *Id.*, art. 68.

²¹ See *The Random House Unabridged Dictionary of the English Language* 1471 (1966).

²² WEBSTER’S ENCYCLOPEDIA DICTIONARY 1025 (1987).

²³ AFG. CONST. OF 1923, art. 2, 5. The 1923 Constitution and all other Afghan constitutions discussed in this article are available at the website of the U.N. Assistance Mission in Afghanistan (UNAMA), <http://www.unama-afg.org/docs/Constitution>.

²⁴ *Id.*, art. 72.

²⁵ *Id.*, art. 21.

²⁶ See Nina Shea, *Sharia in Kabul?: A Theological Iron Curtain Is Descending Across Afghanistan*, NATIONAL REVIEW, Oct 28, 2002, at 20.

²⁷ Iraj Bashiri, *Afghanistan: An Overview* (2002), at <http://www.angelfire.com/rnb/bashiri/Afghanistan/AfghanOverview.html> (2002).

²⁸ See International Crisis Group, *Afghanistan’s Flawed Constitutional Process*, (June 12, 2003), at http://www.icg.org/library/documents/report_archive/A401002_12062003.pdf; THE ENCYCLOPEDIA OF WORLD HISTORY: ANCIENT, MEDIEVAL, AND MODERN (Peter N. Sterns ed., 6th. ed. 2001), available at <http://www.bartleby.com/67/2346.html>.

²⁹ See Mir Hekmatullah Sadat, *Modern Education in Afghanistan*, LEMAR – AFTAAB AFGHANMAGAZINE.COM, Mar. 2004, available at http://www.afghanmagazine.com/2004_03/articles/education.shtml.

³⁰ See RASHID, *supra* note 10, at 83.

³¹ See Nawabi, *supra* note 12, at 8.

- ³² LOUIS DUPREE, AFGHANISTAN 46 (1973), *cited in* Nawabi, *supra* note 12, at 8.
- ³³ *See* RASHID, *supra* note 10, at 84.
- ³⁴ EWANS, *supra* note 8, at 93.
- ³⁵ *See id.* at 94.
- ³⁶ *See id.*
- ³⁷ *See id.*
- ³⁸ *See id.* Jews and Hindus, moreover, would be forced to wear distinctive clothing and pay a special tax. *See* AFG. CONST. OF 1923, art. 2.
- ³⁹ EWANS, *supra* note 8, at 94.
- ⁴⁰ *See* AFG. CONST. OF 1923, art. 24, as amended January 28, 1925.
- ⁴¹ VOGELSANG, *supra* note 8, at 280.
- ⁴² *See id.* at 281.
- ⁴³ *See id.*
- ⁴⁴ *See id.* at 281-82; Ahmed-Ghosh, *supra* note 12, at 5; AFGHANISTAN COUNTRY STUDY AND GOVERNMENT PUBLICATIONS 45-46 (Richard F. Nyrop & Donald M. Seekins, eds., 1986).
- ⁴⁵ *See, e.g.,* Ewans, *supra* note 8, at 96-98; Edgar O'Ballance, *Afghan Wars: Battles in a Hostile Land* 75 (2002).
- ⁴⁶ *See* EWANS, *supra* note 8, at 96.
- ⁴⁷ *See* LEON B. POUILLADA & LEILA D.J. POUILLADA, THE KINGDOM OF AFGHANISTAN AND THE UNITED STATES: 1828-1973 86 (1995); EWANS, *supra* note 8, at 102; AFGHANISTAN COUNTRY STUDY AND GOVERNMENT PUBLICATIONS, *supra* note 44, at 49.
- ⁴⁸ *See* VOGELSANG, *supra* note 8, at 285.
- ⁴⁹ *See* EWANS, *supra* note 8, at 101.
- ⁵⁰ *See* VOGELSANG, *supra* note 8, at 285.
- ⁵¹ *See id.*
- ⁵² *See id.*
- ⁵³ *See* EWANS, *supra* note 8, at 101.
- ⁵⁴ *See id.*; AFGHANISTAN: A COUNTRY STUDY (Peter R. Blood ed., 1997), *available at* <http://countrystudies.us/afghanistan/1.htm>
- ⁵⁵ BLOOD, *supra* note 54, *available at* <http://countrystudies.us/afghanistan/58.htm>.
- ⁵⁶ He was shot to death while visiting a school in Kabul. *See* EWANS, *supra* note 8, at 103.
- ⁵⁷ *See* VOGELSANG, *supra* note 8, at 288.
- ⁵⁸ *See id.* at 288-89; POUILLADA & POUILLADA, *supra* note 47, at 163-66.
- ⁵⁹ Daoud helped broker agreements for the Soviet Union and its satellites to supply Afghanistan with advanced Soviet military training and weaponry, including tanks, helicopters, and fighter-bombers. *See* EWANS, *supra* note 8, at 109-10; BLOOD, *supra* note 54, *available at* <http://countrystudies.us/afghanistan/26.htm>; AFGHANISTAN COUNTRY STUDY AND GOVERNMENT PUBLICATIONS, *supra* note 44; U.S. Department of State, *Country Fact Sheet: Afghanistan*, DEPARTMENT OF STATE DISPATCH NO. 23 (June 6, 1994) (\$1 billion in Soviet aid starting in 1954). Among other projects, the Soviet Union built an international airport for Kabul, roads connecting Afghanistan's three major cities with each other and with the Soviet Union, a tunnel at 11,000 feet through 1.7 miles of the towering Hindu Kush mountains that divide Kabul from the north of Afghanistan, paved streets for Kabul, and a number of grain silos. *See* EWANS, *supra* note 8, at 112-13.
- ⁶⁰ The U.S. oversaw the construction of an international airport in Kandahar and developed Afghanistan's national airline Ariana; led the building of roads from Kabul to Kandahar and from Afghanistan to Iran and Pakistan, then both friendly with the United States; and provided educational assistance. *See* EWANS, *supra* note 8, at 114-15. President Eisenhower also visited Kabul to proclaim American friendship. *See id.*
- ⁶¹ *See id.* at 115.
- ⁶² *See* EWANS, *supra* note 8, at 115.
- ⁶³ *See* M. HASSAN KAKAR, AFGHANISTAN: THE SOVIET INVASION AND THE AFGHAN RESPONSE, 1979-1982, at Introduction (1995), *available at* <http://ark.cdlib.org/ark:/13030/ft7b69p12h>.
- ⁶⁴ *See* VOGELSANG, *supra* note 8, at 293.
- ⁶⁵ The heresy charge was leveled on the theory that King Zahir Shah ruled Afghanistan by divine right, a notion later incorporated into Afghanistan's 1964 constitution. *See* EWANS, *supra* note 8, at 115; AFG. CONST. OF 1964, Art. 15.
- ⁶⁶ *See* KAKAR, *supra* note 63, at Introduction.
- ⁶⁷ *See* EWANS, *supra* note 8, at 115.
- ⁶⁸ *See id.* at 117-120.

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- ⁶⁹ See *id.* at 115-17.
- ⁷⁰ See *id.* at 120.
- ⁷¹ *The Sound of the Sixties*, THE ECONOMIST, Oct. 26, 2002, at 41.
- ⁷² See AFG. CONST. OF 1964, art. 69. Compare *id.* art. 9(8), with *id.* art. 9(7), and *id.* art. 9(10).
- ⁷³ See *id.* art. 9.
- ⁷⁴ See *id.* arts. 43-44. The constitution filled the remaining one-third of the Afghan Senate by having local provincial councils each elect one of their members to serve three-year terms in that body. See *id.* art. 44.
- ⁷⁵ Cf. EWANS, *supra* note 8, at 120 (1964 constitution expressed “clear preference for a secular legal system”).
- ⁷⁶ See Afg. const. of 1964, art. 2.
- ⁷⁷ *Id.* art. 64 (emphasis added). Compare AFG. CONST. OF 1923, art. 72.
- ⁷⁸ AFG. CONST. OF 1923, art. 5.
- ⁷⁹ AFG. CONST. OF 1964, art. 15 (emphasis added).
- ⁸⁰ See DEMOCRACY AND ISLAM IN THE NEW CONSTITUTION OF AFGHANISTAN (Cheryl Benard & Nina Hachigian eds., 2003), available at <http://www.rand.org/publications/CF/CF186/CF186.pdf>.
- ⁸¹ AFG. CONST. OF 1923, art. 21.
- ⁸² AFG. CONST. OF 1964, art. 69.
- ⁸³ See Bharathi A. Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari’ah and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 1970-71 (1995); Urfan Khaliq, *Beyond The Veil?: An Analysis of the Provisions of the Women’s Convention in the Law as Stipulated in Shari’ah*, 2 BUFF. J. INT’L L. 1, 29-30, 30 n.122, 36-7 (1995); John L. Esposito, WOMEN IN MUSLIM FAMILY LAW 34-35 (1982).
- ⁸⁴ AFG. CONST. OF 1964, art. 69.
- ⁸⁵ *Id.*, art. 102. The 1923 Constitution, by comparison, had directed Afghan courts simply to the “principles of Sharia” without specifying which particular school of Islamic law such as Hanafi to follow. See AFG. CONST. OF 1923, art. 21.
- ⁸⁶ *The Sound of the Sixties*, *supra* note 71.
- ⁸⁷ Compare AFG. CONST. OF 1964, art. 25, with AFG. CONST. OF 1923, art. 16. See also VOGELSANG, *supra* note 8, at 279 (1923 constitution interpreted as giving women equal rights).
- ⁸⁸ See AFG. CONST. OF 1964, arts. 25-6, 29-32, 34, 37.
- ⁸⁹ *The Sound of the Sixties*, *supra* note 71.
- ⁹⁰ See VOGELSANG, *supra* note 8, at 296.
- ⁹¹ See Ariane Brunet & Isabelle S. Helal, *Seizing an Opportunity: Afghan Women and the Constitution-Making Process* (Sept. 2003), at <http://www.ichrdd.ca/english/commdoc/publications/women/afghanMissionReportSept2003Eng.html>.
- ⁹² See EWANS, *supra* note 8, at 122-23.
- ⁹³ See *id.* at 121.
- ⁹⁴ See VOGELSANG, *supra* note 8, at 296.
- ⁹⁵ See EWANS, *supra* note 8, at 122-24.
- ⁹⁶ See *id.* at 123-24.
- ⁹⁷ See VOGELSANG, *supra* note 8, at 297.
- ⁹⁸ See EWANS, *supra* note 8, at 123.
- ⁹⁹ See Robert Irwin, *Is This the Man Who Inspired Bin Laden?*, THE GUARDIAN, Nov. 1, 2001.
- ¹⁰⁰ See VOGELSANG, *supra* note 8, at 292.
- ¹⁰¹ See *id.*
- ¹⁰² See *id.* at 298. Most of Afghanistan’s judges were trained at Al-Azhar University. See Barnett R. Rubin, *The Fragmentation of Afghanistan*, FOREIGN AFFAIRS, 1989, at 150.
- ¹⁰³ See VOGELSANG, *supra* note 8, at 298.
- ¹⁰⁴ See KAKAR, *supra* note 63, at 2.4.
- ¹⁰⁵ See *id.* at B, “Niazi.”
- ¹⁰⁶ See *id.* at B, “Rabbani,” & “Sayyaf”; VOGELSANG, *supra* note 8, at 298.
- ¹⁰⁷ See Irwin, *supra* note 99.
- ¹⁰⁸ See *Rabbani’s Afghan Comeback*, BBC NEWS ONLINE, Nov. 14, 2001, at http://news.bbc.co.uk/1/hi/world/south_asia/1656013.stm.
- ¹⁰⁹ See *Profile of an Afghan Warlord* (Australian Broadcasting Corp. broadcast, Nov. 22, 2001), available at <http://www.abc.net.au/worldtoday/stories/s423361.htm>.
- ¹¹⁰ See John F. Burns, *Afghans: Now They Blame America*, N.Y. TIMES MAGAZINE, Feb. 4, 1990, at 6-22 (“As a

Kabul student leader during the early 1970's, [Hekmatyar] had dispatched followers to throw vials of acid into the faces of women students who refused to wear veils.”). In the Afghan context, such attacks can be a fate worse than death, due to the importance of finding a husband for financial support. Cf. Lisa M. Taylor, *Saving Face: Acid Attack Laws After the U.N. Convention on the Elimination of All Forms of Discrimination Against Women*, 29 GA. J. INT'L & COMP. L. 395, 400 n.25 (2001).

