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Charles H. Norchi

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Law as Strategy: Thinking Below the State in Afghanistan

*Charles H. Norchi**

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The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

In Doha, Qatar the government of the United States conducted successive rounds of negotiations with a non-State entity, the Islamic Emirate of Afghanistan (more commonly known as the Taliban) over the future of a State that was not present—the government of Afghanistan. The aim of these negotiations was to achieve an agreement enabling a great power to claim success and draw down forces, reminiscent of the 1988 Geneva talks by which the forces of the Soviet Union withdrew from the country.

Taliban attacks continued and negotiations were suspended. At this writing, the status of the talks and U.S. force posture are unclear. Regardless, the United States will retain a security interest in Afghanistan and the region. Indeed, U.S. engagement in Afghanistan is inevitable, but there will be choices about strategy. In 1952, the U.S. Naval War College convened a lecture series devoted to strategy. On March 20, the lecturer was Harold D. Lasswell, an architect of the New Haven School of Jurisprudence.¹ Lasswell observed, “The aim of strategy is to maximize the realization of the goal values of the body politic.”² This article proposes that law is among the available strategic instruments to advance goal values common to the United States, Afghanistan, and the world community.

II. GENEVA TO DOHA

The *Palais des Nations* in Geneva, Switzerland was built to serve as headquarters of the League of Nations. On April 14, 1988, it was the venue for negotiations leading to an agreement under which the Soviet Union would leave Afghanistan after a ten-year war. These so-called “proximity talks” were facilitated by Diego Cordovez, a personal representative of the U.N. Secretary-General, who acted as go-between in discussions conducted in Kabul and

1. For an overview of the New Haven School, see W. Michael Reisman, *The View from the New Haven School of International Law*, 86 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 118 (1992). For a detailed explanation of the School, see HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY (1992).

2. Harold D. Lasswell, *Political Factors in the Formulation of Strategy*, 4 U.S. NAVAL WAR COLLEGE INFORMATION SERVICE FOR OFFICERS 49, 63–64 (1952).

Islamabad with the Soviet-backed regime.³ The Afghan resistance, known as the *mujahidin*,⁴ was excluded from the negotiations.

The resulting accords consisted of four instruments. The first was a Bilateral Agreement Between the Republic of Afghanistan and the Islamic Republic of Pakistan on the Principles of Mutual Relations, in particular on Non-Interference and Non-Intervention.⁵ Provisions of this treaty were designed to hamstring the *mujahidin*. For example, Article II(8), stated:

to prevent within its territory the training, equipping, financing and recruitment of mercenaries from whatever origin for the purpose of hostile activities against the other High Contracting Party, or the sending of such mercenaries into the territory of the other High Contracting Party and accordingly to deny facilities, including financing for the training, equipping and transit of such mercenaries.⁶

Likewise, Article II(11) disallowed “any assistance to or use of or tolerance of terrorist groups, saboteurs or subversive agents against the other High Contracting Party.”⁷ Finally, Article II(12) provided:

3. See Adam Roberts, *Afghanistan and International Security*, 85 INTERNATIONAL LAW STUDIES 13, 84 (2009); SETH G. JONES, IN THE GRAVEYARD OF EMPIRES, AMERICA’S WAR IN AFGHANISTAN 36 (2009).

4. Mujahidin is the plural form of the word “mujahid,” which means “one who engages in jihad.” *Mujahidin*, OXFORD ISLAMIC STUDIES ONLINE, <http://www.oxfordislamicstudies.com/article/opr/t125/e1593> (citing JOHN L. ESPOSITO, THE OXFORD DICTIONARY OF ISLAM (2004)) (“The term became well known in the West in the early 1980s as the Afghan mujahidin battled against the Soviet invasion of Afghanistan.”). It is important to note, however, that *jihad* does not equate to armed struggle. As Esposito states, “Generally referring to an endeavor toward a praiseworthy aim, the term *jihad* has many meanings,” and that while “often translated as ‘holy war’” in the West, armed struggle is only one of four types of *jihad*. See *Jihad*, OXFORD ISLAMIC STUDIES ONLINE, <http://www.oxfordislamicstudies.com/article/opr/t243/e175> (citing 2 THE ISLAMIC WORLD: PAST AND PRESENT (John L. Esposito ed., 2004)).

5. Bilateral Agreement Between the Republic of Afghanistan and the Islamic Republic of Pakistan on the Principles of Mutual Relations, in particular on Non-Interference and Non-Intervention, Afg.-Pak., Apr. 14, 1988; see also U.N. Secretary-General, Letter dated Apr. 14, 1988 from the Secretary-General Addressed to the President of the Security Council, annex I at 3, U.N. Doc. S/19834 (Apr. 26, 1988) [hereinafter U.N. Secretary-General Letter].

6. Bilateral Agreement Between the Republic of Afghanistan and the Islamic Republic of Pakistan on the Principles of Mutual Relations, in particular on Non-Interference and Non-Intervention, *supra* note 5, art. II(8).

7. *Id.* art. II(11).

to prevent within its territory the presence, harboring, in camps and bases or otherwise, organizing, training, financing, equipping and arming of individuals and political, ethnic and any other groups for the purpose of creating subversion, disorder or unrest in the territory of the other High Contracting Party and accordingly also to prevent the use of mass media and the transportation of arms, ammunition and equipment by such individuals and groups.⁸

The second instrument was a Declaration on International Guarantees.⁹ The parties were the Soviet Union and the United States. The signatories undertook

to invariably refrain from any form of interference and intervention in the internal affairs of the Republic of Afghanistan and the Islamic Republic of Pakistan and to respect the commitments contained in the bilateral Agreement between the Republic of Afghanistan and the Islamic Republic of Pakistan on the Principles of Mutual Relations, in particular on Non-Interference and Non-Intervention.¹⁰

The third instrument was a Bilateral Agreement between the Republic of Afghanistan and the Islamic Republic of Pakistan on the Voluntary Return of Refugees.¹¹ It provided that all Afghan refugees temporarily present in the territory of the Islamic Republic of Pakistan shall be given the opportunity to return voluntarily to their homeland in accordance with the arrangements and conditions set out in the present agreement.¹² The fourth instrument was an Agreement on the Interrelationships for the Settlement of the Situation relating to Afghanistan.¹³ It was signed by the Kabul regime and the government of Pakistan, and in witness, the representatives of the States-Guarantors, the Soviet Union and United States. It provided:

8. *Id.* art. II(12).

9. Declaration on International Guarantees, U.S.S.R.-U.S., Apr. 14, 1988; *see* U.N. Secretary-General Letter, *supra* note 5, annex I, at 6.

10. U.N. Secretary-General Letter, *supra* note 5, annex I, at 1.

11. Bilateral Agreement between the Republic of Afghanistan and the Islamic Republic of Pakistan on the Voluntary Return of Refugees, Afg.-Pak., Apr. 14, 1988; *see* U.N. Secretary-General Letter, *supra* note 5, annex I, at 7.

12. U.N. Secretary-General Letter, *supra* note 5, annex I, at 7.

13. Bilateral Agreement between the Republic of Afghanistan and the Islamic Republic of Pakistan on the Voluntary Return of Refugees, *supra* note 11, at 10.

In accordance with the timeframe agreed upon between the Union of Soviet Socialist Republics and the Republic of Afghanistan there will be a phased withdrawal of the foreign troops which will start on the date of entry into force mentioned above. One half of the troops will be withdrawn by 15 August 1988 and the withdrawal of all troops will be completed within nine months.¹⁴

In the fourth instrument, the U.S. Secretary of State transmitted to the U.N. Secretary-General the following statement:

The obligations undertaken by the guarantors are symmetrical. In this regard, the United States has advised the Soviet Union that the U.S. retains the right, consistent with its obligations as guarantor, to provide military assistance to parties in Afghanistan. Should the Soviet Union exercise restraint in providing military assistance to parties in Afghanistan, the U.S. similarly will exercise restraint.¹⁵

This last instrument was an escape clause. For the Soviet Union, the Geneva Accords were a convenient myth, a mask for an “honorable” disengagement.¹⁶ The Accords also signaled continued support to clients within Afghanistan as long they acted in the interest of the Great Powers. Critically, they did not address internal political arrangements. No strategy was in place, nor apparently, was any contemplated. The consequence was a power vacuum that internal armed groups and external regional powers would enter. Several years of civil war ensued, paving the way for the Taliban.¹⁷

More than thirty years after the Geneva Accords, U.S. representatives were in Doha negotiating an end to another Afghan war.¹⁸ According to the

14. Declaration on International Guarantees (Afghanistan Settlement) U.S. Statement, art. (2).

15. G.R. BERRIDGE, RETURN TO THE UN: UN DIPLOMACY IN REGIONAL CONFLICTS 154 (1991).

16. “Little at Geneva was devoted to finding transitional political arrangements that would reduce subsequent risks of deadly civil strife throughout Afghanistan without impairing the unfolding of self-determination.” Richard Falk, *The Afghan Settlement and the Future of World Politics*, in THE SOVIET WITHDRAWAL FROM AFGHANISTAN 142, 157 (Amin Saikal & William Maley eds., 1989).

17. Olivier Roy presciently wrote, “the seed for a civil war among the mujaheddin have been sown. Olivier Roy, *From Victory to Defeat in Afghanistan*, WASHINGTON POST, Aug. 7, 1989.

18. According to longstanding Afghan analyst and journalist Peter Jouvenal,

U.S. Special Representative for Afghanistan Reconciliation Dr. Zalmay Khalilzad, “We would like to leave a very positive legacy here . . . we are not cutting and running. We are not looking for a withdrawal agreement. We are looking for a peace agreement. And we’re looking for a long-term relationship and partnership with Afghanistan.”¹⁹ The talks were a vehicle to reduce the U.S. military presence. Meanwhile Afghans worried that compassion fatigue has set in and that the West has an exit strategy.²⁰ Their collective memory is a *longue durée*.

III. A LONGUE DURÉE

The French historian Fernand Braudel coined the term *longue durée*, defining it as “the history of long, even very long, duration in contrast with episodic time.”²¹ The *longue durée* resides in the Afghan collective memory as perceptions and interpretations of events that are passed down and remembered.²² This collective mindset is the setting (the deep context) for strategy, development, and constitutive processes in Afghanistan.²³

The Qatar talks are a mirage. No one represents the Taliban. They are as divided as every other Afghan group. The Qatar element is even more disconnected to the Afghan population, as they have been out of Afghanistan for over 15 years, and no longer have the confidence of the Afghans.

Interview with Peter Jouvenal (June 12, 2019).

19. *Envoy: U.S. Not ‘Cutting and Running’ from Afghanistan*, RADIO FREE EUROPE/RADIO LIBERTY (July 12, 2019), <https://www.rferl.org/a/envoy-us-not-cutting-and-running-from-afghanistan/30051289.html>.

20. Afghans have previously been here. *See, e.g.*, Charles H. Norchi, Opinion, *A New Start in Afghanistan*, NEW YORK TIMES (Oct. 13, 2004), <https://www.nytimes.com/2004/10/13/opinion/a-new-start-in-afghanistan.html> (arguing that an Afghan election must not be an exit strategy).

21. FERNAND BRAUDEL, ON HISTORY 25 (Sarah Matthews trans., 1980).

22. Collective memory is “the living bond of generations,” a depository of traditions. It is an accumulation of national experiences and events, as well as society’s efforts to revise and redefine those events and experiences. Individuals living within a particular culture have fixed in their memories, facts and particular attitudes and ways of thinking derived from the past. Personal “remembrances will simply be a reconstruction of the past, achieved with data borrowed from the present.” MAURICE HALBWACHS, ON COLLECTIVE MEMORY 69 (Lewis A. Coser trans. & ed., University of Chicago Press, 1992).

23. Louis Dupree explains that episodes across events of long duration from pre-historic times to the current era are key to understanding Afghans. LOUIS DUPREE, AFGHANISTAN (1980).

The arrival of Alexander the Great set the pattern.²⁴ In Afghanistan, invading armies tended to stay awhile, destroy, and leave a mark that would endure until the next invader. Alexander liberated Greek colonists from Persian rule and fought the Bactrians of Afghanistan in 326–23 BCE.²⁵ As one historian notes, “Alexander faced the same dilemma as modern tacticians whose high-tech hammers have so often pummeled fruitlessly, as was the case throughout the Soviet invasion, where ‘fighting Afghans was like nailing jelly to a wall; in the end there was just a wall full of bent nails.’”²⁶ By the time Alexander reached India, Afghanistan had legal codes and prescriptions that were applied by his designated *satraps* (governor or local leader).²⁷ At the time of Alexander’s death, the Hindu Kush Mountains separated two Greek kingdoms, the Bactrian to its north and the Indo-Greek to its south.²⁸

From 269–32 BCE, the Mauryan Emperor Ashoka reigned and brought Buddhism with its associated norms to Afghanistan.²⁹ By the first century CE, the Kushans exerted control from the Central Asian steppes south into India and west to the Persian plateau. Gandahara, near present day Kabul, became the seat of government and a center of literary and artistic creativity.³⁰ During the second Kushan dynasty, the giant Buddhas of Bamiyan were built.³¹ By the twelfth century CE, Turkish dynasties controlled Afghanistan,

24. See FRANK L. HOLT, INTO THE LAND OF BONES, ALEXANDER THE GREAT IN AFGHANISTAN (2005); GUY MACLEAN ROGERS, ALEXANDER: THE AMBIGUITY OF GREATNESS (2004).

25. “Greek colonists in Asia did not wish to be liberated and resisted [Alexander] fiercely.” DUPREE, *supra* note 23, at 274.

26. HOLT, *supra* note 24 at 67.

27. As Jawaharlal Nehru wrote, “Alexander entered India through the Khyber Pass in the northwest and via Taxila, which lies a little north of Rawalpindi. Even now you can see the ruins of this ancient city.” JAWAHARLAL NEHRU, GLIMPSES OF WORLD HISTORY 48 (1942).

28. DUPREE, *supra* note 23, at 285. Following a mutiny of his troops, Alexander then turned his army toward Babylon where he died. See W. W. TARN, THE GREEKS IN BACTRIA AND INDIA (1951).

29. VINCENT A. SMITH, THE OXFORD HISTORY OF INDIA 117–42 (1958); DUPREE, *supra*, note 23, at 285.

30. WILLIAM MCGOVERN, THE EARLY EMPIRES OF CENTRAL ASIA 251 (1939).

31. See NANCY HATCH DUPREE, AN HISTORICAL GUIDE TO AFGHANISTAN 154 (1970)

The Colossal Buddhas of Bamiyan must be set against the back drop of the fabulous era which created them. Rome, rich and expanding lay to the west. China, ruled with brilliance by the Han Dynasty, lay to the east. India, source of the jewels and spices coveted by all, lay to the south. The Silk Route connected these diverse capitals of luxury and, mid-way, the Kushan King Kanishka gained wealth and power; and the Afghan area prospered. Luxury laden caravans plodded back and forth along the northern plains to the great transshipment depots of Balkh and Tashkurghan, where some turned south to cross the Hindu Kush. Half

Persia (present day Iran), and north India (present day Pakistan).³² Then Genghis Khan swept across the Central Asian steppes destroying the civilizations of the thirteenth century and scattering the Turks. Great Afghan cities such as Balkh, Herat, Ghazni, and Bamiyan were destroyed entirely.

Next came the Moghuls who ruled until 1707.³³ They gave way to invading Uzbeks and ultimately Pashtuns who by 1648 held large areas of southern Afghanistan.³⁴ Two major Pashtun tribes became intense rivals: the Abdalis (who later became Durrani) and the Gilzais. Nadir Shah, a Turkman with a large Persian army, exerted control over Afghan cities.³⁵ In 1736, he took Kandahar allowing the Abdalis to resettle there and exiled the Gilzais to Khurasan, thus determining the current settlements of Pashtun tribes in southcentral and western Afghanistan.³⁶ He attacked the Moghul Court in Delhi and carried the Peacock Throne of Shah Jahan and the crown Moghul jewels, including the Koh-i-Nur diamond, back to Afghanistan.³⁷

Afghanistan became de facto Pashtun and customary Pushtunwali law governed. The centers of power were the Abdali tribe of Kandahar and the Gilzai of Herat.³⁸ But there was no leader until a *jirga*³⁹ chose Ahmad Shah Durrani.⁴⁰ The Durrani empire endured from 1747 to 1793 and stretched from Central Asia south to Delhi and from the Arabian Sea to Kashmir.⁴¹

In 1770, the Amir of Bokhara, Murad Beg, presented Ahmad Shah Durrani with a *kberqa* or a cloak worn by the Prophet Mohammad.⁴² Durrani had a mosque constructed in Kandahar to protect the *kberqa*. By 1772, Durrani

way through this arduous mountain trek they stopped to rest in the valley of Bamiyan where a busy, bustling caravanserai stood at the entrance of the Foladi Valley.

32. See DUPREE, *supra* note 23, at 312–41.

33. SMITH, *supra* note 29, at 320–62.

34. DUPREE, *supra* note 23, at 319.

35. *Id.* at 330.

36. *Id.*

37. The Koh-i-Nur diamond was later carried off to the Punjab in India and then to Britain where it is among the Crown Jewels. *See id.* at 331.

38. See AMIN SAIKAL, MODERN AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL 18 (2012) (noting the phrase “from tribal confederacy to national coalescence”).

39. A *Jirga* is a longstanding instrument of Afghan governance. *Jirga* are authoritative and prescriptions typically backed by effective power and are, hence, law.

40. See GUL GHUBAR, AHMAD SHAH BABA-YI-AFGHAN (1943).

41. GEORGE MACMUNN, AFGHANISTAN FROM DARIUES TO AMANULLAH 52–59 (1929).

42. DUPREE, *supra* note 23, at 339. Eventually the cloak would play a critical role in the rise of Mullah Omar as “commander of the faithful” and Taliban leader. *See* AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN SOUTH ASIA 42 (20002).

was suffering from face cancer that forced him to wear an artificial silver nose.⁴³ He died the same year,⁴⁴ and soon thereafter, the Russians and the British moved on Afghanistan in a pattern that would continue into the twenty-first century: external players sought a buffer to maximize power and protect territory.

By the eighteenth century, much of the world was comprised of States, while Afghanistan was a loose network of autonomous tribes under the rule of emirs. The “land of the Afghan” was a territory in which various actors employed violence in the pursuit of power. As the armies of the Czar moved south, London concluded that the Russian advance could only be thwarted by “forward policies,” which meant getting there first, using common interests to build tribal alliances, and creating a territorial buffer.⁴⁵ This phase of history became known as the “Great Game,” a phrase coined by Captain Arthur Conolly before he was executed by Bokharan tribesmen in 1842⁴⁶ and immortalized by Rudyard Kipling in his poem *Kim*.⁴⁷

Early Great Game intrigues involved England and France.⁴⁸ But, by the early 1800s, the Russians were at the gates of Herat. The empire of the Czar was expanding.⁴⁹ This alarmed the British who viewed Herat, the provincial

43. G. SINGH, AHMAD SHAH DURRANI: FATHER OF MODERN AFGHANISTAN 326 (1959).

44. *Id.*

45. Within his memoir, in a chapter entitled “Kabul Intrigues,” Bruce wrote:

The arrangements we had concluded with the Waziris (an Afghan tribe) for the opening up and pacification of the country continued to progress satisfactorily . . . and should another frontier war with Afghanistan or Russia arise, it is then that the value of the position for dealing with these tribes will be fully realized and appreciated.

RICHARD ISSAQ BRUCE, THE FORWARD POLICY 285 (1900).

46. PETER HOPKIRK, THE GREAT GAME: THE STRUGGLE FOR EMPIRE IN CENTRAL ASIA 1 (1992).

47. “Now I shall go far and far into the North, playing the Great Game.” RUDYARD KIPLING, KIM 203 (1901). But see B.D. HOPKINS, THE MAKING OF MODERN AFGHANISTAN 34 (2012), for an account of the Great Game as a myth.

48. “In the year 1808 when . . . it appeared as if the French were to carry the war into Asia, it was thought expedient by the British government in India to send a mission to the King of Cabaul.” 1 MOUNTSTUART ELPHINSTONE, ACCOUNT OF THE KINGDOM OF CAUBUL, AND ITS DEPENDENCIES, IN PERSIA, TARTARY, AND INDIA 1 (London, Richard Bentley 1842). French agents were active throughout Persia and were attempting to make inroads in Kabul. Napoleon was seeking an alliance between France, Persia, and Afghanistan. But by comparison with Russia, the French threat was exaggerated. See HOPKIRK, *supra* note 46; see also PATRICK MACRORY, KABUL CATASTROPHE: THE RETREAT OF 1842 (1986).

49. See, e.g., KARL E. MEYER & SHAREEN BLAIR BRYCE, TOURNAMENT OF SHADOWS (1999).

capital of Western Afghanistan on Persia's westernmost edge, as the gateway to India. Mohammed, Shah of Persia, laid siege to the city with Russian support. Russia now cast a shadow over Central Asia and loomed over British interests in India.⁵⁰

The 1838 "Simla Manifesto" signaled British intentions toward Afghanistan: invade the territory and restore Soojah as Shah.⁵¹ Further, Governor-General Macnaghten published a codicil stating, "we will continue to prosecute with vigour the measures which have been announced, with a view to the substitution of a friendly for a hostile power in the eastern provinces of Afghanistan and to the establishment of a permanent barrier against schemes of aggression upon our north-west frontier."⁵² This would entail amassing an "Army of the Indus" comprising British Company, Sikh, and Bengal troops, but the key measure signaled in the Manifesto was to place the unpopular Soojah on the throne.⁵³

Britain was a "great civilizing power"⁵⁴ and by civilizing Afghan tribes and identifying their interests with those of England, India could be de-

50. "Herat is called the gate of India because through it, and through it alone, the valleys can be entered which lead to the only vulnerable parts of India." CHARLES MARVIN, *THE RUSSIANS AT THE GATES OF HERAT* 100 (London & New York, Frederick Warne & Co. 1885).

51. TAMIN ANSARY, *GAMES WITHOUT RULES: THE OFTEN INTERRUPTED HISTORY OF AFGHANISTAN* 45 (2012). Soojah was also referred to as Emir Shuja. *See* DUPREE, *supra* note 23, at 376.

52. MACRORY, *supra* note 48, at 81.

53. On October 1, 1838, a "Declaration on the Part of the Right Honourable Governor-General of India," also known as the "Simla Manifesto" was published. It was written by Governor-General Macnaghten and read in part,

His Majesty Shah Soojah-ool-Moolk will enter Afghanistan surrounded by his own troops, and will be supported against foreign interference and fractious opposition by a British army . . . and when once he shall be secured in power, and the independence and integrity of Afghanistan established, the British army will withdraw.

Id. at 80; *see also* ABDUL HAKIM TABIBI, *AFGHANISTAN: A NATION IN LOVE WITH FREEDOM* 114–18 (1985); HENRY MARION DURAND, *THE FIRST AFGHAN WAR AND ITS CAUSES* 66–82 (London, Longmans, Green & Co. 1879).