¹¹¹ See VOGELSANG, *supra* note 8, at 298.

¹¹² Compare EWANS, *supra* note 8, at 126 (stating, “100,000 people – some say more – died”), with Burns, *supra* note 110 (stating that 500,000 Afghans died of starvation in the winter of 1971).

¹¹³ See VOGELSANG, *supra* note 8, at 299.

¹¹⁴ See JOHN K. COOLEY, UNHOLY WARS: AFGHANISTAN, AMERICA AND INTERNATIONAL TERRORISM 11 (2000).

¹¹⁵ See *id.*; BLOOD, *supra* note 54, available at <http://countrystudies.us/afghanistan/28.htm>.

¹¹⁶ See BLOOD, *supra* note 54, available at <http://countrystudies.us/afghanistan/28.htm>.

¹¹⁷ See KAKAR, *supra* note 63, at 3.9-3.12.

¹¹⁸ See VOGELSANG, *supra* note 8, at 300.

¹¹⁹ See *id.*

¹²⁰ See *id.* at 300; EWANS, *supra* note 8, at 155; Antonio Giostozzi, *Re-building the Afghan Army* (2003), at <http://bglatzer.de/arg/arp/giostozzi.pdf>. The Pakistani government trained and armed the Afghan fundamentalists such as Hekmatyar. See George Arney, *The Heroes with Tarnished Haloes: The Ruthless and Murderous Conflicts of Afghanistan's Other War*, THE GUARDIAN (U.K.), Jan. 5, 1988; EWANS, *supra* note 8, at 131; John Kifner, *Afghanistan, by Custom, Has Rebels Everywhere*, N.Y. TIMES, May 14, 1989, at E2.

¹²¹ See EWANS, *supra* note 8, at 131.

¹²² See VOGELSANG, *supra* note 8, at 300.

¹²³ See *id.* at 301.

¹²⁴ Article 2, which in all previous Afghan constitutions had proclaimed Islam the sacred religion of Afghanistan, now called for “the exercise of power by the people, the majority of whom consists of farmers, workers, the enlightened people and the youth.” AFG. CONST. OF 1977, art. 2. Another provision called for land reform, *see id.*, art. 14, five percent of the landowners then owning 45% of all arable land, and some 400 families owning about 20,000 villages. See RAJA ANWAR, THE TRAGEDY OF AFGHANISTAN 130 (1988). The constitution decreed state ownership for Afghan banks, insurers, large industries, oil and other mineral resources, and communications and transport hubs. See AFG. CONST. OF 1977, art. 13; VOGELSANG, *supra* note 8, at 301.

¹²⁵ See AFG. CONST. OF 1977, art. 64.

¹²⁶ See *id.* art. 99.

¹²⁷ See *id.* art. 27.

¹²⁸ See *id.* art. 21.

¹²⁹ See VOGELSANG, *supra* note 8, at 301.

¹³⁰ See *id.* at 303-4.

¹³¹ Burns, *supra* note 110. See also Barry Kramer, *Out of Isolation: Afghanistan Is Pushing Toward the 20th Century With Bold Spending Plan, but Tribesman Resist*, WALL ST. J., Sept. 2, 1977, at 22 (“Afghanistan is plagued by poverty, 90% illiteracy, 50% infant mortality rate and soc[ial] and econ[omic] backwardness”).

¹³² See VOGELSANG, *supra* note 8, at 304.

¹³³ See *id.*

¹³⁴ See *id.* His deputies were the other two leading Afghan communists, Babrak Karmal and Hafiz Allah Amin. See *id.*

¹³⁵ See Amnesty International, *Women in Afghanistan: Pawns in Men's Power Struggles*, Nov. 1, 1999; VOGELSANG, *supra* note 8, at 304.

¹³⁶ Richard Ehrlich, *Feminism, Afghan Style*, THE ADVERTISER (AUSTRALIA), Dec. 5, 1987.

¹³⁷ See VOGELSANG, *supra* note 8, at 304; Ewans, *supra* note 8, at 139.

¹³⁸ See VOGELSANG, *supra* note 8, at 306-7.

¹³⁹ See *id.* at 306

¹⁴⁰ EWANS, *supra* note 8, at 143.

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See PHILLIP C. WILCOX, *STRIKING TERROR: AMERICA'S NEW WAR 80* (Robert B. Silvers & Barbara Epstein eds., 2002); COOLEY, *supra* note 114 at 13, 19-22

¹⁴⁵ WILCOX, *supra* note 146, at 80; COOLEY, *supra* note 114 at 13, 19-22. The Defense Department believed at the time that "there was value in keeping the Afghan insurgency going, 'sucking the Soviets into a Vietnamese quagmire.'" ROBERT GATES, *FROM THE SHADOWS: THE ULTIMATE INSIDER'S STORY OF FIVE PRESIDENTS AND HOW THEY WON THE COLD WAR 145* (1997). The Soviet leadership believed that the CIA was fomenting fundamentalist opposition with the purpose of replacing U.S. bases lost in Iran after the 1979 revolution. See COOLEY, *supra* note 114, at 13-19

¹⁴⁶ EWANS, *supra* note 8, at 146-48; BLOOD, *supra* note 54. The Soviet Union claimed that it had been invited into Afghanistan by the besieged Taraki regime pursuant to a mutual defense treaty, but historians tend to reject these claims, citing a lack of evidence. See, e.g., KAKAR, *supra* note 63, at Chapter 2. Although Taraki, the initial leader of the Afghan communist government, had signed a military assistance treaty with the Soviets, and pleaded with them for both "men and weapons" after the revolt in Herat, he was dead by the time of the invasion. See *id.* While it is undisputed that Taraki's rival Karmal welcomed the Soviet invasion, historians deny that he had the authority to invite the Soviets in because he was not even living in Afghanistan at the time. See *id.*

¹⁴⁷ See EWANS, *supra* note 8, at 146-48

¹⁴⁸ See VOGELSANG, *supra* note 8, at 321.

¹⁴⁹ See *id.* at 309; KAKAR, *supra* note 75, at Chapter 2.

¹⁵⁰ See VOGELSANG, *supra* note 8, at 309.

¹⁵¹ See *id.*

¹⁵² See, e.g., BLOOD, *supra* note 54; KAKAR, *supra* note 63, at Chapter 3.

¹⁵³ U.S. Department of State, *Afghanistan Human Rights Practices, 1993* (Jan. 31, 1994), at http://64.233.167.104/search?q=cache:wGmeiZXg-jMJ:dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_sasia/Afghanistan.html+%22Afghanistan+Human+Rights+Practices,+1993+%22&hl=en.

¹⁵⁴ See Valentine Moghadam, *Afghan Women and Transnational Feminism*, 16 MIDDLE EAST WOMEN'S STUDIES REV. 1-6 (Fall 2001/Winter 2002), available at

http://www.amews.org/review/reviewarticles/transnational_feminism.htm.

¹⁵⁵ Sharon Lerner, *A Place at the Table*, VILLAGE VOICE, Dec. 11, 2001, at 39, available at <http://www.villagevoice.com/issues/0149/lerner.php>.

¹⁵⁶ See Moghadam, *supra* note 154.

¹⁵⁷ See Carlotta Gall, *Afghan Women Lose their Rights*, CALGARY HERALD, Oct. 9, 1992, at A20.

¹⁵⁸ See Moghadam, *supra* note 154.

¹⁵⁹ *Id.*

¹⁶⁰ Soon after the Soviet invasion began, the U.S. coordinated an international campaign of support for the anti-communist *jihād* that had been waged from the fundamentalists' safe haven in Pakistan for several years prior to the Soviet intervention. Pakistan agreed to set up training camps for Afghan and foreign fighters, Saudi Arabia to contribute large sums of cash, and Egypt to bequeath their stocks of Soviet-made assault rifles. See COOLEY, *supra* note 114, at 15-16, 59, 65-69, 100, 95, 108-110. The *mujahideen* eventually received over \$10 billion, almost \$5 billion from the U.S. and \$3 billion from Saudi Arabia. See RASHID, *supra* note 10, at 18; SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER* at 247 (1998).

¹⁶¹ HUNTINGTON, *supra* note 160, at 247. The Reagan administration awarded one-third of the CIA's financial aid to the *mujahideen* and powerful anti-aircraft Stinger missiles to Hekmatyar's faction, which used this support to gain even more influence among Afghans. See Ahmed Rashid, *Afghan Designs: Geneva Accord on Afghanistan*, THE NATION, May 21, 1988, at 700; Richard Ehrlich, *Afghan Rebels at Each Others' Throats*, TORONTO STAR, Jan. 31, 1988, at H3; Arney, *supra* note 120.

¹⁶² Barry Shlachter, *Most-Disciplined Afghan Rebel Faction Seeks Strict Islamic State*, ASSOCIATED PRESS, Jan. 1, 1982. At the time, Hekmatyar was on "good terms" with the regime of Ayatollah Khomeini in Iran. *Id.*

¹⁶³ Christina Lamb, *Westernised Women Dread Return to a Veiled Existence*, FINANCIAL TIMES (U.K.), June 23, 1989, at 6.

¹⁶⁴ See Jan Goodwin & Jessica Neuwirth, *The Rifle and the Veil*, N.Y. TIMES, Oct. 19, 2001, at A19.

¹⁶⁵ *Grand Council to Begin Historic Work: Turbaned Delegates in High-Tech Setting Chart the Future: A New Day for Afghanistan*, EDMONTON JOURNAL (CANADA), June 9, 2002, at A4. See also RASHID, *supra* note 10, at 131 (Saudis used Sayyaf to "promote Wahhabism"); RALPH H. MAGNUS & EDEN NABY, *AFGHANISTAN: MULLAH, MARX, AND MUJAHID* at 97 (1998).

¹⁶⁶ *Grand Council to Begin Historic Work*, *supra* note 165, at A4. The Arab-Afghans had "very good relations" with both Sayyaf and Hekmatyar according to Ahmed Shah Massoud, who was later killed on the orders of the most famous one of them, bin Laden. RASHID, *supra* note 10, at viii, 132-33.

- ¹⁶⁷ See JASON BURKE, *AL-QAEDA: CASTING A SHADOW OF TERROR* 55 (2004).
- ¹⁶⁸ *Id.* at 55, 66, 125, 145; Vincent Cannistraro *A Strike Against Terrorism - and Ourselves?*, BOSTON GLOBE, Aug. 23, 1998, at E1 (“At 18, [bin Laden] joined Abd’al Rauf Sayyaf, an Afghan tribal leader who was trained in Saudi Arabia by the Wahabis.”). Sayyaf has even been described as a “mentor” to bin Laden. MARY ANNE WEAVER, *PAKISTAN: IN THE SHADOW OF JIHAD AND AFGHANISTAN* 191, 201, 222, 269 (2002).
- ¹⁶⁹ See O’BALLANCE, *supra* note 45, at 245. Bin Laden built a major CIA-financed tunnel complex and arms depot for the *mujahideen* in 1986. See RASHID, *supra* note 10, at 132; Michael Moran, *Bin Laden Comes Home to Roost: His CIA Ties Are Only the Beginning of a Woeful Story*, MSNBC, Aug. 23, 1998, available at <http://www.msnbc.com/news/190144.asp?cp1=1>.
- ¹⁷⁰ RASHID, *supra* note 10, at 129.
- ¹⁷¹ See *id.* at 13. See also HUNTINGTON, *supra* note 160, at 247 (putting number at 25,000).
- ¹⁷² RASHID, *supra* note 10, at 130.
- ¹⁷³ Jason Burke, *Frankenstein the CIA Created*, OBSERVER (U.K.), Jan. 17, 1999, available at <http://www.guardian.co.uk/yemen/Story/0,2763,209260,00.html>.
- ¹⁷⁴ See Ken Silverstein, *Two Panelists Detail Allies’ Al Qaeda Ties*, L.A. TIMES, June 21, 2004, at A12.
- ¹⁷⁵ See, e.g., Russell Watson & John Barry, *Insurgencies: Two of a Kind*, NEWSWEEK, Mar. 23, 1987, at 32; John F. Burns, *Misery Replaces Hope in a Battered Afghanistan*, N.Y. TIMES, Dec. 17, 1989, at 26 (1.3 million); Lamb, *supra* note 163, at 6 (1.5 million).
- ¹⁷⁶ See Watson & Barry, *supra* note 175, at 32; see also *Supplementary Material to the Interim Report on the Situation of Human Rights in Afghanistan*, quoted in Juliana Geran Pilon, *The Report that the U.N. Wants to Suppress: Soviet Atrocities in Afghanistan*, HERITAGE FOUNDATION REPORTS (Jan. 12, 1987).
- ¹⁷⁷ See Burns, *supra* note 175; Watson & Barry, *supra* note 176, at 32. See also Pilon, *supra* note 176.
- ¹⁷⁸ HUNTINGTON, *supra* note 160, at 247.
- ¹⁷⁹ See EWANS, *supra* note 8, at 160-61; Arney, *supra* note 120.
- ¹⁸⁰ See *Afghan Women Face Future of Backwardness*, S.F. CHRON., June 1, 1989, at A22.
- ¹⁸¹ *Id.*
- ¹⁸² See *id.*
- ¹⁸³ See The White House, Office of Mrs. Bush, *Radio Address by Laura Bush* (Nov. 17, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011117.html>; U.S. Department of State, Office of the Senior Coordinator for International Women’s Issues, *Fact Sheet: Women and Girls in Afghanistan* (Oct. 30, 2001), available at <http://www.state.gov/p/sa/rls/fs/index.cfm?docid=5795>.
- ¹⁸⁴ See EWANS, *supra* note 8, at 167-68.
- ¹⁸⁵ See Craig Karp, *Afghanistan: Seven Years of Soviet Occupation*, DEPARTMENT OF STATE BULLETIN (Feb. 1987), available at http://www.findarticles.com/p/articles/mi_m1079/is_v87/ai_4754840/print.
- ¹⁸⁶ AFG. CONST. OF 1987, art. 2, available at http://home.no.net/dawat1/constitution_of_afghanistan_1987.htm.
- ¹⁸⁷ See *id.*, art. 38.
- ¹⁸⁸ See *id.*, art. 39-60.
- ¹⁸⁹ See VOGELSANG, *supra* note 8, at 319.
- ¹⁹⁰ See CP-Reuters, *Join Afghan Parliament, Najibullah Urges Rebels*, TORONTO STAR (CANADA), May 30, 1988, at A3.
- ¹⁹¹ See EWANS, *supra* note 8, at 168-69.
- ¹⁹² See Burns, *supra* note 175.
- ¹⁹³ See *id.*
- ¹⁹⁴ See EWANS, *supra* note 8, at 171-72; VOGELSANG, *supra* note 8, at 322-23.
- ¹⁹⁵ See AFG. CONST. OF 1990, art. 2, 5, 29, available at <http://www.afghan-web.com/history/const/const1990.html>.
- ¹⁹⁶ See *id.*, art. 20, 25, 27; EWANS, *supra* note 8, at 175.
- ¹⁹⁷ See AFG. CONST. OF 1990, art. 75, 81.
- ¹⁹⁸ See *id.*, art. 75, 122-24.
- ¹⁹⁹ See Felix Ermacora, *Introduction to the Ninth Report of the Special Rapporteur of the Commission on Human Rights on the Human Rights Situation in Afghanistan*, ¶ 31 at 9, U.N. Doc. A/C.3/48/SR.40 (Nov. 23, 1993), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c3e13fa375d96e7a80256715003d714d?Opendocument>.
- ²⁰⁰ See VOGELSANG, *supra* note 8, at 323-24.
- ²⁰¹ See Burns, *supra* note 175.
- ²⁰² See John F. Burns, *Afghan’s Chief Vows to Stay in Office*, N.Y. TIMES, May 4, 1990, at A3.
- ²⁰³ Felix Ermacora, *Final Report on the Situation of Human Rights in Afghanistan*, ¶ 37 at 10, U.N. Doc.

E/CN.4/1995/64, available at <http://www1.umn.edu/humanrts/commission/country51/64.htm>.

²⁰⁴ See EWANS, *supra* note 8, at 180.

²⁰⁵ See U.S. Department of State, *Afghanistan Human Rights Practices, 1993* (Jan. 31, 1994), available at http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_sasia/Afghanistan.html.

²⁰⁶ Ermacora, *supra* note 203.

²⁰⁷ See Michael Griffin, *A Gruesome Record*, THE GUARDIAN (U.K.), Nov. 16, 2001, available at <http://www.guardian.co.uk/waronterror/story/0,1361,595529,00.html>.

²⁰⁸ O'Ballance, *supra* note 45, at 241.

²⁰⁹ See *10,000 Killed in 8 Months in Kabul*, THE FRONTIER POST (PAKISTAN) Nov. 28, 1993, available at <http://pz.rawa.org/rawa/reports.htm#1>.

²¹⁰ U.S. Department of State, *Afghanistan Human Rights Practices, 1994* (Feb. 1995), available at http://dosfan.lib.uic.edu/ERC/democracy/1994_hrp_report/94hrp_report_sasia/Afghanistan.html.

²¹¹ Charles M. Sennott, *A Dark Side to the Northern Alliance: Afghanistan's Anti-Taliban Militias Share History of Human Rights Abuse*, THE BOSTON GLOBE Oct. 6, 2001, at A1. "Thousands of women and girls were systematically raped by armed thugs, and many committed suicide to avoid being sexually assaulted by them." Mariam Rawi, *Rule of the Rapists*, THE GUARDIAN (U.K.) Feb. 12, 2004, available at <http://www.guardian.co.uk/comment/story/0,3604,1146134,00.html>.

²¹² See Amnesty International, *Women in Afghanistan: A Human Rights Catastrophe* (Nov. 3, 1995), available at <http://www.amnesty.org/ailib/intcam/afgan/afg5.htm>.

²¹³ Syed Saleem Shahzad, *Empty Words of War*, ASIA TIMES (Hong Kong), Nov. 27, 2001, available at <http://www.atimes.com/c-asia/CK27Ag02.html>. See also Sonali Kolhatkar, *Commentary: The Impact of U.S. Intervention on Afghan Women's Rights*, 17 BERKELEY WOMEN'S L.J. 12, 16 (2002) ("The Mujahadeen [] instituted laws banning alcohol and requiring that women be veiled. Both of these new crimes were punishable by floggings, amputations, and public executions."); U.S. Department of State, *supra* note 205 (Rabbani government imposed a mandatory "strict, conservative Islamic dress code"); *Killing for a Cause*, CALGARY HERALD (CANADA), Aug. 21, 1992, at A4 (Rabbani government "forced women to wear veils").

²¹⁴ U.S. Department of State, *supra* note 210.

²¹⁵ See *id.*

²¹⁶ Ronald Reagan, *Proclamation 5034 -- Afghanistan Day, 1983* (Mar. 21, 1983), available at <http://www.reagan.utexas.edu/resource/speeches/1983/32183d.htm>.

²¹⁷ U.S. Department of State, *Country Fact Sheet: Afghanistan*, DEPARTMENT OF STATE DISPATCH NO. 23 (June 6, 1994).

²¹⁸ Griffin, *supra* note 207; CHRISTINA LAMB, THE SEWING CIRCLES OF HERAT 20 (2002). See also *Grand Council to Begin Historic Work*, *supra* note 165, at A4; *Loya Jirga Defuses Battle of Good and Evil*, DEUTSCHE PRESSE-AGENTUR, June 12, 2002 ("Backed by hundreds of Arab recruits," Sayyaf "spearheaded a vicious campaign against the country's Shia Hazara minority.").

²¹⁹ See Strobe Talbott, *The Age of Terror: America and the World After September 11*, at 39 (2003).

²²⁰ *Id.* at 21.

²²¹ See BURKE, *supra* note 167, at 66, 125, 145.

²²² See U.S. Department of State, *supra* note 210; EWANS, *supra* note 8, at 179.

²²³ U.S. Department of State, *supra* note 210. See also Dan Chapman, *Many Afghans Haunted by Northern Alliance's Past*, THE ATLANTA JOURNAL-CONSTITUTION, Nov. 12, 2001, at 8A.

²²⁴ See EWANS, *supra* note 8, at 186.

²²⁵ See Scott Baldauf, *Life Under Taliban Cuts Two Ways*, CHRISTIAN SCI. MONITOR, Sept. 20, 2001 at 1.

²²⁶ RASHID, *supra* note 10, at 25. See also *id.* at 115.

²²⁷ Statement of Mr. Hamid Karzai, *The Taliban: Engagement or Confrontation?*, Hearing Before the Committee on Foreign Relations United States Senate, 106th Cong., 2d Sess., S. Hrg. 106-868 (July 20, 2000).

²²⁸ See RASHID, *supra* note 10, at 23.

²²⁹ See *id.* at 46, 158-59, 166, 176-177. See also Howard Schneider, *Saudi Missteps Helped Bin Laden Gain Power*, WASHINGTON POST FOREIGN SERVICE, Oct. 15, 2001, at A01. Saudi Arabia and some Pakistanis seized on the Taliban as a vehicle for promoting fundamentalist ideals. See RASHID, *supra* note 10, at 197-206, 211.

²³⁰ The U.S. reportedly funded Pakistani military training of the Taliban. See EWANS, *supra* note 8, at 225 (recounting statement to this effect by the Prime Minister of Pakistan to the BBC). The U.S. State Department praised the Taliban to Congress and argued publicly as late as 1996 that there was "nothing objectionable" about their fundamentalist policies. MAGNUS & NABY, *supra* note 165, at 184; see RASHID, *supra* note 10, at 158-59, 166. The Taliban owed much of their military sophistication and the speed of its success to highly trained professionals in the Pakistani security services, who trained the Taliban and provided it with thousands of Pakistani troops, 12,000

assault rifles and ammunition, and fuel and maintenance for tanks, artillery, and aircraft. See EWANS, *supra* note 8, at 183; RASHID, *supra* note 10, at 27-28, 39. U.S. “allies” Saudi Arabia and Pakistan also provided direct support to the *al Qaeda* brigades fighting alongside the Taliban and planning foreign terrorist attacks, including financial, intelligence, and military assistance. See Josh Meyer, *2 Allies Aided Bin Laden, Say Panel Members*, L.A. TIMES, June 20, 2004, available at <http://www.latimes.com/news/nationworld/world/la-fg-alqaeda20jun20,1,440629.story?coll=la-headlines-world>.