54. Lord Roberts observed in an influential speech to the House of Lords in 1898:

I can only venture to express my firm conviction that, whatever may be the cost of the measures I propose, the cost, to say nothing of the danger to the Empire, will be definitely greater if we allow matters to drift until we are obliged, in order to resist aggression in Afghanistan, to hurriedly mobilize a sufficient force to subdue the hostile tribes through whose country we should have to pass before we could reach those strategical positions which it is essential we should be able to occupy without delay if we do not intend India—that brightest jewel in Great Britain's Crown—to pass out of our safe keeping.

fended against Russia. Hence, the forward policy was “the policy of endeavoring to extend our influence over, and establish law and order on that part of the Border where anarchy, murder, and robbery up to the present time have reigned supreme.”⁵⁵ A chronicler of the period noted,

an active forward policy . . . involved two suppositions, and also a deep-seated economic problem. Those points were the certitude that Shah Shujah was sufficiently acceptable to the Afghan people for his restoration to produce the effect desired The economic problem was this: Were the resources of the army in India in stores and transport sufficient? Could the army be maintained so far from its bases . . . Was it adequate for the entirely novel and distant undertaking?⁵⁶

The policy, as applied, was deeply flawed.

Mohammad Akbar Khan, the son of Ahmad Shah who earlier had been deposed by the British, pretended to quell a growing insurrection. Previously, he watched Sir William Macnaghten be hacked to death.⁵⁷ As the population became intensely hostile to the British presence, a withdrawal was planned. Four-thousand British troops and 12,000 followers, wives, and children departed Kabul after Christmas in 1841.⁵⁸ The column was relentlessly attacked while retreating. At the fortress of Jalalabad near India, rather than the retreating Army of the Indus, the British garrison saw a lone horseman riding up the Kabul-Jalalabad Road. The date was January 13, 1842, the last remnant of an army, Surgeon Brydon, had arrived in Jalalabad.⁵⁹ Afghan tribesmen had briefly slowed the expansion of British power.⁶⁰

A culture of political violence continued. On February 20, 1919, Afghanistan’s Amir Habibullah was assassinated and succeeded by his youngest son,

See BRUCE, *supra* note 45, at 327 (citing Robert G. Sandeman, Speech in the House of Lords, Mar. 7, 1898).

55. *Id.* at 325.

56. MACMUNN, *supra* note 41, at 110.

57. HOPKIRK, *supra* note 46, at 256.

58. LADY SALE, *A JOURNAL OF THE DISASTERS IN AFGHANISTAN, 1841–2*, at 221–78 (New York, Harper & Brothers 1843).

59. The dramatic incident inspired these lines by Rudyard Kipling:

When you’re wounded and left on Afghanistan’s plains,
And the women come out to cut up what remains,
Jest roll to your rifle and blow out your brains,
An’ go to your Gawd like a soldier.

RUDYARD KIPLING, *THE YOUNG BRITISH SOLDIER* 56 (1892).

60. *See* J.P. FERRIER, *HISTORY OF THE AFGHANS* (London, John Murray 1858).

Amanullah, who proclaimed the independence of Afghanistan.⁶¹ Afghan forces in the Khyber Pass were repulsed by the British and a peace treaty was concluded at Rawalpindi in August 1919.⁶² The treaty recognized the Durand Line Agreement separating Afghanistan and India (later Pakistan).⁶³ But much of India's North West Frontier, including the city of Peshawar and the tribal agencies, was traditional Pashtun territory. Tribes on each side of the Durand Line shared a common ethnic identity and looked to Peshawar as their capital. At the time of Indo-Pakistani partition, Kabul demanded the Pashtun areas be given independence rather than a choice between India and Pakistan.⁶⁴ What became known as the Pashtunistan issue has never been fully resolved.⁶⁵ Indeed, even today, the plaza in front of the presidential palace in Kabul retains the name Pashtunistan Square.

Amanullah undertook extensive modernization programs, improving the judiciary and government administration. The first constitution of Afghanistan was promulgated in 1923.⁶⁶ A system of courts was established and secular law codes were drafted. Following a visit to Europe, Amanullah announced reforms directed against traditional social customs, including the wearing of the veil. In the autumn of 1928, tribal uprisings began in eastern Afghanistan. Kabul was occupied in January 1929, by a brigand who proclaimed himself Habibullah II.⁶⁷ After unsuccessful efforts to reclaim power, Amanullah fled to India and then Europe.⁶⁸

Amanullah was replaced by Nadir Shah who was assassinated in 1933 and succeeded by his only son, Zahir Shah.⁶⁹ Good relations were established with Britain and the Soviet Union, as well as with predominantly Muslim countries, especially Turkey, Iran, and Iraq. Attempts to form close links with the United States generated little success but important connections

61. DUPREE, *supra* note 23, at 441.

62. THOMAS BARFIELD, *AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY* 181 (2010).

63. DUPREE, *supra* note 23, at 443.

64. JEFFERY J. ROBERTS, *THE ORIGINS OF CONFLICT IN AFGHANISTAN* 123 (2003).

65. See Charles H. Norchi, *Culture and Law on the Durand Line: Continuity and Change*, in WILLIAM ASCHER & JAY HEFFRON, *CULTURAL CHANGE AND PERSISTENCE: NEW PERSPECTIVE ON DEVELOPMENT* 203 (2010); see also AZMAT HAYAT KHAN, *THE DURAND LINE: ITS GEO-STRATEGIC IMPORTANCE* (2000); HASSAN KAKAR, *A POLITICAL AND DIPLOMATIC HISTORY OF AFGHANISTAN 1863–1901* (2006).

66. MOHAMMAD HASHIM KAMALI, *LAW IN AFGHANISTAN* 20 (1985).

67. ABDUL SAMAD GHANUS, *THE FALL OF AFGHANISTAN* 46 (1988).

68. See generally SMITH, *supra* note 29.

69. DUPREE, *supra* note 23, at 477.

were made with Germany. During the Second World War, Afghanistan remained neutral.⁷⁰

In 1947, British rule ended in India. Afghanistan's role as a balance among powers continued although the country increasingly leaned towards the Soviet Union. In turn, the Soviet Union supported Afghanistan's position on the question of the tribal lands in the North West Frontier Province (NWFP) of the new Pakistan State. Kabul contended that Pashtun tribesmen should be given the choice of joining Pakistan or forming an independent Pashtunistan.⁷¹ This led to strained relations between Afghanistan and Pakistan and hindered Afghanistan's transit trade through Pakistan.

In September 1953, Prime Minister Shah Mahmud was replaced by Sardar Muhammed Daud Khan.⁷² His regime pressed for large-scale State-directed economic development.⁷³ In December 1955, Soviet leaders Nikolay Bulganin and Nikita Khrushchev visited Kabul and declared support for Afghanistan's position on Pashtunistan.⁷⁴ The Soviet Union provided large-scale economic aid and the United States provided some aid as well.⁷⁵ Daud obtained military assistance, arms, and training facilities from the Soviet Union and greatly strengthened the army. He also introduced reforms to improve the status of women, and in 1959, reformists launched a campaign protesting the wearing of the veil, generating considerable opposition from tribal and conservative religious leaders.⁷⁶

Daud pressed more strongly for Pashtunistan. He denounced the 1921 Anglo-Afghan treaty that had endorsed the Durand Line and summoned a *Loya Jirga* to declare support of Pashtunistan.⁷⁷ Afghan-Pakistan relations de-

70. HENRY S. BRADSHER, *AFGHANISTAN AND THE SOVIET UNION* 16 (1983).

71. Largely owing to the Pashtunistan issue, Afghanistan voted against the admission of Pakistan to the United Nations. See ROBERT D. CREWS, *AFGHAN MODERN: THE HISTORY OF A GLOBAL NATION* 129 (2015).

72. OLIVIER ROY, *ISLAM AND RESISTANCE IN AFGHANISTAN* 74 (1986).

73. DUPREE, *supra* note 23, at 507 (noting that economists and policymakers often referred to these practices as *étatisme* during this era).

74. EDWARD GIRARDET, *AFGHANISTAN: THE SOVIET WAR* 221 (1985).

75. A well-placed U.S. diplomat and scholar wrote of this period, "very modest American aid and generous understanding could have established an Afghanistan future inextricably linked to the West." Leon B. Poullada, *Afghanistan and the United States: The Crucial Years*, 35 *MIDDLE EAST JOURNAL* 178, 182 (1981).

76. DUPREE, *supra* note 23, at 499.

77. *Id.*

teriorated and Afghan troops entered Pakistan tribal territory. In 1961, diplomatic relations were broken with Pakistan and the border sealed.⁷⁸ Afghanistan was obliged to make arrangements with the Soviet Union for transit facilities for exports. When Daud abruptly resigned, King Zahir Shah appointed Dr. Mohammad Yousuff as Prime Minister.⁷⁹ On March 28, 1963, the King appointed a committee to draft a new constitution, which was presented to a *Loya Jirga* in September 1964, proclaiming, “Afghanistan is a constitutional monarchy, an independent, unitary and indivisible state.”⁸⁰ The Constitution prescribed that the State would conduct its religious rituals according to the Islamic Hanafi School and that freedom of worship would be guaranteed to non-Muslims.⁸¹ The *Loya Jirga* approved the Constitution and a period of stability followed, to which many Afghans in later years would look to with nostalgia.⁸²

In 1973, King Zahir Shah was deposed, a republic declared, and Sardar Muhammed Daud Khan returned to Afghanistan as Prime Minister.⁸³ Daud’s main objective was rapid economic development. He increased taxes and sought foreign aid from Western States, Eastern bloc States, Iran, and the Arab Gulf States. Daud tightened State control over the economy, nationalized the principal private bank, the *Banke Milli Afghan*, and instituted land reform.⁸⁴

In 1975, the Soviet-Afghan Treaty of Neutrality and Non-Aggression was renewed.⁸⁵ During the latter part of 1977 and in 1978 Daud increased his attacks on domestic political opponents of the right and left.⁸⁶ On April

78. *Id.*

79. *Id.*

80. ASSASI QANUN [CONSTITUTION] Oct. 1, 1964, art. 1 (Afg.) [hereinafter AFGHANISTAN CONSTITUTION] (“Sovereignty in Afghanistan belongs to the nation. The Afghan nation is composed of all those individuals who possess the citizenship of the State of Afghanistan in accordance with the provisions of the law. The word Afghan shall apply to each such individual.”).

81. DUPREE, *supra* note 23, at 559.

82. The 1964 Constitution served as the interim constitution of the transitional government under the terms of the December 2001 Bonn Agreement until the adoption of the 2004 Constitution. See BARNETT R. RUBIN, AFGHANISTAN FROM THE COLD WAR THROUGH THE WAR ON TERROR 149 (2013).

83. DUPREE, *supra* note 23, at 753.

84. DAVID B. EDWARDS, BEFORE TALIBAN 62 (2006).

85. GHAUS, *supra* note 67, at 161.

86. As one account notes, Daud “was happiest when he could light his American cigarettes with Soviet matches.” See THEODORE ELIOT, CIA BIOGRAPHICAL REPORT: THE AF-

27, the commander of military and air force units in the Kabul area staged a coup that became known as the Great Saur Revolution.⁸⁷ Daud, nearly all his family, leading ministers, and principal military commanders were killed.⁸⁸

Democratic Party of Afghanistan (PDPA) leader Nur Muhammad Taraki became President of the Revolutionary Council and Prime Minister.⁸⁹ The 1977 Constitution was abolished, the Republic of Afghanistan was renamed the Democratic Republic of Afghanistan (DRA), power was vested in a Revolutionary Council, and the PDPA became the only political party. The PDPA introduced a five-year plan to reduce rural indebtedness, abolish dowries, and redistribute land. The reforms pitted urban Kabul against rural Afghanistan and new civil law codes against revered customary legal practices. A tribal revolt began in the eastern province of Nuristan and armed insurrection spread.