²³¹ See EWANS, *supra* note 8, at 184. The Pakistani Interior Minister even called the Taliban “our boys” and boasted that he was responsible for their victory in Kandahar. See RASHID, *supra* note 10, at 27-29.

²³² See VOGELANG, *supra* note 8, at 327; RASHID, *supra* note 10, at 33.

²³³ RASHID, *supra* note 10, at 39.

²³⁴ See *id.* at 48.

²³⁵ See O’BALLANCE, *supra* note 45, at 243.

²³⁶ See *id.* at 52-53.

²³⁷ See RASHID, *supra* note 10, at 51.

²³⁸ See UNHCR, *supra* note 10, ¶ 6 at 5.

²³⁹ See RASHID, *supra* note 10, at 74-6.

²⁴⁰ See *id.* at 58-60, 72-74; O’BALLANCE, *supra* note 45, at 244. The Pakistanis approved a budget of \$5 million for this operation, and the Saudis contributed as well. See RASHID, *supra* note 10, at 72, 138.

²⁴¹ See *id.* at 76; Gizabi, *supra* note 16.

²⁴² See David Filipov, *Reconstruction: Hazaras Hold Key Role After Taliban Destruction*, BOSTON GLOBE, Feb. 14, 2002, available at <http://www.afgha.com/?af=article&sid=12366>

²⁴³ See RASHID, *supra* note 10, at 76.

²⁴⁴ See *id.* at ix-x.

²⁴⁵ RASHID, *supra* note 10, at 43.

²⁴⁶ *Id.* at 107.

²⁴⁷ See *id.* at 106.

²⁴⁸ See *id.* at 51, 85.

²⁴⁹ Taliban leader Mullah Omar used to say, “Whatever Saudi Arabia wants me to do, I will do.” Steve Coll, GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 11, 2001, at 295 (2004).

²⁵⁰ See SAUDI ARABIA CONST., art. 1, 5-8, available at <http://www.the-saudi.net/saudi-arabia/saudi-constitution.htm>.

²⁵¹ See Harvey Morris, *Saudi Arabia 'Torturing Christians'; Expatriates and Shia Minority Victimised in State-Sanctioned Persecution*, Says Amnesty International, INDEPENDENT (U.K.), Sept. 14, 1993, at 10; Mark Latimer, Letter: Plight of Saudi Women, INDEPENDENT (U.K.), Oct. 24, 2000, at 2 (“Women in Saudi Arabia cannot move freely, appear in public without a hijab or gain equal access to education or employment. The al-Mutawa’een (religious police) aggressively target women, frequently beating them in the streets for perceived infractions of moral codes relating to dress or behaviour.”); Robert Fisk, *Saudi Torture of Women Rampant*, Says Amnesty, INDEPENDENT (U.K.), Sept. 27, 2000, at 14. (“Amnesty International has turned its humanitarian searchlight on Saudi Arabia’s justice ‘system’ - the quotation marks are essential - demanding to know why the kingdom’s judiciary and regal authorities should subject women to arbitrary detention, arrest, flogging and execution.”). In 2002, 15 Saudi girls burned to death in a fire in their dormitory after the religious police refused to allow them to leave the building without being completely covered. See *Palpitations at the Kingdom's Heart*, THE ECONOMIST Aug. 22, 2002, available at http://www.economist.com/world/africa/displayStory.cfm?story_id=1291310.

²⁵² See COLL, *supra* note 249, at 341-42.

²⁵³ See *id.* at 297, 613.

²⁵⁴ See *id.* at 29, 105, 115, 218-19; LAMB, *supra* note 218, at 283.

²⁵⁵ See RASHID, *supra* note 10, at xii, 219.

²⁵⁶ See, e.g., *id.* at 15-18.

²⁵⁷ See, e.g., *id.* at 17.

²⁵⁸ See RASHID, *supra* note 10, at 93; EWANS, *supra* note 8, at 184, 187.

²⁵⁹ See Pamela Constable, *Far From Prosperity: The Taliban Is Gone, But Drought and Corruption Have Hit Hard*, WASHINGTON POST Feb. 17, 2004, at C1. See also LAMB, *supra* note 218, at 10-11.

²⁶⁰ Thousands of Taliban conscripts and troops died in battles for one northern city, Mazar-i-Sharif, many being roasted in metal containers in the desert into which they were packed. See RASHID, *supra* note 10, at 59, 63.

²⁶¹ See Physicians’ Committee for Human Rights, *The Taliban's War on Women - A Health and Human Rights Crisis in Afghanistan*, “Overview” (1999), at http://www.phrusa.org/research/health_effects/exec.html (“Thousands

of men have been taken prisoner, arbitrarily detained, tortured, and many killed and disappeared.”).

²⁶² See RASHID, *supra* note 10, at 106, 110, 218.

²⁶³ See *id.* at 29; LAMB, *supra* note 218, at 81.

²⁶⁴ See Anastasia Telesetsky, *Recent Developments: In the Shadows and Behind the Veil: Women in Afghanistan Under Taliban Rule*, 13 BERKELEY WOMEN'S L.J. 293, 296 (1998).

²⁶⁵ See LAMB, *supra* note 218, at 30-31, 162. Even before the Taliban took power, more than 90% of girls and 60% of boys in Afghanistan were illiterate. See RASHID, *supra* note 10, at 107.

²⁶⁶ See Rashid, *supra* note 10, at 217-18; Robert Scheer, *Bush's Faustian Deal With the Taliban*, L.A. TIMES, May 22, 2001, available at http://www.robertscheer.com/1_natcolumn/01_columns/052201.htm.

²⁶⁷ See Schneider, *supra* note 229, at A01.

²⁶⁸ *Taliban Repeats Call for Negotiations*, CNN.COM, Oct. 2, 2001, at <http://www.cnn.com/2001/WORLD/asiapcf/central/10/02/ret.afghan.taliban>.

²⁶⁹ Stephen Biddle, *Afghanistan and the Future of Warfare: Implications for Army and Defense Policy* 8, U.S. ARMY WAR COLLEGE STRATEGIC STUDIES INSTITUTE (Nov. 2002), at <http://www.au.af.mil/au/awc/awcgate/ssi/afghan.pdf>.

²⁷⁰ *Id.* at 8-11, 18, 26-28; see also Michael Gordon, “New” U.S. War: *Commandos, Airstrikes and Allies on the Ground*, NEW YORK TIMES, Dec. 29, 2001, at A1; Thom Shanker, *Conduct of War is Redefined by Success of Special Forces*, NEW YORK TIMES, Jan. 21, 2002, at A1.

²⁷¹ See Yvonne Abraham, *UN Backs Reports of Mass Execution*, BOSTON GLOBE, Nov. 14, 2001, at A33; Carlotta Gall, *A Nation Challenged: Prisoners*, N.Y. TIMES, Dec. 11, 2001, at A1; Nicholas Watt, Richard Norton-Taylor, & Luke Harding, *Allies Justify Mass Killing of Taliban Prisoners in Fort*, GUARDIAN (U.K.), Nov. 29, 2001, available at <http://www.globalpolicy.org/wtc/analysis/1129justify.htm>; Holly J. Burkhalter, *POW Atrocities: An Ugly Lesson*, L.A. TIMES, Oct. 14, 2002, available at <http://www.commondreams.org/views02/1014-04.htm>; Human Rights Watch, *World Report 2003: Asia: Afghanistan*, available at <http://www.hrw.org/wr2k3/asia1.html>.

²⁷² See Barry Bearak, *Uncertain Toll in the Fog of War: Civilian Deaths in Afghanistan*, N.Y. TIMES, Feb. 10, 2002, available at <http://www.globalpolicy.org/wtc/analysis/2002/0211fog.htm>; Masuda Sultan, *Thousands of Civilian Casualties*, Miami Herald, Oct. 2, 2004, available at <http://www.miami.com/mld/miamiherald/news/opinion/9815562.htm?1c>.

²⁷³ See, e.g., Barry Bearak, *A Nation Challenged: The Victims*, N.Y. TIMES, Dec. 16, 2001, at 3B; Susan B. Glasser, *Afghans Live and Die With US Mistakes; Villagers Tell of Over 100 Casualties*, WASH. POST, Feb. 20, 2002, at A1; Human Rights Watch, *Afghanistan: U.S. Military Should Investigate Civilian Deaths* (Dec. 13, 2003), at <http://www.hrw.org/press/2003/12/afghanistan121303.htm>. Reporting by the New York Times in Afghanistan revealed that the deaths of “as many as four hundred civilians” resulted from American forces relying “on mistaken, incomplete, inaccurate and intentionally misleading information provided by locale Afghans harboring vendettas.” Matthew Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan*, 33 CAL. W. INT'L L.J. 1, 59 (2002) (citing Dexter Filkins, *Flaws in U.S. Air War Left Hundreds of Civilians Dead*, N.Y. TIMES, July 21, 2002, at A1).

²⁷⁴ See Barry Bearak, *Unreconstructed*, N.Y. TIMES, June 1, 2003, available at <http://www.afgha.com/?af=article&sid=33717>.

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²⁷⁷ See Gordon, *supra* note 270, at A1; Shanker, *supra* note 270, at A1.

²⁷⁸ See *Ally of Afghan Leader Shot Dead*, BBC NEWS ONLINE, Apr. 5, 2003, at http://news.bbc.co.uk/1/hi/world/south_asia/2919815.stm; Biddle, *supra* note 269, at 11.

²⁷⁹ See UN Doc. S/2001/1154, Dec. 5, 2001 (relaying the “Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions” signed in Bonn).

²⁸⁰ See *id.* § III(A)(2); Kolhatkar, *supra* note 213, at 21-22; Norimitsu Onishi, *A Nation Challenged: War in South*, N.Y. TIMES, Dec. 15, 2001, at A1; David Rohde, *A Nation Challenged: The Politics*, N.Y. TIMES, Dec. 16, 2001, at B3. The shape of the new administration came together when the three modernizing former lieutenants to Northern Alliance military leader Ahmed Shah Massoud indicated their willingness to serve under Karzai rather than their titular leader, former President Rabbani, and were rewarded with positions heading the key government ministries of Defense, Foreign Affairs, and Interior. See Rashid, *supra* note 161; Profile: Younis Qanooni, BBC NEWS ONLINE, Dec. 6, 2001, at http://news.bbc.co.uk/1/hi/world/south_asia/1695218.stm; UNHCR, *supra* note 10, ¶¶ 9 nn. 9-14.

²⁸¹ See UNHCR, *supra* note 10, ¶ 19, at 10.

²⁸² See *The Sound of the Sixties*, *supra* note 71 (“Conservative elements led by Abdul Rasul Sayyaf, a warlord who

destroyed much of western Kabul in the early 1990s (though he still teaches religion at Kabul University), insisted that the provisional administration be designated as 'Islamic'.")

²⁸³ *Afghans Claim U.S. Is Manipulating Loya Jirga*, HOLLAND ONLINE SENTINEL, June 20, 2002, available at http://www.hollandsentinel.com/stories/061302/new_061302024.shtml; Chris Otton, *US Pressure May Undermine Karzai and Long-Term Ambitions: Analysts*, AGENCE FRANCE-PRESSE, June 20, 2002.

²⁸⁴ *Warlords Demand Say in Future of Afghanistan*, TORONTO STAR, June 14, 2002, at B4.

²⁸⁵ See World Bank, *Afghanistan: Facts and Figures at a Glance* (Apr. 2002), at [http://Inweb18.worldbank.org/SAR/sa.nsf/Attachments/dat/\\$File/AfgData.pdf](http://Inweb18.worldbank.org/SAR/sa.nsf/Attachments/dat/$File/AfgData.pdf); *Afghanistan: Government Set to Tackle Maternal Mortality*, United Nations Integrated Regional Information Network (U.N. IRIN), May 1, 2003, at http://www.irinnews.org/report.asp?ReportID=33189&SelectRegion=Central_Asia&SelectCountry=AFGHANISTAN; Amnesty International, *Afghanistan: Constitution Fails Women* (Nov. 26, 2003), at <http://web.amnesty.org/library/Index/ENGASA110272003?open&of=ENG-AFG>; *Plight of "Forgotten Women" Needing Health Care in Rural Areas*, U.N. IRIN (May 14, 2004), at http://www.irinnews.org/report.asp?ReportID=39783&SelectRegion=Central_Asia&SelectCountry=AFGHANISTAN; Physicians for Human Rights, *Women's Health and Human Rights in Afghanistan* (2001), at http://www.phrusa.org/campaigns/afghanistan/Afghan_report_toc.html.

²⁸⁶ Rashid, *supra* note 161.

²⁸⁷ See Michael Moran, *The Other Unfinished War*, MSNBC, June 24, 2003, at <http://www.msnbc.msn.com/id/3340310>.

²⁸⁸ See Farangis Najibullah, *Afghanistan: Little Progress Seen in Reform of Judicial System*, RADIO FREE EUROPE, Mar. 10, 2003, at <http://www.rferl.org/features/2003/03/11032003204729.asp>.

²⁸⁹ See RASHID, *supra* note 10, at 83, 131.

²⁹⁰ See John Sifton, *We're Losing The War in Afghanistan, Too*, SALON.COM, Aug. 21, 2003, at http://www.salon.com/news/feature/2003/08/21/afghanwar/index_np.html.

²⁹¹ *Id.*

²⁹² *Loya Jirga Defuses Battle of Good and Evil*, DEUTSCHE PRESSE-AGENTUR, June 12, 2002.

²⁹³ Saudi Arabia's "most senior Islamic cleric" has publicly warned: "Allowing women to mix with men is the root of every evil and catastrophe." Robin Gedye, *Unveiled Women Are Root of All Evil, Says Saudi Cleric*, DAILY TELEGRAPH (U.K.), Jan. 22, 2004.

²⁹⁴ Sifton, *supra* note 290.

²⁹⁵ See *id.*

²⁹⁶ See *id.*; Reporters Without Borders, *Afghanistan: Supreme Court Confirms Death Sentence for Two Journalists for "Blasphemy"* (Aug. 6, 2003), at http://www.rsf.org/article.php3?id_article=7706.

²⁹⁷ For an exposition of the similarities and differences between Pashtun culture and Taliban practice, see Isabel Hilton, *The Pashtun Code*, THE NEW YORKER, Dec. 3, 2001.

²⁹⁸ See Paisley Dodds, *Afghan Women Jailed for Disobedience*, ASSOCIATED PRESS, July 30, 2002.

²⁹⁹ See *id.*

³⁰⁰ See Yola Monakhov, *Beaten, Abused, Chained. This Is One Afghan Woman's "Liberation,"* OBSERVER (U.K.), Oct. 5, 2003.

³⁰¹ Seymour Hersh, *The Other War*, THE NEW YORKER, Apr. 12, 2004.

³⁰² See Human Rights Watch, *Afghanistan: Paying for the Taliban's Crimes: Abuses Against Ethnic Pashtuns in Northern Afghanistan* (Apr. 2002), at <http://www.hrw.org/reports/2002/afghan2>. See also Anna Badkhen, *Afghan Women Still Shrouded in Oppression*, S.F. CHRON., Oct. 14, 2002 ("Soldiers loyal to the powerful northern warlord Abdul Rashid Dostum are alleged to have repeatedly raped women and girls in northern Afghanistan.").

³⁰³ See Anna Badkhen, *Reports of Rape, Looting by Afghan Militiamen*, S.F. CHRON., Feb. 15, 2002, at A1.

³⁰⁴ Dexter Filkins & Barry Bearak, *A Tribe Is Prey to Vengeance After Taliban's Fall in North*, N.Y. TIMES, Mar. 7, 2002.

³⁰⁵ See Human Rights Watch, *supra* note 302.

³⁰⁶ David Brunnstrom, *Desperate Afghan Women Opt for Fiery Suicides*, REUTERS, Apr. 16, 2004.

³⁰⁷ See Hersh, *supra* note 301.

³⁰⁸ See, e.g., UNHCR, *supra* note 10, ¶ 48 at 21 (reporting that soldiers loyal to Ismail Khan "have regularly committed acts of violence and intimidation against persons and groups perceived to oppose his rule. His armed forces and agents have made explicit threats to, arrested, harassed, and beaten members of nascent political, civic, media, professional, and cultural groups.").

³⁰⁹ Human Rights Watch, *All Our Hopes Are Crushed: Violence and Repression in Western Afghanistan* (2002), available at http://hrw.org/reports/2002/afghan3/herat1002-07.htm#P1061_165296.

- ³¹⁰ See Human Rights Watch, *We Want to Live As Humans: Repression of Women and Girls in Western Afghanistan* (Dec. 2002), available at http://www.hrw.org/reports/2002/afghnwmn1202/Afghnwmn1202-04.htm#P342_63329.
- ³¹¹ See *id.*
- ³¹² See Gary Thomas, *Afghan President Must Still Negotiate Political Minefield*, VOICE OF AMERICA, Oct. 25, 2004, available at <http://ibb7.ibb.gov/newswire/3f7b65d5.html>.
- ³¹³ *Afghan President Karzai Declares State Based on Islamic Principles*, DEUTSCHE PRESSE-AGENTUR, June 17, 2002.
- ³¹⁴ *Id.*
- ³¹⁵ See Sharon Lerner, *What Women Want*, VILLAGE VOICE, Nov. 17, 2001, at 53.
- ³¹⁶ See International Crisis Group, *Afghanistan: Judicial Reform and Transitional Justice* 16 (2003), available at <http://www.crisisweb.org/home/getfile.cfm?id=309>.
- ³¹⁷ Nanji, *supra* note 5, at A9.
- ³¹⁸ See Robyn Dixon, *For Young Afghans, Love Is a Tale of Sorrow*, THE AGE (AUSTRALIA), Dec. 11, 2002.
- ³¹⁹ See Nanji, *supra* note 5, at A9. Women are literally relegated to the back of the bus under these segregationist policies. See also Belquis Ahmadi, *Reality Gap in Afghanistan*, WASH. POST, July 8, 2002, at A17. Ms. Ahmadi describes the situation on buses, the only form of transit for most Afghan women (whose families can hardly afford automobiles on incomes of less than \$200 per year), as even worse than under the Taliban, when women were forced into separate buses but “at least had seats on those buses.” *Id.*
- ³²⁰ Amin Tarzi, *Afghan Women Complain about Lack of Progress*, RADIO FREE EUROPE, Feb. 27, 2003, available at <http://www.rferl.org/reports/afghan-report/2003/03/9-140303.asp>.
- ³²¹ See Ron Synovitz, *Division Between Islamists, Moderates Hampers Effort on New Constitution*, EURASIANET, Feb. 2, 2003, at http://www.eurasianet.org/departments/insight/articles/pp020103a_pr.shtml.
- ³²² See Nanji, *supra* note 5, at A9; International Crisis Group, *supra* note 316, at 16.
- ³²³ See *Afghanistan: First Female Judges Association*, U.N. IRIN, Jan. 9, 2003, at http://www.irinnews.org/report.asp?ReportID=31652&SelectRegion=Central_Asia&%20%3CBR%3ESelectCountry=AFGHANISTAN.
- ³²⁴ Marc Kaufman, *U.S. Role Shifts as Afghanistan Founders*, WASH. POST, Apr. 14, 2003, at A10.
- ³²⁵ See *Talking about a Constitution*, ECONOMIST, Dec. 18, 2003, available at http://www.economist.com/world/asia/displayStory.cfm?story_id=2300564; J. Alexander Their, *Judiciary Not Upholding Afghan Law*, SEATTLE TIMES, Jan. 30, 2004, available at http://seattlepi.nwsource.com/opinion/158606_afghanwomen30.html; Scott Baldauf, *Afghans Wary of Karzai Dealings*, CHRISTIAN SCI. MONITOR, June 1, 2004, available at <http://search.csmonitor.com/2004/0601/p06s02-wosc.html>.
- ³²⁶ *Sound of the Sixties*, *supra* note 71.
- ³²⁷ See U.S. Institute of Peace, *Establishing the Rule of Law in Afghanistan* (Mar. 2004), at <http://www.usip.org/pubs/specialreports/sr117.html>. A small course of training of judges in “gender awareness” has begun. *UN Scheme to Teach Gender Awareness to Judicial Officers in Afghanistan*, U.N. NEWS SERVICE, Feb. 5, 2004, at <http://www0.un.org/apps/news/story.asp?NewsID=9674&Cr=afghanistan&Cr1=>.
- ³²⁸ See *id.*
- ³²⁹ See Farangis Najibullah, *Afghanistan: Rights Groups Criticize Torture, Abuse in Prisons*, RADIO FREE EUROPE, July 20, 2003, at <http://www.rferl.org/features/2003/07/14072003160601.asp>.
- ³³⁰ See Victoria Burnett, *Debate on Afghan Constitution Nears End: Critics Fear Hard-Liners Will Get Too Much Power*, BOSTON GLOBE, Dec. 27, 2003; Xinhuanet, *Afghan President Not to Make Alliance in Elections*, June 1, 2004, at http://news.xinhuanet.com/english/2004-06/01/content_1502397.htm.
- ³³¹ See Bonn Agreement, § 6, U.N. Doc. S/2001/1154 (Dec. 5, 2001); Carlotta Gall, *In Warlord Land, Democracy Tries Baby Steps*, N.Y. TIMES, June 11, 2003.
- ³³² See UNAMA, *The Constitutional Process* (2003), at <http://www.unama-afg.org/docs/Constitution/Draft%20Constitution%20Factsheet.doc>.
- ³³³ See *id.*
- ³³⁴ See Danish Karokhel & Rahimullah Samander, *Approval for Afghan Constitution’s Islamic Content*, INSTITUTE FOR WAR AND PEACE REPORTING, Nov. 13, 2003, at <http://www.worldpress.org/Asia/1680.cfm>.
- ³³⁵ See *Afghanistan: Special Report on the New Constitution*, U.N. IRIN, June 2, 2003, at http://www.irinnews.org/report.asp?ReportID=34455&SelectRegion=Central_Asia&SelectCountry=AFGHANISTAN.
- ³³⁶ See UNAMA, *supra* note 332.
- ³³⁷ See *id.* See also U.S. Department of State, *Women’s Participation in the Constitution-Making Process in*

Afghanistan (Oct. 1, 2003), at <http://www.state.gov/g/wi/rls/24794.htm>.