The regime grew dependent on Soviet aid. The Afghan national flag was changed from black, red, and Islamic green to an all-red design similar to the flags of the Soviet Republics throughout Central Asia. During the winter of 1978, guerrilla warfare erupted sporadically in the countryside. The army was beset by defections. Soviet military advisors and civilians became integral to the functioning of ministries. A resistance emerged and soon established political organizations across the Khyber Pass in Peshawar, Pakistan.

In February 1979, U.S. Ambassador Adolph “Spike” Dubs was killed in a kidnapping incident when Afghan police coached by Soviet advisors assaulted the hotel where he was held.⁹⁰ The event further alienated Washington from the Taraki regime. The Carter administration cut aid programs and withdrew most U.S. personnel.⁹¹ By mid-year the regime’s behavior and the country’s chaos ended all foreign aid outside of Communist countries.

GHAN LEADERSHIP 22 (1975); *see also* Nushin Arbabzadah, Opinion, *Remembering Afghanistan’s First President*, GUARDIAN (Mar. 21, 2009), <https://www.theguardian.com/commentis-free/2009/mar/21/afghanistan>.

87. BRADSHER, *supra* note 70, at 74.

88. ABDUL SHAMS, IN COLD BLOOD: THE COMMUNIST CONQUEST OF AFGHANISTAN 22 (1987).

89. BARNET RUBIN, THE FRAGMENTATION OF AFGHANISTAN 111 (1995); *see also*, PETER TOMSEN, THE WARS OF AFGHANISTAN (2013).

90. *See* Robert Trumbull, *U.S. Asserts Afghans Ignored Pleas Not to Attack Abductors of Envoy*, NEW YORK TIMES, Feb. 15, 1979, at A1.

91. NANCY NEWELL & RICHARD NEWELL, THE STRUGGLE FOR AFGHANISTAN 105 (1981)

Taraki met with Brezhnev in Moscow and agreed that Amin must be removed in a coup. However, a forewarned Amin turned the tables and Taraki was killed instead.⁹² Now even more strongly in control, Amin urged President Zia of Pakistan to seal the border and restrict guerrilla operations. However, Amin failed to win over the rebels or to suppress them. And, as the flight of refugees from Afghanistan continued,⁹³ new guerrilla groups formed among the refugees in Pakistan. Apart from a common devotion to Islam, there was little unity.⁹⁴ The Amin regime was supported by 80,000 Soviet troops and 1,500 Soviet civilians.⁹⁵

In December, Moscow engineered another coup, airlifting thousands of troops into Afghanistan. They utilized a network of transportation and communications that Moscow had put in place during the last two decades. In mid-month, Amin narrowly escaped assassination. On December 25, Soviet troop movements became a major airlift transporting 5,000 soldiers into Kabul.⁹⁶ Two days later, having secured the city, Soviet forces attacked the stronghold to which Amin had retreated.⁹⁷ By day's end, fighting ceased and Radio Kabul broadcast an announcement by Afghan Soviet puppet Babrak Karmal proclaiming an end to the Amin regime and appealing for Soviet aid.⁹⁸ Amin was summarily executed.⁹⁹

Four Soviet divisions crossed the Amu Darya River to begin garrisoning the major Afghan towns.¹⁰⁰ On April 21, a constitution was adopted by the Revolutionary Council outlining basic rights, the organs of government, and their competences.¹⁰¹ In May, Radio Kabul announced that anti-government

92. *Id.*

93. The number of refugees in Pakistan rose from 192,000 in September 1979 to 400,000 in December. A substantial number also fled to Iran. See, e.g., *Afghanistan: The Unending Crisis*, REFUGEES MAGAZINE, June 1, 1997.

94. Several short-lived alliances were announced. These included the Islamic Alliance for the Liberation of Afghanistan, formed among refugees in Pakistan, and the Islamic Revolution Liberation Front of Afghanistan, established in Iran. However, the bulk of rebel military activity came from local groups within Afghanistan.

95. In November 1979, the DRA and the Soviet Union concluded a Treaty of Friendship and Co-Operation. Meanwhile a fundamentalist revolution was sweeping Iran.

96. BRADSHER *supra* 70, at 169.

97. *Id.*

98. *Id.* at 170

99. SHAMS, *supra* note 88, at 32.

100. *Id.* at 23.

101. BRADSHER *supra* 70, at 89.

demonstrators arrested earlier that month would be tried by the Afghan Revolutionary Courts. Afghans were again subjected to the policies and strategies of outsiders. They became victims of the Brezhnev Doctrine:

When external and internal forces hostile to socialism try to turn the development of a given socialist country in the direction of restoration of the capitalist system, when a threat arises to the cause of socialism in any country—a threat to the security of the socialist commonwealth as a whole—this is no longer merely a problem for that country’s people, but a common problem, the concern of all socialist countries.¹⁰²

Within a month, Red Army forces rose to 85,000, and shortly thereafter to 105,000.¹⁰³ The strategy was initially aimed at securing main cities, strategic points, and roads. The Soviet presence emboldened the resistance who called themselves *mujahidin* or holy warriors. *Mujahidin* forces ambushed Soviet convoys and government bases before receding into the Afghan hills. The Red Army responded. Crops were burned, trails blanketed with anti-personnel mines, entire villages razed, and non-combatants killed.¹⁰⁴

Through displacement and flight, close to one-half of the Afghan population became refugees. Bombings, torture, executions, and forced displacement rendered the human rights picture increasingly grim. In turn, the *mujahidin* resistance grew. By mid-1980, the resistance controlled nearly eighty percent of the countryside while the Karmal Regime held the cities.¹⁰⁵

102. Harry Schwartz, *The Khrushchev/Brezhnev Doctrine at Helsinki*, NEW YORK TIMES, Aug. 5, 1975, <https://www.nytimes.com/1975/08/05/archives/the-khrushchevbrezhnev-doctrine-at-helsinki.html>. In addition, it is evident there was concern in the Kremlin over the possible disintegration of the Afghan State. As one official remarked, “To leave the Afghan revolution without internationalist help and support would mean to condemn it to inevitable destruction and to permit an access to hostile imperialist forces to the Soviet border.” See J. BRUCE AMSTUTZ, *AFGHANISTAN: THE FIRST FIVE YEARS OF SOVIET OCCUPATION* 41 (1986).

103. See AMSTUTZ, *supra* note 102, at 155.

104. See Rep. of the Econ. & Soc. Council, *Situation of Human Rights in Afghanistan*: Note by the Secretary-General, Annex, Report on the Situation of Human Rights in Afghanistan, Prepared by the Special Rapporteur of the Commission on Human Rights in Accordance with Commission Resolution 1987/58 and Economic and Social Council Decision 1987/51, U.N. Doc. A/42/667, annex (Oct. 23, 1987) [hereinafter *Situation of Human Rights in Afghanistan*].

105. BRADSHER *supra* 70, at 90.

Although poorly developed and articulated, the doctrine of the Afghan resistance movement hewed to the traditional tenets of partisan warfare. Because the physical expulsion of Soviet forces was beyond its means, the resistance instead sought to conduct guerilla operations of a scale and intensity that could inflict as high a price as possible on Soviet forces and could also be sustained indefinitely.¹⁰⁶

The Afghan struggle against the Soviet presence acquired a religious dimension. It became a *jihad*.¹⁰⁷

The unremitting violations of human rights and humanitarian law breached legal obligations to which the Soviet Union was bound by treaty.¹⁰⁸ Afghans would live with the resulting human rights and development consequences for years after the Soviet withdrawal. The profound attack on human rights and Afghan culture caused the country to largely disintegrate before being captured by an Islamic fundamentalist movement and becoming host to al Qaeda, a development that would have transnational effects.

As the population suffered under withering attacks, the *mujahidin* achieved battlefield successes with the support of an U.S. covert aid program. In 1988, Kremlin elites concluded that the costs were too high and cut its losses. Soviet troops withdrew in 1989. The Soviet war was a period of human dignity under assault that is engrained in the collective Afghan memory. The period has been very well chronicled.¹⁰⁹

106. Marin J. Strmecki, *Power Assessment: Measuring Soviet Power in Afghanistan* 428 (1994) (unpublished Ph.D. dissertation, Georgetown University) (on file with author).

107. See HENRY S. BRADSHER, *AFGHANISTAN AND THE SOVIET UNION* (1985); see also *supra* note 4.

108. See JERI LABER & BARNETT RUBIN, *A NATION IS DYING* (1988); *Situation of Human Rights in Afghanistan*, *supra* note 104.

109. See, e.g., THOMAS BARFIELD, *AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY* (2010); ZBIGNIEW BRZEZINSKI, *POWER AND PRINCIPLE* (1990); STEVE COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001* (2004); EDWARD GIRARDET, *AFGHANISTAN: THE SOVIET WAR* (1985); DORIS LESSING, *THE WIND BLOWS AWAY OUR WORDS* (1987); NANCY NEWELL & RICHARD NEWELL, *THE STRUGGLE FOR AFGHANISTAN* (1981); AHMED RASHID, *TALIBAN: ISLAM, OIL AND THE NEW GREAT GAME IN CENTRAL ASIA* (2000); OLIVIER ROY, *ISLAM AND RESISTANCE IN AFGHANISTAN* (1985); RUBIN, *supra* note 89; ABDUL SHAMS, *IN COLD BLOOD: THE COMMUNIST CONQUEST OF AFGHANISTAN* (1987); VLADISLAV TAMAROV, *AFGHANISTAN: SOVIET VIETNAM* (1992).

In 1988, the President of the Afghan Interim Government, Ahmed Shah, told this author, “Our hope is that America will not wash its hands of Afghanistan.”¹¹⁰ It was becoming clear to moderate Afghans that Washington was losing interest and consequently giving little thought to which resistance organizations were benefiting from the massive inflow of arms. The bulk of those decisions were left to Pakistani intelligence.¹¹¹ This view colored the British disentanglement from Afghanistan years earlier.¹¹²

When the Soviets withdrew in 1989, then President Najibullah dug in until 1992 when the *mujabidin* took Kabul.¹¹³ The city was captured by Tajik leader Burhanuddin Rabbani and Commander Ahmad Shah Massood with the support of Uzbek forces led by General Rashid Dostum.¹¹⁴ The Pashtun parties based in Peshawar and their military organizations were largely absent. For the previous three hundred years, Pashtuns had controlled the capital. Gulbaddin Hekmatyar, a Pashtun fundamentalist who had been well armed by Pakistan and the United States, pummeled the city. This open ethnic wound would eventually play to the Taliban base.¹¹⁵

The Geneva Accords had paved the way for chaos, which the Taliban exploited to justify the imposition of a rigid sixteenth-century brand of Islam previously unknown to most of the Afghan population.¹¹⁶ Girls were sent home from schools, the university was shut down, and female doctors were ordered out of the hospital.¹¹⁷ There were cases of women needing medical treatment being turned away from the hospital and men were ordered to grow beards. Anything deemed un-Islamic was prohibited and punished.

110. Charles Norchi, *United States Walks Away from Afghanistan Vacuum*, THE CLEVELAND PLAIN DEALER, July 1, 1988.

111. See COLL, *supra* note 109.

112. GEORGE MACDONALD FRASER, FLASHMAN 146 (1969) (“The alternative now is a hurried withdrawal, which no one here can guarantee in safety, for none has the power to restrain the wilder tribes. And Afghanistan will be left to warring factions.”).

113. Ambassador Peter Tomsen, Special Envoy to the Afghan resistance from 1989 to 1992, describes the events in PETER TOMSEN, THE WARS OF AFGHANISTAN MESSIANIC TERRORISM, TRIBAL CONFLICTS, AND THE FAILURES OF GREAT POWERS (2013).

114. *Id.*

115. See EDWARD GIRARDET, KILLING THE CRANES (2012).

116. AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA 22 (2d ed. 2000).

117. See Charles H. Norchi, *Human Rights: The Struggle for Dignity, in AFGHANISTAN: CROSSLINES ESSENTIAL FIELD GUIDES* 53 (Edward Girardet & Jonathan Walter eds., 2d ed. 2004).

Taliban leaders were largely uneducated in matters of Islam or government and religion became a convenient mask for exercising power.¹¹⁸

In an advanced digital and globally connected era, it was difficult to comprehend that expression, education, and decisionmaking across an entire nation could be squelched. The Taliban emerged in the mid- to late-1990s, a period marked by the Internet, email, and interactive CD ROMs. Yet these features were partial contours of the times. Taliban Islam, which brokered no discussion or debate and claimed a level of purity and sacrifice, appealed to young zealots and the newly radicalized. The Taliban opposed modernism, progress, culture, science, and economic development.¹¹⁹

On September 11, 2001 a coordinated attack, using four hijacked passenger airliners brought down the World Trade Center twin towers in New York and destroyed a wing of the Pentagon building. A fourth plane on the way to Washington crashed in Pennsylvania. The death toll of nearly 3,000 people exceeded that of the Japanese attacks on Pearl Harbor.¹²⁰

Operation Enduring Freedom removed the Taliban regime and a new chapter in Afghanistan's national constitutive process opened with the Bonn Agreement.¹²¹ The Bonn Agreement committed the Transitional Government to an interim legal framework based on the Constitution of 1964 that operated during the time of the King. The Islamic Transitional State of Afghanistan was inaugurated on December 22, 2001.¹²² The former King Mohammad Zahir Shah returned to Kabul after twenty-nine years of exile in Rome, and opened an emergency *Loya Jirga* on June 9, 2002.¹²³ An assembly of 1,500 Afghans streamed into Kabul to select a government, under the protection of U.S. and allied troops.¹²⁴ In December 2003, a subsequent *Loya*

118. For an account of the U.S. Ambassador and Special Envoy to Afghanistan from 1989 to 1992, see PETER TOMSEN, *THE WARS OF AFGHANISTAN* (2011).

119. Thomas Gouttierre, Director of the Center for Afghanistan Studies at the University of Nebraska observed, "There is nowhere to go [in Afghanistan] for really credible education and training. . . . It's such a tragedy, I lived in a country and saw a society that believed in education." Amy Magaro Rubin, *A Bleak Future for Afghan Higher Education*, 44 *CHRONICLE OF HIGHER EDUCATION*, Sept. 5, 1997, at A73.

120. *THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 1* (2004).

121. RUBIN *supra* 89, at 149; *see also* WILLIAM MALEY, *THE AFGHANISTAN WARS* 224 (2009).

122. RUBIN, *supra* note 82.

123. *Id.* at 151.

124. *Id.*; *see also* Anders Fänge, *The Emergency Loya Jirga: Hopes and Disappointments*, *AFGHANISTAN ANALYSTS NETWORK* (2012), https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/09/2_Fange_The_Emergency_Loya_Jirga.pdf.

Jirga was convened to serve as the constitutional convention. A preliminary draft constitution was completed in the spring of 2003. A marker in a battle of conflicting demands, it was debated and revised in meetings continuing through the Constitutional *Loya Jirga* until approved.

The 2004 Constitution was a laudable text. But would it ever become the operational code for the conduct of the government? A newly drafted constitution may be a myth while what people actually do in informal settings is the accepted code of operation. The Constitution again codified the *Loya Jirga*, stating, “the Loya Jirga is the highest expression of the will of the people of Afghanistan.”¹²⁵ Where the National Assembly is termed an expression of the will of the Afghan people, in keeping with tradition, the *Loya Jirga* is the highest expression of that will, authoritative and controlling.

A subtext in the debate at the 2003 Constitutional *Loya Jirga* was over who would own Afghanistan’s Constitution. Well-meaning foreigners offered drafting advice and even model texts. This exposed Afghans who were working for a draft that reflected international human rights standards to criticism. Faruq Wardak, director of the Constitutional Commission said, “Western minded people say mullahs are making the constitution, the fundamentalist elements say the Americans are making our constitution.”¹²⁶

The process appeared to be “imposed constitutionalism” to borrow a phrase from Noah Feldman, who writes,

[a]lthough the wholesale imposition of an entire constitutional order is increasingly rare, constitutions *are* being drafted and adopted in the shadow of a gun. In the last decade in the former Yugoslavia, East Timor, Afghanistan, and . . . Iraq, interim or permanent constitutions have been drafted under the conditions of de facto or de jure occupation. Each of the cases has also seen substantial intervention and pressure imposed from outside to produce constitutional outcomes preferred by international actors . . .

125. The President convenes the *Loya Jirga*. It makes decisions relating to “independence, national sovereignty, territorial integrity, and high public interests,” to “modify commandments of the constitution,” and for “other issues stated in this constitution.” Membership of the *Loya Jirga* consists of “(1) Members of the national assembly, (2) Presidents of provincial councils, (3) Representatives of the provinces in proportion to the population on the basis of general, free, secret and direct elections in accord with law.” AFGHANISTAN CONSTITUTION, *supra* note 80, art. 110.

126. Interview with Faruq Wardak, Director, Constitutional Commission, in Kabul, Afghanistan (Aug. 2003).

Yet there is something theoretically and practically distinctive about imposed liberal constitutionalism today: it takes place against a backdrop of widespread commitment to democratic self-determination.¹²⁷

The indigenous commitment may be to a *sui generis* form of self-determination and to Western style democracy only as a myth.

For the next decade, Afghanistan seemed to be in a state of permanent reconstruction and became victim to what William Easterly calls the “Cartel of Good Intentions.”¹²⁸ During this period, a massive influx of foreign aid poured into the country, but the international development technocracy largely dominated these projects while producing local dependency and thus self-perpetuating their presence within the country.¹²⁹ Afghanistan was a *faux* State, a polity whose real power lay in diffuse pockets disconnected from the center. A constitution was in place, government ministries buzzed with activity, and the government had a seat in the United Nations. Yet warlords and their private armies controlled the provinces, engaging in banditry and “taxed” commerce. Effective control and authority of the government was confined to a narrow space.

Under President Obama, U.S. troop levels within Afghanistan reached an apex of 100,000 in 2010.¹³⁰ In 2011, Osama Bin Laden was found in Pakistan and killed in a special operations raid that Obama authorized.¹³¹ Later that year a steady troop draw down began.¹³² On August 21, 2017, President Trump stated the U.S. policy would be an open-ended military commitment

127. Noah Feldman, *Imposed Constitutionalism*, 37 *CONNECTICUT LAW REVIEW* 857, 858–59 (2005).

128. See William Easterly, *The Cartel of Good Intentions: The Problem of Bureaucracy in Foreign Aid*, 5 *JOURNAL OF POLICY REFORM* 223 (2002).

129. See James Bovard, *The Continuing Failure of Foreign Aid*, *CATO INSTITUTE POLICY ANALYSIS*, no. 65, Jan. 31, 1986, at 1, <https://www.cato.org/publications/policy-analysis/continuing-failure-foreign-aid>; P. Boone, *Politics and the Effectiveness of Foreign Aid*, 40 *EUROPEAN ECONOMIC REVIEW* 289 (1996); Craig Burnside & David Dollar, *Aid, Policies and Growth*, 90 *AMERICAN ECONOMIC REVIEW*, 847 (2000); see generally WILLIAM EASTERLY, *THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS’ ADVENTURES AND MISADVENTURES IN THE TROPICS* (2001).

130. See *OUR LATEST LONGEST WAR: LOSING HEARTS AND MINDS IN AFGHANISTAN* (Aaron B. O’Connell ed., 2017) (featuring essays by U.S. veterans on history, governance, strategy, special operations, and the U.S. withdrawal from Afghanistan).

131. For a full account of this period, see STEVE COLL, *DIRECTORATE S: THE CIA AND AMERICA’S SECRET WARS IN AFGHANISTAN AND PAKISTAN* (2018).

132. *A Timeline of U.S. Troop Levels in Afghanistan Since 2001*, *MILITARY TIMES* (July 6, 2016), <https://www.militarytimes.com/news/your-military/2016/07/06/a-timeline-of-u-s-troop-levels-in-afghanistan-since-2001/>.

to prevent a “vacuum for terrorists.”¹³³ But on December 19, 2018, he ordered a withdrawal of 7,000 troops, half of the remaining 14,000.¹³⁴ For the Afghan population, the pendulum swung again from personal insecurity to the expectation of violence—the familiar pattern of their *longue durée*.¹³⁵

IV. BELOW THE STATE

Since the Peace of Westphalia,¹³⁶ populations have looked to nation-States to satisfy a wide range of needs. Operating in a community of similarly organized units, these territorial political arrangements provided security for citizens who were also bases of State power. In return for security, the people ceded control and conferred an expectation of authority upon ruling State elites. This bargain was a foundation of the State system and formed the delicate balance upon which world order turned. But increasingly, weak and fragile States have collapsed, piercing their sovereignty. People living within their borders were often engulfed by armed conflict and their human rights eclipsed. Failed and wobbly States harbored exportable violence and became problems for an international system that lacked the institutional capacity to address such problems.

The U.N. Charter did not contemplate the collapse or disintegration of a State.¹³⁷ It presumed effective communication among sovereign governments and their elites, and a range of action available to the Security Council, including provisional measures, sanctions short of force, and coercion. These instrumentalities were designed to bring pressure upon a cohesive

133. Julie Hirschfeld Davis & Mark Landler, *Trump Outlines New Afghanistan War Strategy with Few Details*, NEW YORK TIMES (Aug. 21, 2017), <https://www.nytimes.com/2017/08/21/world/asia/afghanistan-troops-trump.html>.

134. Gordon Lubold & Jessica Donati, *Trump Order Big Troop Reduction in Afghanistan*, WALL STREET JOURNAL (Dec. 20, 2018), <https://www.wsj.com/articles/trump-administration-is-considering-substantial-afghan-troop-drawdown-11545341452>.

135. See AHMED RASHID, *DESCENT INTO CHAOS* (2010); SETH G. JONES, *IN THE GRAVEYARD OF EMPIRES, AMERICA'S WAR IN AFGHANISTAN* (2009).

136. The origin of the modern nation-State system can be traced to 1648 and the Thirty Years War that ended with the Treaties of Munster and Osnabruck or the Peace of Westphalia. It has also been argued that the State system originated with the Concordat of Worms in 1122 because the Investiture Struggle established a property right corresponding to sovereign territory—“the right of kings to the income from the territory defined by the domain of each bishop.” See Bruce Bueno de Mesquita, *Popes, Kings, and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty*, 2 INTERNATIONAL STUDIES REVIEW, no. 2, 2000, at 93.