³³⁸ See Feinstein Int'l Famine Center, *Human Security and Livelihoods of Rural Afghans, 2002-2003*, at 8 (2004), available at <http://famine.tufts.edu/pdf/Mazurana2.pdf>.

³³⁹ See Synovitz, *supra* note 321.

³⁴⁰ *Id.*

³⁴¹ BENARD & HACHIGIAN, *supra* note 80, at 4.

³⁴² See Human Rights Watch, *Open Letter to President Hamid Karzai: Insist on Equality in Constitution, Stand Up for Afghan Human Rights* (Sept. 22, 2003), at <http://www.hrw.org/press/2003/09/afghanistan092203-ltr.htm>.; Amnesty International, *Open Letter to President Hamid Karzai on Human Rights Protection and the Draft Constitution* (Dec. 8, 2003), at <http://web.amnesty.org/library/index/ENGASA110282003>.

³⁴³ See *Afghanistan: Special Report on the New Constitution*, *supra* note 335.

³⁴⁴ Women for Afghan Women, *Afghan Women's Bill of Rights* (Sept. 5, 2003), at <http://www.womenforafghanwomen.org/events/BillofRights.html>.

³⁴⁵ See (DRAFT) AFG. CONST. OF 2003, art. 1-2, available at <http://www.constitution-afg.com/resrouces/Draft.Constitution.pdf>.

³⁴⁶ *Id.*, art. 3.

³⁴⁷ *Id.*, art. 130.

³⁴⁸ *Id.*, arts. 45, 63, 119.

³⁴⁹ AFG. CONSTITUTION OF 1964, art. 64.

³⁵⁰ Golnaz Esfandieri, *Afghanistan: Loya Jirga Adjourns Amid Disputes Over Constitution*, RADIO FREE EUROPE, Dec. 29, 2003, at <http://www.rferl.org/features/2003/12/29122003152947.asp>.

³⁵¹ (DRAFT) AFG. CONST. OF 2003, art. 84.

³⁵² See Masuda Sultan & Hannibal Travis, *Bias Remains under the New Law*, BOSTON GLOBE, Nov. 13, 2003, available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2003/11/13/bias_remains_under_the_new_law/.

³⁵³ See Carlotta Gall, *Women Draft Bill of Rights in New Afghan Constitution*, S.F. CHRON., Sept. 28, 2003, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/09/28/MN137202.DTL>.

³⁵⁴ (DRAFT) AFG. CONSTITUTION OF 2003, *supra* note 345, Arts. 22, 33, 35-36, 43, 50, 52.

³⁵⁵ Sultan & Travis, *supra* note 352.

³⁵⁶ See Amin Tarzi, *Afghan Women's Group Wants Amendments to Draft Constitution*, RADIO FREE EUROPE (Nov. 10, 2003), at <http://www.rferl.org/newsline/2003/11/6-SWA/swa-101103.asp>; see also Gender and Law Working Group, *Recommendations on the Draft Constitution for Strengthening Women's Political Participation and Securing Women's Human Rights* (2003), available at http://www.nodo50.org/ddhhmujeres/afganistan_genderandlaw.htm.

³⁵⁷ *Bush: Afghanistan Is a Victory Over Terrorism*, CNN.COM (June 15, 2004), at <http://www.cnn.com/2004/US/06/15/karzai/index.html>.

³⁵⁸ Agence France-Presse, *US, UN Envoys Welcome Afghan Constitution*, OUTLOOK INDIA (Jan. 5, 2004), at http://www.outlookindia.com/pti_news.asp?id=192469.

³⁵⁹ AFG. CONST. OF 2004, art. 22, available at <http://www.constitution-afg.com/resrouces/1382Constitution.pdf>.

³⁶⁰ See AFG. CONST. OF 1976, art. 27, available at <http://www.afghan-web.com/history/const/const1976.html>; AFG. CONST. OF 1987, art. 33, available at <http://www.afghan-web.com/history/const/const1987.html>; Nawabi, *supra* note 12, at 20.

³⁶¹ See AFG. CONST. OF 2004, art. 82-84.

³⁶² Such protections were proposed by a Gender and Law Working Group, which was headed by the Minister for Women's Affairs and includes two members of the Supreme Court, four other judges, two members of the Afghan Independent Human Rights Commission, two members of the Judicial Reform Commission, representatives of the Attorney General's Office and Ministry of Foreign Affairs, professors of law and Sharia at Kabul University, and

several leaders of nongovernmental human rights organizations. See Lauryn Oates & Isabelle Solon Helal, *At the Cross-Roads of Conflict and Democracy: Women and Afghanistan's Constitutional Loya Jirga*, RIGHTS AND DEMOCRACY, at Appendix C (May 2004), available at <http://www.peacewomen.org/resources/Afghanistan/RDLoyaJirga2004.pdf>.

³⁶³ See *id.* at 25-33.

³⁶⁴ See *id.* at 27.

³⁶⁵ Amy Waldman, *Meeting on New Constitution, Afghan Women Find Old Attitudes*, N.Y. TIMES, Dec. 16, 2003, available at <http://www.peacewomen.org/news/Afghanistan/Dec03/old.html>.

³⁶⁶ Oates & Helal, *supra* note 362, at 32.

³⁶⁷ AFG. CONST. OF 2004, *supra* note 359, Art. 3

³⁶⁸ Hamida Ghafour, *Afghanistan Gets New Name and a Constitution*, L.A. TIMES, Jan. 6, 2004, available at <http://www.smh.com.au/articles/2004/01/05/1073267970952.html>.

³⁶⁹ Rob Moll, *Afghan Constitution Provides Little Protection for Religion*, CHRISTIANITY TODAY, Jan. 17, 2004, available at <http://www.christianitytoday.com/ct/2004/102/42.0.html>. See also Oates & Helal, *supra* note 362, at 43; Ghafour, *supra* note 368; G. Rauf Roashan, *Afghan Constitution an Exercise in Nation Building: A Test in Social Organization*, LOYA JIRGA REPORT (2004), at <http://www.institute-for-afghan-studies.org/Contributions/Commentaries/DRRoashan/The-Loya-Jirga-Report.htm#Conclusions>.

³⁷⁰ See J. Alexander Thier, *Attacking Democracy From the Bench*, N.Y. TIMES, Jan. 26 2004, available at http://www.pacificcouncil.org/public/publications/articles/thier_012604.asp; Alex Spillius, *Afghans to Carry On Stoning Criminals*, THE DAILY TELEGRAPH (U.K.), Jan. 25, 2002, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2002/01/25/wtal325.xml&sSheet=/news/2002/01/25/ixnewstop.html>.

³⁷¹ AFG. CONST. OF 2004, art. 121.

³⁷² Thier, *supra* note 370.

³⁷³ See Sultan & Travis, *supra* note 352.

³⁷⁴ See *Id.*; AFG. CONST. OF 2004, art. 62, 72, 85, 118.

³⁷⁵ Amnesty International, *supra* note 342.

³⁷⁶ Sultan & Travis, *supra* note 352.

³⁷⁷ Ilene R. Prusher, *Ex-Taliban Officials Change Headdress, Resume Duties*, CHRISTIAN SCI. MONITOR, Jan. 14, 2002, available at <http://www.csmonitor.com/2002/0114/p12s1-wosc.html>.

³⁷⁸ James Ingalls, *The New Afghan Constitution: A Step Backwards for Democracy*, FOREIGN POLICY IN FOCUS, Mar. 2004, at <http://www.fpiif.org/pdf/papers/SR2004afghanconst.pdf>.

³⁷⁹ *Id.*

³⁸⁰ *Afghans Endorse New Constitution*, BBC NEWS ONLINE, Jan. 4, 2004, at http://news.bbc.co.uk/1/hi/world/south_asia/3366455.stm.

³⁸¹ See Carlotta Gall, *News Analysis: Afghan Constitution Offers Slim Hope in a Land Where Warlords Rule*, INT'L HERALD TRIB., Jan. 15, 2004, available at <http://www.iht.com/articles/125027.html>.

³⁸² *Id.*

³⁸³ See Kathy Gannon, *Afghanistan Unbound*, 83 FOREIGN AFF. 35 (2004) ("The warlords have stolen people's homes, arbitrarily arrested their enemies, and tortured them in private jails"); see also Carlotta Gall, *Afghan Parliamentary Elections May Be Delayed Again*, N.Y. TIMES, July 9, 2004, at A 10.

³⁸⁴ Hundreds of thousands of people may have died during the Crusades, in which numerous massacres of Jews, Muslims, and Christians took place. See 6 EDWARD GIBBON, HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE n.70 & accompanying text (1788), available at <http://www.gutenberg.org/dirs/etext96/6dfre10.txt>.

³⁸⁵ Religious wars killed millions of Germans and hundreds of thousands of British subjects. See ALAN MACFARLANE, THE SAVAGE WARS OF PEACE 51 (2003); Roger Hutchinson, *Embattled Britain*, THE SCOTSMAN (U.K.), Mar. 6, 2004, available at <http://thescotsman.scotsmen.com/s2.cfm?id=260402004>.

³⁸⁶ The Spanish carried out their genocide of Native Americans in the name of Catholicism. See, e.g., George J. Annas, *The Man on the Moon, Immortality, and Other Millennial Myths: The Prospects and Perils of Human Genetic Engineering*, 49 EMORY L.J. 753, 754-56 (2000). Similarly, the U.S. policy of a "Manifest Destiny" to Christianize the New World contributed to its genocide of Native Americans. See, e.g., Lindsay Glauner, *The Need for Accountability and Reparation: 1830-1976 The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 911-12 (2001-2002); Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER

L.J. 107, 108-9 (1999).

³⁸⁷ The mass killings of black Africans in South Africa had strong religious roots. See Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271, 362-64 (1997); COLIN MARTIN TATZ, *WITH INTENT TO DESTROY: REFLECTIONS ON GENOCIDE* 107-9 (2003).

³⁸⁸ The Turkish genocide against 1.5 million Armenian Christians and hundreds of thousands of Assyrian and Greek Christians had "holy war" aspects associated with fundamentalist Islam. See PETER BALAKIAN, *THE BURNING TIGRIS: THE ARMENIAN GENOCIDE AND AMERICA'S RESPONSE* 339 (2003); *Chaldean Victims of the Turks*, THE TIMES (U.K.), Nov. 22, 1919, at 11 (250,000 Assyrians died due to Turkish persecutions and famine).

³⁸⁹ The partition of British India into India and Pakistan resulted in the murders of hundreds of thousands of Muslims and Hindus by their "religious opponents." ERIC HOBBSBAWM, *THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914-1991*, at 219 (1994). In 1971, the fundamentalist Pakistani government "systematically slaughtered" the Hindu community in rebellious East Pakistan, present-day Bangladesh, and confiscated their homes and businesses, even painting some with Nazi-like yellow patches marked "H" for Hindu. Jaideep Saikia, *Terror Sans Frontiers: Islamic Militancy in North East India*, ACDIS OCCASIONAL PAPER (July 2003), Chapter Three, at http://www.acdis.uiuc.edu/Research/OPs/Saikia/contents/chap_three.html. More recently, Hindu fundamentalism played a prominent role in the massacres of thousands of Indian Muslims in Gujarat in 2002. See Smita Narula, *Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India*, 16 HARV. HUM. RTS. J. 41, 49-56 (2003).