137. See U.N. Charter, arts. 1, 2.

form of supranational political organization: functioning States. However, by the late twentieth century the problem of failing States was becoming an urgent challenge.¹³⁸ With the September 11, 2001 attacks, it was apparent that disintegrating and failed States were “threats to the peace” under the meaning of Article 39 of the U.N. Charter.¹³⁹ Since preventing threats to the peace is a fundamental purpose of the United Nations,¹⁴⁰ the world community came to appreciate that addressing this type of threat would require strengthening fragile States and reconstructing failed States.¹⁴¹

The presumed robust character of the sovereign State increasingly convulsed from the conditions of the twenty-first century. Sovereignty was not absolute.¹⁴² It had been changing to reflect the reality of the world social process, yet sovereignty remained an important technique wielded by State elites, and it performed a stabilizing international function that was central to maintaining world public order.¹⁴³ The old bargain had begun to change from the peoples’ ceding of power to the sovereign in return for security, to the peoples’ ceding of power to the sovereign in return for guarantees of rights.¹⁴⁴

138. See Chester Crocker, *Engaging Failing States*, 82 FOREIGN AFFAIRS Sept.–Oct. 2003, at 32.

139. U.N. Charter art. 39.

140. *Id.* art. 1(1).

141. None of the U.N. institutional machinery effectively helped countries transition from war to peace. Secretary-General Kofi Annan proposed a Peacebuilding Commission as a key U.N. reform based on the recommendations of the High Level Panel on Threats, Challenges and Change he had convened. U.N. Secretary-General, Note by the Secretary-General to the General Assembly, ¶ 14, U.N. Doc. A/59/565 (Dec. 2, 2004).

142. C. Wilfred Jenks’ observation that “Sovereignty is not absolute, but divisible” was increasingly apparent. He had observed that this was “inconceivable to the dogmatic school of thought” represented by Hobbes’ Leviathan, “which regarded the essence of sovereignty as being its absolute quality.” C. WILFRED JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 499 (1964).

143. As observed by Judge Alvarez in the *Corfu Channel* judgment,

Sovereignty confers rights upon States and imposes obligations on them. . . . This notion has evolved and we must now adopt a conception of it which will be in harmony with the new conditions of social life. We can no longer accept sovereignty as an absolute and individual right of every State The sovereignty of States has now become an *institution*, an *international social function* of a psychological character, which has to be exercised in accordance with the new international law.

Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 43 (Apr. 9) (individual opinion by Alvarez, J.).

144. The old myth was giving way to a view of sovereignty based on an international legal instrument: “the will of the people shall be the basis of the authority of the government.” G. A. Res. 217 (III) A, Universal Declaration of Human Rights art. 21(3) (Dec. 10, 1948).

Where absolute sovereignty was about State security, popular sovereignty is about human dignity.¹⁴⁵ And a secure State might enhance the rights and dignity of the population. But sovereignty, as traditionally conceived, had helped solve, or at least significantly improve, a problem of the anarchical State system: maintaining order in international relations.¹⁴⁶

For States that were weak and whose territorial integrity was challenged, sovereignty was severable.¹⁴⁷ Francis Fukuyama wrote, “sovereignty and the nation-state, cornerstones of the Westphalian system, have been eroded in fact and attacked in principle, because what goes on inside states—in other words their internal governance—often matters intensely to other members of the international system.”¹⁴⁸ Interventions, both humanitarian and strategic-based, resulted in the removal of odious regimes and nation-building projects that assumed traditional State functions. As one scholar has noted, “[t]he state-building practices of international administrations reveal a sovereignty paradox: international administrations compromise a fundamental aspect of a political community’s sovereignty by violating its right to self-governance, but do so with the aim of making it sovereign with regard to the relations between state and society.”¹⁴⁹ This describes Afghanistan in the year 2019. Sovereignty is pierced; formal institutions of government are weak; yet life below the State goes on.

145. In his 1999 annual address to the General Assembly, U.N. Secretary-General Kofi Annan stated,

State sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation. The State is now widely understood to be the servant of its people, and not vice versa. . . . [I]t is not the deficiencies of the Charter which have brought us to this juncture, but our difficulties in applying its principles to a new era; an era when strictly traditional notions of sovereignty can no longer do justice to the aspirations of peoples everywhere to attain their fundamental freedoms.

Press Release, Secretary-General, Secretary-General Presents His Annual Report to the General Assembly, U.N. Press Release SG/SM/7136, GA/9596 (Sept. 20, 1999).

146. HEDLEY BULL, *THE ANARCHICAL SOCIETY* 53 (1977).

147. The principle of territorial integrity of States is a central goal of the United Nations. *See* U.N. Charter arts. 2(4), 2(7) (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . .”).

148. FRANCIS FUKUYAMA, *STATE BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY* 92 (2004).

149. “By establishing international administrations and denying self-governance to the affected populations, the international community compromises one of the fundamental aspects of sovereignty, the norm of self-determination.” DOMINIK ZAUM, *THE SOVEREIGNTY PARADOX: THE NORMS AND POLITICS OF INTERNATIONAL STATEBUILDING* 27 (2007).

Through tranquility, violence, and chaos many Afghan communities had thrived.¹⁵⁰ They drew on common interests animated by social capital and shared cultural and religious perspectives. They thrived below the State. As Thomas Barfield has observed,

One reason that Afghan society has survived so many years of turmoil has been its ability to govern itself at the local level even in the absence of state institutions. The international community should take advantage of this strength by recognizing that most problems are not solved in the formal judicial institutions but rather informally.¹⁵¹

But how should external actors engage a polity and its people in a context of conflict and fractured sovereignty? Or, as Michael Reisman asked, “What are the strategies available to communities in transition, for their process of redefinition, and what role should the international community—an increasingly effective participant in all these sub-communities—take in the process?”¹⁵² If law is an available strategy, how can it be effectively wielded in Afghanistan and advance the goal values of the body politic?¹⁵³

V. LAW AS STRATEGY

Harold Lasswell delivered the March 20, 1952 U.S. Naval War College lecture on strategy.¹⁵⁴ His view of strategy accounted for ends, means, and values. For Lasswell, “The management of base values to achieve scope values is strategy”¹⁵⁵ Values are preferred outcomes—the things people need and want. And accumulated values (base) could generate additional values

150. See RORY STEWART, *THE PLACES IN BETWEEN* (2004).

151. Thomas Barfield, *Culture and Custom in Nation-Building: Law in Afghanistan*, 60 *MAINE LAW REVIEW* 2 (2008).

152. *Theme II Roundtable Communities in Transition: Autonomy, Self-Governance and Independence*, 87 *AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS* 248, 249 (1993) (featuring remarks by W. Michael Reisman).

153. Values, for Lasswell and New Haven School of Jurisprudence, as described in Lasswell’s 1952 U.S. Naval War College lecture were terms that described social process dynamics: power, wealth, respect, well-being, enlightenment, skill, affection, and rectitude. See Lasswell *supra* note 2, at 53.

154. See *supra* notes 1–2 and accompanying text.

155. HAROLD D. LASSWELL & MYRES S. MCDUGAL, 1 *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* 345 (1992).

(scope).¹⁵⁶ Law is a strategic instrument because of its value manipulating and fulfilling qualities, including the value power.¹⁵⁷

Michael Reisman explains that law in every community is made by a continuing and comprehensive process of communication.¹⁵⁸ This process entails communications directed toward a target audience. Each communication contains policy content, an authority signal, and a control intention indicated by the communicators.¹⁵⁹ In order to know the law, one cannot solely rely on formal agreements and other textual statements.¹⁶⁰ One must also observe habitual behavior. Behavior, which in the beginning might be considered unlawful, if repeated and tolerated throughout a period, might eventually become regarded as lawful. To make the distinction requires appraising the flow of behavior and the flow of words. Thus, Myres McDougal states, “[T]he term ‘law’ includes reference to both authority, in the sense of community expectations about the requirements of decision, and control, in the sense of actual participation in the making and enforcement of decision.”¹⁶¹

Legal systems must not be confused with legal rules. In any community, rules rest on the surface of the legal system.¹⁶² The real dimensions of the system are often found in other places. One must come to terms with other processes within the culture and the society if one is to truly understand law

156. Because the number of preferred outcomes is infinite, Lasswell used a workable heuristic of eight terms: power, enlightenment, wealth, well-being, skill, affection, respect, rectitude. See HAROLD D. LASSWELL, A PRE-VIEW OF POLICY SCIENCES 18 (1971).

157. Law has been appraised as a strategic instrument under the rubric, “Lawfare,” which Charles Dunlap defines “as the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.” Charles J. Dunlap, Jr., *Lawfare Today*, YALE JOURNAL OF INTERNATIONAL AFFAIRS, Winter 2008, at 146; see also Charles J. Dunlap, Jr., *Lawfare Today . . . And Tomorrow*, 87 INTERNATIONAL LAW STUDIES 315(2011); Dale Stephens, *The Age of Lawfare*, 87 INTERNATIONAL LAW STUDIES 327 (2011).

158. See W. Michael Reisman, *International Law-Making: A Process of Communication*, 75 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 101 (1981).

159. *Id.* at 108.

160. Anthropologist Leopold Pospisil identified four attributes of law: authority, intention of universal application, *obligatio*, and sanction. *Obligatio* “is the part of the legal decision which defines the rights of the entitled and the duties of the obligated,” while sanction is the “authorized power that enforces the applied decision.” See LEOPOLD J. POSPISIL, THE ETHNOLOGY OF LAW 30 (1985).

161. Myres S. McDougal, *Law and Peace*, 18 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 1, 4 (1989).

162. The “rule of law,” a term heavily used in international development, is about “norm creation and cultural change as much as an issue of creating new institutions and legal codes.” See JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHT? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 75 (2007).

in context.¹⁶³ A legal system may have more to do with custom or religion, or tradition than with what might be considered modern social conventions.¹⁶⁴ Unwritten law, emanating from the political process, is an important feature of community decisionmaking. This is especially apparent in rural settings where customary and formalized councils are both engaged in choice making and resource allocation.¹⁶⁵

Anthropologist Bronislaw Malinowski urged scholars, “not to study how human life submits to rules—it simply does not; the real problem is how the rules become adapted to life.”¹⁶⁶ This exercise in what Clifford Geertz called “thick description,”¹⁶⁷ or sorting out the various codes of meaning in webs of significance, may seem distant from legal method. However, Oliver Wendell Holmes observed:

It is perfectly proper to regard and study the law simply as a great anthropological document. It is proper to resort to it to discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century. It is proper to study law as an exercise in the morphology and transformation of human ideas.¹⁶⁸

Societies and communities possess multiple normative systems. The normative code relied upon by officials may be a myth system whose reliability for guidance will vary. Far more significant is often the unofficial normative system that operates as the real operational code.¹⁶⁹ As the entrenched normative system of the populace, the operational code will often prevail over a constitution and codified law. Identifying authority and control enables

163. J.H. Merryman, *The Convergence (and Divergence) of the Civil Law and the Common Law*, in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 222 (Mauro Cappelletti ed., 1978).

164. W. Michael Reisman, *The Cult of Custom in the Late 20th Century*, 17 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 133 (1978) (“Custom . . . concerns the *implicit* creation of norms through the behavior of a few politically relevant actors who are frequently unaware that law is being, or has been, made.”).

165. W. Michael Reisman, *Law From The Policy Perspective*, in MYRES S. MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW ESSAYS 1, 6 (1981).

166. BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 127 (1948).

167. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 5 (1973).

168. Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARVARD LAW REVIEW 99 (1889).

169. W. MICHAEL REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS 16 (1979).

distinguishing between real law and *lex simulata*. Or, as Lasswell and McDougal conclude, “The degree to which the technical legal doctrines of a community represent reality or illusion may in great measure depend upon the exact interrelations of formal authority and effective control.”¹⁷⁰ This conception of law can be strategically deployed in Afghanistan.