³⁹⁰ The fundamentalist government of Sudan is now blamed for more than two million war deaths. See William L. Saunders Jr. & Yuri G. Mantilla, *Human Dignity Denied: Slavery, Genocide, and Crimes Against Humanity in Sudan*, 51 CATH. U.L. REV. 715, 715 (2001-2002); BASSAM TIBI, *THE CHALLENGE OF FUNDAMENTALISM: POLITICAL ISLAM AND THE NEW WORLD DISORDER* 168 (1998).

³⁹¹ AFG. CONST. OF 2004, *supra* note 359, Art. 35.

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⁴¹⁷ See Benard, *supra* note 413; Nanji, *supra* note 5, at A9.

⁴¹⁸ Benard, *supra* note 413.

⁴¹⁹ See Nanji, *supra* note 5, at A9.

⁴²⁰ See Amnesty International, *Afghanistan: Re-establishing the Rule of Law* 40-47 (Aug. 2003), at [http://web.amnesty.org/library/pdf/ASA110212003ENGLISH/\\$File/ASA112103.pdf](http://web.amnesty.org/library/pdf/ASA110212003ENGLISH/$File/ASA112103.pdf); Declan Walsh, *Young Lovers Left Stranded in Afghan Legal Limbo: Control of the Justice System By Mullahs Leads to Confusion Between Custom and Law*, THE GUARDIAN (U.K.), Nov. 11, 2004, at 21.

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⁴⁸⁵ Law of Administration for the State of Iraq for the Transitional Period (Mar. 8, 2004), available at <http://www.cpa-iraq.org/government/TAL.html>.

⁴⁸⁶ Nina Shea, *Religious Freedom Gap for Iraq?*, WASH. TIMES, Nov. 9, 2003, available at http://freedomhouse.org/religion/news/bn2003/bn-2003-11-09.htm?article_id=170.

⁴⁸⁷ The Iraqi constitution in effect at the time of the 2003 war was adopted in 1970, and contained only one reference to Islam, proclaiming it to be the "religion of the State" but not requiring all laws to conform to its tenets. See IRAQ CONST. OF 1970, Art. 4. Even the 1925 constitution only contemplated that Islamic law govern Muslims and that Jews and Christians exercise jurisdiction over themselves in such matters. See IRAQ CONST. OF 1925, Art. 77-80, available at <http://www.mallat.com/iraq%20const%201925.htm>. The TAL does not allow Christians or Jews to apply their religious laws if they depart from the tenets of Islam, a clear example of discrimination. See Law of Administration for the State of Iraq for the Transitional Period, Art. 7, *supra* note 485; Bruce Fein, *Flawed Interim Constitution*, WASH. TIMES, Mar. 23, 2004, available at <http://www.washtimes.com/commentary/20040322-082831-2551r.htm>.

⁴⁸⁸ See Fein, *supra* note 487.

⁴⁸⁹ *Transcript: Political Authority Handover Ceremony*, WASH. POST, June 28, 2004, available at

<http://www.washingtonpost.com/ac2/wp-dyn/A11428-2004Jun28?language=printer>.

⁴⁹⁰ See Steven R. Weisman, *Bush Plan Will Limit Sovereignty for Iraqis*, N.Y. TIMES, Apr. 23, 2004, available at <http://www.chron.com/cs/CDA/ssistory.mpl/special/iraq/2525467>; Terence P. Jeffrey, *Is Sistani Iraq's Khomeini?*, HUMAN EVENTS, May 26, 2004, available at <http://www.humaneventsonline.com/article.php?id=4012>; Andrew Hammond, *Iraqi Shiites Oppose Power Transfer Plan: 'Real Problems' Ahead: Ayatollah Makes Rare Public Statement on U.S. Timetable*, NATIONAL POST, Nov. 27, 2003.

⁴⁹¹ See Graham E. Fuller, *Islamist Politics in Iraq after Saddam Hussein* (Aug. 2003), available at <http://www.usip.org/pubs/specialreports/sr108.pdf>; Borzou Daragahi, *Al-Sistani Mixes Tradition with Modern Outlook*, WASH. TIMES, Mar. 9, 2004, available at <http://www.washtimes.com/world/20040309-120239-2760r.htm>.

⁴⁹² See Daragahi, *supra* note 491; Jeffrey, *supra* note 490.

⁴⁹³ See Jeffrey, *supra* note 490.

⁴⁹⁴ Edward Wong, *Iraq's Path Hinges on the Words of Enigmatic Cleric*, N.Y. TIMES, Jan. 25, 2004, available at <http://query.nytimes.com/gst/abstract.html?res=F30913FD3D5C0C768EDDA80894DC404482>.

⁴⁹⁵ David Enders, *Iraqi Vote Gives Shia Parties a Mandate for Islamic Law*, THE INDEPENDENT (U.K.), Feb. 14, 2005, at 2.

⁴⁹⁶ See *id.*; Daniszewski, *supra* note 3, at A1.

⁴⁹⁷ See Michael Jansen, *Shia Clerics Insist on the Adoption of Islamic Law*, IRISH TIMES, Feb. 7, 2005, at 11.

⁴⁹⁸ See, e.g., *Ruling Cleric Warns Iran 'On the Brink of Explosion'*, WORLDTRIBUNE.COM, June 3, 2002, at http://216.26.163.62/2002/me_iran_06_03.html; *Poll on US Ties Rocks Iran*, BBC NEWS ONLINE, Oct. 2, 2002, at http://news.bbc.co.uk/2/hi/middle_east/2294509.stm.

⁴⁹⁹ For example, the theocratic regime in Iran has executed thousands of political opponents, razed villages belonging to religious and ethnic minorities such as the Kurds, and practiced widespread torture. See, e.g., U.S. Department of State, *Country Reports on Human Rights Practices for 2000: Iran* (Feb. 23, 2001), at www.state.gov/g/drl/rls/hrrpt/2000/nea/786.htm; Amnesty International, *Iran: Executions of Prisoners Continue Unabated* (1992), at <http://www.amnestyusa.org/countries/iran/document.do?id=7D4EA7D35E816F03802569A600602B9A> ("Between July 1988 and January 1989 alone Amnesty International recorded more than 2,500 political prisoners who were executed....").

⁵⁰⁰ See Nicholas D. Kristof, *Iraq's Little Secret*, N.Y. TIMES, Oct. 1, 2002, available at <http://web.naplesnews.com/02/10/perspective/d822739a.htm>.

⁵⁰¹ See U.N. Development Programme, *Supporting Iraqi Women* (2002), at <http://www.iq.undp.org/gender.htm>.

⁵⁰² See U.N. Development Programme, *The Arab Human Development Report 2003*, at 192, at <http://www.miftah.org/Doc/Reports/Englishcomplete2003.pdf>.

⁵⁰³ See U.N. Educational, Scientific, and Cultural Organization, *Percentage of Female Teachers* (2002), at <http://www.uis.unesco.org/TEMPLATE/html/HTMLTables/education/percentfemale.htm>.

⁵⁰⁴ See U.S. Department of State, *Iraqi Women Under Saddam's Regime: A Population Silenced* (Mar. 20, 2003), at <http://www.state.gov/g/wi/rls/18877.htm> (citing U.N. Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women* ¶ 23 (Jan. 2002)), at [http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/42e7191fae543562c1256ba7004e963c/\\$FILE/G0210428.doc](http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/42e7191fae543562c1256ba7004e963c/$FILE/G0210428.doc).

⁵⁰⁵ See *id.*

⁵⁰⁶ See Agence France-Presse, *More than 400 Iraqi Women Kidnapped, Raped in Post-War Chaos: Watchdog*, RELIEF WEB (Aug. 24, 2003), available at <http://www.reliefweb.int/w/rwb.nsf/480fa8736b88bbc3c12564f6004c8ad5/c21efb4c4e3dda7e49256d8d0010bacb>.

⁵⁰⁷ See Gettleman, *supra* note 478.

⁵⁰⁸ See Houzan Mahmoud, *An Empty Sort of Freedom*, THE GUARDIAN (U.K.), Mar. 8, 2004, available at <http://www.guardian.co.uk/comment/story/0,3604,1164268,00.html>.

⁵⁰⁹ See Lauren Sadler, *Veiled and Worried in Baghdad*, N.Y. TIMES, Sept. 16, 2003, available at <http://query.nytimes.com/gst/abstract.html?res=F4091EFE3C5E0C758DDDA00894DB404482>.

⁵¹⁰ Raja Habib Khuzai and Songul Chapouk, *Iraq's Hidden Treasure*, N.Y. TIMES, Dec. 3, 2003, available at <http://www.womenwagingpeace.net/content/articles/0328a.html>.

⁵¹¹ *Id.*

⁵¹² See Hannah Allam, *Hundreds of Iraqi Women Gather to Demand Political Power*, KNIGHT RIDDER NEWSPAPERS, Feb. 21, 2004, available at <http://www.realcities.com/mld/kwashingon/8009667.htm>.

⁵¹³ Constable, *supra* note 483.