The text of the 2004 Constitution of Afghanistan is one element of a larger constitutive process whose most enduring dimension is customary decision-making and related practices. Law in Afghanistan has always been a mix of the weak law of the State in the form of civil codes and courts, and a more robust customary and Islamic law, the latter two legal frameworks featuring more prominently in the daily lives of most Afghans. Since the founding of the independent Afghan State, successive administrations in Kabul have sought to impose civil codes upon local communities with centuries-old authoritative decision-making arrangements. Afghan customary law and practices embody resilient micro-legal systems.¹⁷¹ These environments of enduring normative expectation display the functional equivalents of formal law and governance. They operate parallel to the Afghan State and allow ordinary people to survive.

When thinking and operating below the State, it becomes apparent that “as total systems, societies differ radically in their patterns of values. The differences reside not only in hierarchies or priorities—the ordering of values according to importance, in some sense—but also in other important modes of relationships among values.”¹⁷² Regardless of the context, there is an important relationship between values, individual decision making, and collective community choice. As Talcott Parsons noted,

[t]he values which come to be constitutive of the structure of a societal system are . . . the conceptions of the desirable type of society held by the members of the society of reference and applied to the particular society of which they are members A value pattern . . . defines a direction of choice, and consequent commitment to action.¹⁷³

170. Harold D. Lasswell & Myres S. McDougal, *Trends in Theories about Law: Maintaining Observational Standpoint and Delimiting the Focus of Inquiry*, 8 *TOLEDO LAW REVIEW* 23 (1976).

171. See W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* (1999).

172. Robin M. Williams, Jr., *Change in Stability in Values and Value Systems: A Sociological Perspective*, in *UNDERSTANDING HUMAN VALUES* 17 (Milton Rokeach ed., 1979).

173. Talcott Parsons, *On the Concept of Value-Commitments*, 38 *SOCIOLOGICAL INQUIRY* 135, 136 (1968).

A key task is to appraise the direction of choice implicit in value aspirations in communities and these may be disconnected from the formal State.

In his Naval War College lecture on strategy, Lasswell described “distinctive means” and “distinctive effects.”¹⁷⁴ A distinctive mean that generated distinctive effects across Afghanistan was the National Solidarity Program (NSP).¹⁷⁵ It is a concrete example of deploying law as strategy beneath the Afghan State.¹⁷⁶ NSP was implemented by the government of Afghanistan’s Ministry of Rural Rehabilitation and Development (MRRD) with funding from the International Development Association (IDA) of the World Bank Group. The program’s goal was to facilitate an inclusive participatory process within the community that would result in an equitable community development plan comprising one or more subprojects that would be eligible for funding under both the NSP and other existing programs. The longer-term goal was the creation of community institutions that would become the expression of the community’s ability to mobilize, consult, plan, finance, implement, and evaluate its own development.¹⁷⁷ NSP became a national program to accumulate value and develop institutional capacity.¹⁷⁸

NSP was designed for a context in which the power of the Afghan central government was limited to Kabul and its immediate environs. Outside Kabul, the country was controlled by a myriad of major and minor warlords who carved out small and sometimes quite large fiefdoms in the political vacuum that emerged after the fall of the Taliban. Because the central government was unable to control or neutralize destabilizing elites, it devised NSP, in large part, to fill power interstices in the short-run by providing services directly to communities. Service delivery was, however, conditioned

174. Lasswell, *supra* note 2, at 50.

175. According to the initiative’s Operational Manual, “NSP promotes a new development paradigm whereby communities are empowered to make decisions and control resources during all stages of the project cycle.” See MINISTRY OF RURAL REHABILITATION AND DEVELOPMENT (AFGHANISTAN), NATIONAL SOLIDARITY PROGRAM OPERATIONAL MANUAL 4 (2003) (noting that this refers to the Dec. 1, 2003 draft version) [hereinafter NSP OPERATIONAL MANUAL]; see also 3RD EYE PHOTOJOURNALISM CENTER, CELEBRATING TEN YEARS OF THE NATIONAL SOLIDARITY PROGRAM (NSP): A GLIMPSE OF THE RURAL DEVELOPMENT STORY IN AFGHANISTAN (2013), <http://documents.worldbank.org/curated/en/155731467993744166/pdf/819840WP0FINAL0Box0379855B00PUBLIC0.pdf>.

176. Aligning strategy and aid in Afghanistan has long been a challenge. See PETER MARSDEN, AFGHANISTAN: AID, ARMIES & EMPIRES (2009).

177. See Alastair McKechnie, *Rebuilding a Robust Afghan Economy*, in BUILDING A NEW AFGHANISTAN 98 (Robert I. Rotberg ed., 2007)

178. NSP operated in most Afghan provinces and by 2006 covered nearly 20,000 villages. See NSP OPERATIONAL MANUAL, *supra* note 175.

upon fundamental changes in local constitutive processes. Kabul elites saw the long-term NSP goal as laying the foundations for improving local governance and strengthening democracy by making the process relevant at the village level, while also fostering local initiative for sustainable development and extending the power of the central government through contact with the rural population.¹⁷⁹

NSP was about law and governance as much as development. A key factor in achieving program goals was universal suffrage of representative Community Development Councils (CDCs).¹⁸⁰ The CDC was established through an election, conducted by secret ballot, where each person had one vote. Importantly, men and women were eligible to serve on CDCs. The CDC members regularly consulted amongst themselves and with the community about development needs and priorities. They would manage and monitor the use of their development resources. While CDCs could contribute to the empowerment of the poor and to the stability of Afghanistan, they could also contribute to violence and instability if they attempted to displace traditional customary practices, particularly if done so abruptly.

The program defined a community as a village of more than 50 families. A development council was established for each community and a block grant allocated.¹⁸¹ The MMRD contracted with facilitating partners,¹⁸² eventually covering thirty-two provinces. The role of the facilitating partners operating within the NSP framework was to create an enabling environment

179. NSP was built upon four core elements. (1) Facilitation at the community level, would assist communities to either establish or strengthen their institutions through elections, and achieve consensus on project priorities (2) Block grant transfers planned and implemented by elected and inclusive community institutions. (3) Capacity building activities designed to enhance transparent community management. (4) Linkage activities to connect local institutions to government line ministries. NSP OPERATIONAL MANUAL, *supra* note 175, at 4.

180. The Development Council is a community-based decision making body which is elected by the community through a secret ballot that oversees the preparation of the Community Development Plan and the preparation and implementation of individual sub-projects. *Id.* at 9.

181. The block grant rate was \$200 per family with a limit of \$60,000 per community. *Id.* at 6.

182. NSP facilitating partners were the Afghan Development Association, ACTED, ActionAid, AfghanAid, Agha Khan Development Network, Agency for Rehabilitation and Energy Conservation in Afghanistan (AREA), BRAC, CARE International, Coordination of Humanitarian Assistance, DACAAR, German Agro Action, GOAL, Ghazi Rural Support, International Rescue Committee, Islamic Relief Agency, Swedish Committee for Afghanistan, Sanayee Development Foundation, UN-Habitat.

through facilitation of inclusive community elections, community planning, technical assistance, and timely release of funds, so that communities could plan and manage their development projects. In these traditional Afghan communities, NSP was crucial to evolving constitutive processes, which was important, as community empowerment was a key objective of the program.

In the conflict-enveloped communities of Afghanistan, certain decisions are still made and enforced irrespective of community members' preferences. These decisions are made through naked power, often by local commanders and warlords. Other decisions—those made by *shuras*, *jirgas*, and CDCs—are from perspectives of authority. These decisions are made by individuals who are expected to act in accordance with the fundamental policies and general expectations of the community. They are achieved through established procedures and through accepted structures. The individuals who make these decisions, the *shura* and CDC members, possess sufficient influence and community support to put them into operation. These are the authoritative decisions of the community and therefore law.¹⁸³

CDCs are similar to *shuras* and *jirgas*, albeit with an important distinction. To the extent practicable, they are gender inclusive. Customary Afghan governance structures are patriarchal and based on conservative Islamic values. Securing outcomes in the common interest in Afghanistan and elsewhere presumes degrees of “normative termination,”¹⁸⁴ meaning that as older norms fall into disuse, communities begin to accept newer, often more progressive norms.

The Citizen's Charter is the successor to NSP.¹⁸⁵ It builds on the model of community decision-making through councils employing familiar legal values. Under the NSP, customary law arrangements evolved and this trend can continue under the Citizens' Charter. However, a much less positive outcome is also a possibility: a reversion to Taliban norms and prescriptions.

183. See MYRES S. MCDUGAL ET AL., *STUDIES IN WORLD PUBLIC ORDER* (1960); see also Lasswell & McDougal, *supra* note 170.

184. Harold D. Lasswell & Allan R. Holmberg, *Toward a General Theory of Directed Value Accumulation and Institutional Development*, in *POLITICAL AND ADMINISTRATIVE DEVELOPMENT* 354, 378 (Ralph Braibanti ed., 1969) (“Development programs typically entail the obsolescence and termination of older norms.”).

185. CITIZENS' CHARTER AFGHANISTAN PROJECT, THE WORLD BANK, <https://projects.worldbank.org/en/projects-operations/project-detail/P160567?lang=en> (last visited Nov. 11, 2019).

VI. U.S. STRATEGY AND THE WAY OF THE PATHAN¹⁸⁶

U.S. engagement in Afghanistan has been a tale of two timeframes—the long and the short. U.S. foreign policy is often episodic. It is largely conceived to confront immediate problems and resonates when the objectives are clear, measurable, and when American might is deployed with a return date. However, certain challenges, such as Afghanistan, are not susceptible to an episodic foreign policy approach. Episodes can be significant building blocks for a long-term foreign policy when coupled with strategic vision.¹⁸⁷ For the Great Game British, the Cold War Soviets, and the twenty-first century United States, the overriding challenge in Afghanistan was how to align the conduct of episodic foreign policy to *longue durée* problems.

With collapse of the Doha negotiations, a reorientation to the problem and plausible futures for Afghanistan is in order. Will a post-Doha agreement bring Afghanistan back to the future by enabling Taliban power?¹⁸⁸ Will Afghanistan be a modern State on the outside and an Islamic Emirate on the inside? Will a severe interpretation of Islamic law be enforced, reversing women's rights and curtailing "Western" education? In this scenario, a clash of values would ensure instability and the probable collapse of the State. Present trends already indicate a heightened expectation of violence.¹⁸⁹

186. The British called Pashtuns "Pathans," a Hindi word they acquired in India. The term "Afghan" originally applied *only* to the Pashtuns. Pashtun customary law is pashtunwali, or the way of the pathans. See JAMES W. SPAIN, *THE WAY OF THE PATHANS* (1962).

187. See ZBIGNIEW BRZEZINSKI, *STRATEGIC VISION* (2012).

188. Draft documents that emerged from the Doha talks contain conflicting statements across translations in English, Dari, Pashtu, and Urdu. According to one analyst the draft Doha Agreement is an "instrument for the enforcement of the Taliban's shari'a-based objectives in Afghanistan." Tufail Ahmad, *The Doha Agreement: Paving the Way for the Taliban's Takeover of Afghanistan and Enforcement of Shari'a-Based Governance*, MEMRI (July 12, 2019), <https://www.memri.org/reports/doha-agreement-%E2%80%93-paving-way-talibans-take-over-afghanistan-and-enforcement-sharia-based>.

189. See, e.g., Susannah George, *The Past Three Months in Afghanistan Have Been the Deadliest for Civilians in a Decade*, WASHINGTON POST (Oct. 17, 2019), https://www.washingtonpost.com/world/asia_pacific/past-three-months-in-afghanistan-have-been-the-deadliest-for-civilians-in-a-decade/2019/10/17/09bf904e-f054-11e9-bb7e-d2026ee0c199_story.html. Moreover, as Lasswell noted, "The assumption that men will settle their differences by fighting reacts powerfully upon the identifications, demands and expectations of human beings." HAROLD D. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* 40 (1965).