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

- ⁵¹⁶ *Id.*
- ⁵¹⁷ See U.N. Commission on Human Rights, *Report of the U.N. High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, The Present Situation of Human Rights in Iraq*, E/CN.4/2005/4 (June 9, 2004), available at <http://www.unhchr.ch/html/hchr/docs/iraq1.doc>.
- ⁵¹⁸ See Swanee Hunt & Cristina Posa, *Where Are the Women in the New Iraq?*, BOSTON GLOBE, June 22, 2004, available at <http://www.commondreams.org/views04/0622-02.htm>.
- ⁵¹⁹ See Fein, *supra* note 487. Ayatollah Sistani, as the “pre-eminent cleric among the majority Shi’ite population [and] the most powerful political figure in the land,” demanded that Article 7 be codified for this purpose. Patrick Bishop, *Differences Settled As Iraqis Agree Package of Interim Laws*, THE DAILY TELEGRAPH (U.K.), Mar. 2, 2004, available at <http://www.opinion.telegraph.co.uk/news/main.jhtml?xml=/news/2004/03/02/wirq02.xml>.
- ⁵²⁰ See generally *Islamic Laws*, available at <http://sistani.org/html/eng/main/index.php?page=3&lang=eng&part=1> [hereinafter *Islamic Laws*]; *Contemporary Legal Rulings in Shiei Law*, available at <http://sistani.org/html/eng/main/index.php?page=2&part=1> [hereinafter *Contemporary Legal Rulings*].
- ⁵²¹ See generally, *Islamic Laws*, *supra* note 520.
- ⁵²² See Howland, *supra* note 412, at 314; CP-Reuters *supra* note 190.
- ⁵²³ See Mahmoud, *supra* note 508.
- ⁵²⁴ See Damien McElroy, *Iraq's Christians Run Gauntlet of Anti-US Hostility*, THE DAILY TELEGRAPH (U.K.), Nov. 2, 2003, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2003/11/02/wirq02.xml&sSheet=/news/2003/11/02/ixnewstop.html>
- ⁵²⁵ Paul Marshall, *Elsewhere in Iraq*, WALL ST. J., Aug. 22, 2003, available at <http://www.benadorassociates.com/article/524>.
- ⁵²⁶ See *Contemporary Legal Rulings*, *supra* note 520.
- ⁵²⁷ See David Rieff, *The Shiite Surge*, N.Y. TIMES, Feb. 1, 2004, available at <http://www.nytimes.com/2004/02/01/magazine/01SHIITE.html>; Associated Press, *Selling Alcohol in Iraq Is Now a Risky Business*, MODERN BREWERY AGE, Jan 26, 2004, available at http://articles.findarticles.com/p/articles/mi_m3469/is_4_55/ai_113897936; Jonathan Steele, *Kidnappers Find a Profitable Way to Drive Out Educated Families*, THE GUARDIAN (U.K.), June 17, 2004, available at <http://www.guardian.co.uk/Iraq/Story/0,2763,1240571,00.html>.
- ⁵²⁸ Suleiman al-Khalidi, *Iraqi Christians Fear for Their Lives*, REUTERS, Dec. 30, 2003, available at http://www.iol.co.za/index.php?sf=2813&click_id=2813&art_id=qw1072762923269B262&set_id=6; McElroy, *supra* note 524.
- ⁵²⁹ al-Khalidi, *supra* note 528.
- ⁵³⁰ See *id.*
- ⁵³¹ See Sabrina Tavernise, *For Now, Merchants Cast Lot With a New Iraq*, N.Y. TIMES, Sept. 12, 2004, available at <http://www.nytimes.com/2004/09/12/international/middleeast/12store.html?ex=1113364800&en=848f5b04b6bf7b18&ei=5070&hp>; Kim Sengupta, *Exodus of Iraqi Christians in Full Flood as Targeted Killings Grow*, THE INDEPENDENT (U.K.), Oct. 12, 2004, available at http://news.independent.co.uk/world/middle_east/story.jsp?story=571219.
- ⁵³² See Associated Press, *Iraqis Protest Said Voting Irregularities*, ABC NEWS INTERNATIONAL, Feb. 6, 2005, at <http://abcnews.go.com/International/wireStory?id=475479>; Associated Press, *Assyrian Christians Say Kurds Wouldn't Let Them Vote*, WKRN.COM, Feb. 14, 2005, at <http://www.wkrn.com/Global/story.asp?S=2877020>; Agence France Presse, *US Hails Vote Success in Mosul But Iraqi Parties Cry Foul*, YAHOO! NEWS, Jan. 31, 2005, available at <http://us-politics.news.designerz.com/us-hails-vote-success-in-mosul-but-iraqi-parties-cry-foul.html?d20050131?d20050131>.
- ⁵³³ See Stephen Farrell, *Voters Give Shias a Majority--Now the Wrangling Will Begin*, THE TIMES (U.K.), Feb. 14, 2005, at 6.
- ⁵³⁴ James Glanz & Christine Hauser, *Election Complaints Fuel Protests in Iraq; Claims of Fraud Dampen the Euphoria*, N.Y. TIMES, Feb. 3, 2005, at 8.
- ⁵³⁵ See David N. Goodman, *Christian Iraqis in U.S. Happy, Worried by Vote Result*, ASSOCIATED PRESS, Feb. 14, 2005, available at <http://www.fortwayne.com/mld/newssentinel/10892774.htm>.
- ⁵³⁶ Ken Auletta, *Fortress Bush*, THE NEW YORKER, Jan. 11, 2004, available at http://www.newyorker.com/fact/content/?040119fa_fact2.
- ⁵³⁷ In Afghanistan, warlords “hold sway over much of the country outside Kabul.” *Afghanistan: Review of 2004*, U.N. IRIN, Jan. 17, 2005, at http://www.irinnews.org/report.asp?ReportID=45110&SelectRegion=Central_Asia. The “Afghan Ministry of Defence estimates that there are still more than 100,000 illegally armed gunmen, most loyal to warlords or local tribal chiefs, who also need to be disarmed.” *Afghanistan: Warlord Attacks Provincial*

Disarmament Team, U.N. IRIN, Apr. 14, 2005, at

<http://www.alertnet.org/thenews/newsdesk/IRIN/07425e42d0195ac9ee967c8073543f09.htm>. Although several Iraqi militias agreed to disarm in July 2004, this simply entailed integration into the Iraqi security forces, with existing chains of command surviving. See *Deal to Disband Iraq Militias Announced*, CNN.COM, June 8, 2004, at <http://www.cnn.com/2004/WORLD/meast/06/07/iraq.main>; Michael Knights, *Militias and the Monopoly of Force in Transitional Iraq*, WASHINGTON INSTITUTE FOR NEAR EAST POLICY (Mar. 16, 2004), at <http://www.washingtoninstitute.org/templateC05.php?CID=1720>.

⁵³⁸ The financial cost of occupying Iraq and Afghanistan has exceeded \$60 billion per year, for a total cost so far in excess of \$200 billion, while only about \$25 billion per year spent on the Global Fund for AIDS could save about eight million lives, a much greater number than claimed for the wars in Iraq and Afghanistan. See Dave Moniz, *Monthly Costs of Iraq, Afghan Wars Approach that of Vietnam*, USA TODAY, Sept. 8, 2003, available at http://www.usatoday.com/news/world/iraq/2003-09-07-cover-costs_x.htm; Institute for Policy Studies & Foreign Policy in Focus, *Paying the Price: The Mounting Costs of the Iraq War* (June 24, 2004), at <http://www.fpif.org/papers/0406costsofwar.html>; Jeffrey Sachs, *Weapons of Mass Salvation*, THE ECONOMIST, Oct. 24, 2002, available at http://www.economist.com/opinion/displayStory.cfm?story_id=1403544. The human cost has been even greater, as more than 1,750 Americans have sacrificed their lives as part of their nation's response to September 11. See *War in Iraq; Forces: U.S. & Coalition/Casualties*, CNN.COM, 2005, at <http://edition.cnn.com/SPECIALS/2003/iraq/forces/casualties> (1,573 American deaths during war in Iraq from 2003 through late April 2005); *Enduring Freedom Casualties*, CNN.COM, 2005, at <http://edition.cnn.com/SPECIALS/2004/oef.casualties> (180 American deaths during war in Afghanistan from 2001 through late April 2005).

⁵³⁹ For example, life expectancy in Bosnia increased by about 15 years after an international coalition intervened in 1995 against the civil war and genocide that were ongoing in that country. See U.S. Bureau of the Census, *International Data Base* (2004), available at <http://www.census.gov/ipc/www/idbprint.html>.

⁵⁴⁰ Countries that were U.S. colonies, on which U.S. troops were stationed, or had U.S.-backed governments, but that suffered brutal dictatorships, systematic violations of human rights, or genocide during or after U.S. involvement, include Cuba, el Salvador, Nicaragua, Guatemala, Haiti, Zaire/Congo, the Philippines, Indonesia, Iran, Afghanistan, and Kuwait. See Ellen C. Collier, *Instances of Use of United States Forces Abroad, 1798–1993*, LIBRARY OF CONGRESS (Oct. 7, 1993), available at <http://www.history.navy.mil/wars/foabroad.htm>; PHILIP S. FONER, *THE SPANISH-CUBAN-AMERICAN WAR AND THE BIRTH OF AMERICAN IMPERIALISM, 1895-1902* (1972); William M. Leogrande & Kenneth Sharpe, *Colombia: Is U.S. Re-Creating El Salvador?*, L.A. TIMES, Mar. 19, 2000, available at <http://www.commondreams.org/views/031900-101.htm>; Susanne Jonas, *A New Guatemalan Tragedy in the Making?*, S.F. CHRON., Apr. 26, 2000, available at <http://www.commondreams.org/views/042600-105.htm>; Marc Cooper, *A Sandinista Lesson for Afghanistan*, L.A. TIMES, Nov. 4, 2001, available at <http://www.commondreams.org/views01/1104-01.htm>; *Haiti - A Country Study*, LIBRARY OF CONGRESS (Richard A. Haggerty ed., 1989), at <http://lcweb2.loc.gov/frd/cs/htoc.html>; Human Rights Watch, *Haiti: Human Rights Developments, 1994*, at http://www.hrw.org/reports/1994/WR94/Americas-06.htm#P330_164164; Carole J.L. Collins, *Congo/Zaire*, FOREIGN POLICY IN FOCUS (June 1997), at <http://www.fpif.org/pdf/vol2/37ifcong.pdf>; Amy Kaplan, *Confusing Occupation With Liberation*, L.A. TIMES, Oct. 24, 2003, available at <http://fairuse.1accesshost.com/news1/latimes15.html>; Alfred W. McCoy, *Dark Legacy: Human Rights Under the Marcos Regime* (Sept. 20, 1999) available at <http://www.hartford-hwp.com/archives/54a/062.html>; Joseph Nevins, *Justice Still Eludes Indonesia: Washington's Double Standards Toward Mass Murderers*, INT'L HERALD TRIB., Feb. 19, 2004, available at <http://www.commondreams.org/views04/0219-09.htm>; STEPHEN KINZER, *ALL THE SHAH'S MEN: AN AMERICAN COUP AND THE ROOTS OF MIDDLE EAST TERROR* (2003); Immigration and Naturalization Service, *Alert Series: Kuwait Human Rights after February 28, 1991* (Mar. 1992), at <http://uscis.gov/graphics/services/asylum/ric/documentation/alkwt92-001.pdf>; Dennis Bernstein & Larry Everest, *Liberated Kuwait*, S.F. BAY GUARDIAN, Sept. 9, 1992, available at <http://www.sfbg.com/gulfwar/090992.html>.

⁵⁴¹ For example, women tend to be better off, and more equal to men, in literacy, employment opportunities, and/or life expectancy and access to medical care, in Tajikistan and Uzbekistan than in Iran or Afghanistan; in Tunisia, Lebanon, or Jordan than in Saudi Arabia; in Mexico, Venezuela or Brazil than in Guatemala, el Salvador, or Nicaragua; in Jamaica than in Haiti; in Malaysia than in Indonesia or the Philippines; and in Kenya or Tanzania than in the Congo. See, e.g., U.N. Development Programme, *Human Development Indicators 2004*, at Tables 24-27, at http://hdr.undp.org/statistics/data/index_indicators.cfm; Save the Children, *State of the World's Mothers 2004*, at 32-36, at http://www.savethechildren.org/mothers/report_2004/images/pdf/Index_Rank_pp28_36.pdf.

⁵⁴² Defenders of the view that the West should accept the religious extremism and medieval customs to which their allies in Afghanistan and Iraq cling frequently cite cultural sensitivities, but this is disingenuous, as these sensitivities have proved to be no barrier to implementing the other priorities of the U.S. government, only those relating to protecting the human rights of women and religious minorities. See, e.g., *Torture Policy (cont'd)*, WASH. POST, June 21, 2004, at A18 (U.S. commander in Iraq approved policy of forcing nudity on detainees).

⁵⁴³ Iraqis seem to be ambivalent at best about whether the war was morally justified. See, e.g., Cesar G. Soriano & Steven Komarow, *Poll: Iraqis Out of Patience*, USA TODAY, Apr. 29, 2004 (“In the multiethnic Baghdad area ... only 13% of the people now say the invasion of Iraq was morally justifiable.”); *Poll: Iraqis Conflicted About War, Its Impact*, CNN.COM, Apr. 28, 2004, at <http://www.cnn.com/2004/WORLD/meast/04/28/iraq.poll> (“Thirty-three percent of [3,444 Iraqis asked in a CNN/USA Today/Gallup Poll] said the war had done more good than harm, while 46 percent said it had done more harm than good.”); Steven Komarow, *New Era Is Blessing for Some, Curse for Others*, USA TODAY, June 29, 2004, available at http://www.usatoday.com/news/world/2004-06-28-iraq-future_x.htm (“A recent poll showed the majority of Iraqis said the U.S.-led coalition was wrong to invade their country, but they welcome democracy”).