But, there is an alternative future. And as General Mark Milley testified, pulling U.S. troops prematurely from Afghanistan would be a “strategic mistake.”¹⁹⁰ The 2017 U.S. National Security Strategy stipulated four vital national interests coupled with strategic pillars all guided by “principled realism.”¹⁹¹ It declared U.S. vital interests as (1) protecting the homeland, (2) promoting American prosperity, (3) preserving peace through strength, and (4) advancing American influence.¹⁹² It also acknowledged the central role of power in international relations, the sovereign State as the *sine quo non* of world order, and the principle of promoting American values globally.¹⁹³ Accordingly, it stated, “The United States will promote a development model that partners with countries that want progress, consistent with their culture, based on free market principles, fair and reciprocal trade, private sector activity, and rule of law.”¹⁹⁴ Likewise, it stated, “We will continue to champion American values and offer encouragement to those struggling for human dignity in their societies.”¹⁹⁵

The National Security Strategy declared a long view commitment, providing that the United States will “assist fragile states to prevent threats to the U.S. homeland.”¹⁹⁶ Specific to Afghanistan, it stated:

We are committed to supporting the Afghan government and security forces in their fight against the Taliban, al-Qa’ida, ISIS, and other terrorists.

190. Lolita C. Baldor & Robert Burns, *General: Early Afghanistan Pullout Would Be a Mistake*, ASSOCIATED PRESS, July 11, 2019, <https://www.apnews.com/3b24724c72dd49c2ba6cab86e7de548c>. And as Barnett Rubin pertinently observed,

Despair about Afghanistan may be intellectually respectable, but we cannot walk away from a civil war in a region with new nuclear powers bordering on the world’s major sources of energy. And the United States has a special relationship: we paid for many of the weapons that have destroyed Afghanistan, and we helped put them in the wrong hands.

RUBIN, *supra* note 89, at 26.

191. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1 (2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905-2.pdf>. “A statutorily mandated document, the NSS explains to the American people, U.S. allies and partners, and federal agencies how the President intends to put his national security vision into practice on behalf of fellow citizens.” *A New National Security Strategy for a New Era*, WHITE HOUSE (Dec. 18, 2017), <https://www.whitehouse.gov/articles/new-national-security-strategy-new-era/>.

192. NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, *supra* note 191, at 4.

193. *Id.*

194. *Id.* at 38

195. *Id.*

196. *Id.* at 39.

We will bolster the fighting strength of the Afghan security forces to convince the Taliban that they cannot win on the battlefield and to set the conditions for diplomatic efforts to achieve enduring peace.¹⁹⁷

These statements articulate a long-term strategic vision,¹⁹⁸ but in Afghanistan, U.S. strategy has tacked to the episodic.

The United States has enduring interests in Afghanistan—addressing the threat of exportable terrorism, State collapse, nuclear weapons, regional chaos, the Kashmir flashpoint,¹⁹⁹ the China challenge,²⁰⁰ the influence of Russia and Iran, the alignment of Chinese and Russian interests, and promoting the dignity and human rights of all Afghans. Indeed, U.S. engagement within Afghanistan is inevitable, yet available resources will be reduced.²⁰¹ In an environment of resource reduction, law properly conceived is one available instrument to help achieve these strategic goals.

Strategy entails pursuing ends and means under various contingencies.²⁰² One contingency is the inclusion, and influence, of the Taliban in the Gov-

197. *Id.* at 50.

198. On the importance of long-term strategic thinking, see BRZEZINSKI, *supra* note 187.

199. Afghans and Sikhs fought over Kashmir in the 1800s. In the late 1980s Afghan *mujahidin* made common cause with Kashmiri guerillas who after 1992 found haven in training camps of eastern Afghanistan. See B.D. HOPKINS, *supra* note 47, at 75; DAVID LOYN, IN AFGHANISTAN: TWO HUNDRED YEARS OF BRITISH, RUSSIAN AND AMERICAN OCCUPATION 196 (2010). Pakistan and India, each nuclear armed States, have gone to war over Kashmir. Further, on August 5, 2019, India terminated the constitutionally protected special status of Kashmir and deployed troops to the area. See, e.g., *India Revokes Disputed Kashmir's Special Status with Rush Decree*, AL JAZEERA (Aug. 5, 2019), <https://www.aljazeera.com/news/2019/08/india-abolishes-kashmir-special-status-rush-decree-190805061331958.html>.

200. Afghanistan holds observer status in the Chinese-led Shanghai Cooperation Organization, which is a vehicle to challenge U.S. influence in Central Asia. China has hosted Afghan peace conferences, holds mineral rights in Afghanistan's Mes Aynak copper mine, and provides equipment and training to the Afghan government. Chinese military vehicles reportedly operate in the Wakhan corridor. See *US Envoy to Afghanistan Zalmay Khalilzad in China for Peace Meeting*, THE NATION (July 11, 2019), <https://www.thenational.ae/world/mena/us-envoy-to-afghanistan-zalmay-khalilzad-in-china-for-peace-meeting-1.884909>.

201. The political and legal environment of the redesigned U.S. mission in Afghanistan must account for a range of "expectations held by politically relevant actors." See W. Michael Reisman, *International Legal Dynamics and the Design of Feasible Missions: The Case of Afghanistan*, 85 INTERNATIONAL LAW STUDIES 59 (2009).

202. See Lasswell, *supra* note 2, at 63–64; see also LIDDELL HART, STRATEGY (1954), BERNARD BRODIE, STRATEGY IN THE MISSILE AGE (1959); THOMAS SCHELLING, THE STRATEGY

ernment of Afghanistan. The internal struggle will be over values. In his lecture, Lasswell emphasized, “the fundamental importance of relating the objectives of any special sphere of strategy to the goal values sought by the body politic for whom the strategy is formulated.”²⁰³ Elsewhere he wrote, “Strategies are the management of base values to affect value outcomes.”²⁰⁴ An understated, and rarely understood success of the U.S. presence in Afghanistan, has been the promotion of values shared by Americans and by most Afghans. These values will be challenged and potentially curtailed in post-America Afghanistan. The Taliban will have a seat at the governance table and the power and influence to shape the direction that the country takes following a significant U.S. withdraw. “Power is an indispensable component of any effective legal arrangement.”²⁰⁵ This, the Taliban knows.

But, law as strategy can build capacity. The effective performance of country systems—administration, governance, goods and service delivery, a suitable regulatory and legal environment for development—depends on capacity. Rather than focus on services, infrastructure, and capital transfers, donor countries and international organizations must define capacity itself as the primary objective of all development assistance.²⁰⁶ This requires devoting attention to the State while operating below. This proposition is supported by experience in Afghanistan, recent and long past.

A strategy of law for post-America Afghanistan must be conceived (1) above the State, (2) at the level of the State, and (3) below the State. The strategic objective is to enable what anthropologist Leopold Pospisil called “the basic legal function—the exercise of institutionalized social control.”²⁰⁷ The strategy must explicitly account for the capacity of people and institutions. Capacity is the ability of people, organizations, and society to manage their affairs successfully.²⁰⁸ Capacity includes problem-solving skills and governance processes and systems that can be sustained. The goal is to build

OF CONFLICT (1960); CARL VON CLAUSEWITZ, *ON WAR* 177, 183 (Michael Howard & Peter Peret eds. & trans., Princeton University Press, 1989) (1832).

203. See Lasswell, *supra* note 2, at 51.

204. HAROLD D. LASSWELL, *A PRE-VIEW OF POLICY SCIENCES* 26 (1971).

205. W. MICHAEL REISMAN, *THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT* 95 (2013).

206. See FUKUYAMA, *supra* note 148, at 82–91.

207. POSPISIL, *supra* note 160, at 15.

208. See DEVELOPMENT ASSISTANCE COMMITTEE, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *THE CHALLENGE OF CAPACITY DEVELOPMENT: WORKING TOWARDS GOOD PRACTICE* (2006).

“locally-owned processes of improvement in certain organizational spheres even when conditions in the wider system are suboptimal.”²⁰⁹

Above the State means holding the government of Afghanistan accountable to its international human rights obligations. At the level of the State, attention must be devoted to the continued promotion of the Constitution, secular legal codes, and legal instruction at all Afghan university law faculties.²¹⁰ There have been calls to revise the Constitution that will intensify with Taliban participation in the government. Hence, the same attention devoted to drafting the text must be devoted to grounding the document so the population accepts it as authoritative. A constitution is more process than text.²¹¹ It must be accepted as authoritative by the population, otherwise it is only a myth. People assume a common responsibility to the extent they participate in assenting to the law. The constitutive process must take root in the teahouses and mosques.²¹² The alternative could be the fate of Amanullah, who was driven from Kabul when his secular legal codes and reforms were rejected.

Another contingency is the severing of Afghan sovereignty.²¹³ This is why life as it unfolds below the State will merit very close attention. Community decision-making outcomes will continue to convey authority and generate legitimate control. The Taliban will intensely promote their law

209. *Id.* at 7.

210. See Mehdi J. Hakimi & Erik G. Jensen, *Rethinking Legal Education in Afghanistan: The Law Program at the American University of Afghanistan*, 55 STANFORD JOURNAL OF INTERNATIONAL LAW 2 (2019).

211. As the Roman jurist Papinian wrote, “*Lex* is a common engagement of the Republic.” See CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN 50 (1947).

212. In Afghanistan, formal authority has been minimal and dispersed. Effective control is spotty and rarely applied from Kabul, the administrative center of the country. See Charles H. Norchi, *Toward the Rule of Law in Afghanistan: The Constitutive Process*, in BEYOND RECONSTRUCTION IN AFGHANISTAN 115 (John Montgomery & Dennis Rondinelli eds., 2004).

213. Hersch Lauterpacht concluded,

sovereignty is not in the nature of an absolute and rigid category, but that, being no more than a bundle of rights, it is capable of division and separation in a manner permitting a real measure of competence on the part both of the residuary sovereign and of the authority charged with its total or partial exercise.

HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 324–25 (1958).

and mobile courts which some communities will accept as authoritative.²¹⁴ But even the most traditional community is complex and operates with multiple and dynamic value systems. Thus, the ability to appraise unwritten law, or custom, will be an indispensable strategic task.²¹⁵

The effective deployment of law requires continually clarifying goals, constantly appraising trends, identifying and isolating the factors shaping those trends, and making realistic projections while considering achievable alternatives owing to strategic choices.²¹⁶ To deploy law as strategy in Afghanistan requires recognizing context, conceiving of law beyond rules, understanding values,²¹⁷ building upon authentic operational codes, and aligning means (available assets) and ends. The NSP and Citizen's Charter are good models. International development agencies, civil society, legal organizations and universities can be good partners. In modern States and traditional cultures, "[l]aw is a process of human beings making choices."²¹⁸

That process has been the way of the Pathan across a *longue durée*. In the looming environment of reduced resources, law is a deployable strategy, for Afghanistan, the United States, and the greater common interest.

214. "The Judicial system forms the backbone of Taliban governance and generally appears to be superior to the official government alternative." Anand Gopal, *The Taliban in Kandahar*, in TALIBANISTAN 34 (Peter Bergen ed., 2003).

215. As a scholar and long term regional analyst notes, "Time is running out, but Talibanization trends in Afghanistan can be reversed." HASSAN ABBAS, THE TALIBAN REVIVAL 223 (2014).

216. Lasswell referred to these sequential operations as intellectual tasks. See HAROLD D. LASSWELL, A PRE-VIEW OF POLICY SCIENCES 39 (1971).

217. Values as what they (Afghans) want and what we (Americans) want, thus strategic objectives.

218. W. MICHAEL REISMAN & AARON M. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW: CASES, READINGS, COMMENTARY 595 (1987).