NOTE: Afghanistan: Minority Rights and Autonomy in a Multi-Ethnic Failed State

J Alexander Thier*

* J.D. Candidate, 2001, Stanford Law School; M.A.L.D. Candidate, Fletcher School of Law and Diplomacy, 2001. B.A., Brown University 1992. The author wishes to thank family and friends for their support and advice, especially Afghan friends and colleagues who continue to endure the tyranny of war, poverty, diaspora, and discrimination with untrammeled spirit, wisdom, and humor. Alexander Thier was Field Officer and Officer-in-Charge for the U.N. Office for the Coordination of Humanitarian Assistance (UNOCHA) in Kabul, Afghanistan; Chief of Sub-Office for the International Organization for Migration (IOM) in Mazar-i-Sharif, Afghanistan; and Oxfam's Social Organization Officer in the Hazarajat region of Afghanistan from 1993 to 1996.

SUMMARY:

In 1980, at the height of the superpower rivalry, the fate of Afghanistan attracted much international attention, including direct Soviet military intervention, the U.S. boycott of the Olympics, the constant debate within the U.N. Security Council, and millions of dollars in military aid to Afghan mujahideen ("rebel") groups. ... To this day, the border between Afghanistan's and Pakistan's "tribal areas" exists only as a few border posts. ... In the center of Afghanistan, the Hazaras stand alone as a unique ethnic group with no direct ethnic ties to any complementary group. ...

TEXT:

[*351]

I. Introduction

In 1980, at the height of the superpower rivalry, the fate of Afghanistan attracted much international attention, including direct Soviet military intervention, the U.S. boycott of the Olympics, the constant debate within the U.N. Security Council, and millions of dollars in military aid to Afghan mujahideen ("rebel") groups. n1 Since 1992, the international community has responded to Afghanistan's turmoil with a trickle of humanitarian aid, several unsupported peace missions, and a Human Rights Rapporteur who issues an annual report. n2 Between 1992 and 1996, the U.N. Security Council had only one open debate on Afghanistan. The General Assembly and Security Council have eschewed
action, preferring simply to pass annual resolutions decrying the war, human rights abuses, and the unmitigated suffering of the Afghan people. Most recently, the United States launched a brief missile burst at Afghanistan, hunting the same terrorists it trained and supported previously in the war against the Soviets.

---Footnotes---


---End Footnotes---

Within Afghanistan, the rebel or mujahideen "victory" over the Soviet army, which led to the Soviet withdrawal in 1988-89 and the collapse of the Soviet-backed government in 1992, was pyrrhic. Skirmishes between rebel groups vying to fill the power vacuum quickly turned into a full scale civil war, dividing Afghanistan into a patchwork of ethnic fiefs. Completing the scorched earth policy of the Soviets, what remained of the already devastated urban centers and infrastructure was laid to waste. As the fratricidal conflict continued, the geographical and psychological fault lines between Afghanistan's ethnic and religious minorities deepened until Afghanistan resembled not one but several fragmented states. n3 Now that much of the country has come under the nominal military control of the Taliban movement, n4 increased ethnic and religious persecution continues to widen the rifts between minorities.

---Footnotes---

n3. Five regions in Afghanistan, the North, Northeast, Southeast, Center, and West, at one time or another exhibited most or all of the de facto criteria of statehood, as established by the Montevideo Convention: defined territory, permanent population, government, and the capacity to enter into foreign relations with other states. Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 165 L.N.T.S. 19. These areas were governed from provincial capitals, each with an independent military, and a territorial base, albeit one with shifting boundaries. Each of these "governments" carried on relations with other countries and sometimes even establishing consulates. Several of them also printed currency and established "foreign ministries" that issued visas. See, e.g., Rubin, supra note 1, at 274-78.
n4. The Taliban, literally "religious students," formed in 1994 and seized Kabul (Afghanistan's capital) in 1996. Although the genesis of the movement remains shrouded in myth and mystery, it has been variously described as "fundamentalist," "traditionalist," "totalitarian," and "mercenary," and is broadly seen as a reassertion of Pushtun dominance. The Pushtuns, discussed in detail below, are Afghanistan's largest ethnic group and have ruled Afghanistan for most of its existence as a state. See generally Fundamentalism Reborn?: Afghanistan and the Taliban (William Maley ed., 1998) [hereinafter Fundamentalism Reborn] (discussing Pushtuns in Afghanistan). The Taliban advanced in 1998 into the ethnic strongholds of Afghanistan's other minorities, and their sway over these areas remains unpredictable. Historically, governments with greater military control and national political and economic organization than that exhibited by the Taliban have been ineffective in centralizing or even nationalizing governmental authority. At present, there is little reason to expect the Taliban to be more successful in this mission. See M. Nazif Shahrani, The Future of the State and the Structure of Community Governance in Afghanistan, in Fundamentalism Reborn?, supra, at 213.

Historically, Afghanistan has rarely resembled a coherent nation-state. n5 Afghanistan's borders owe their existence and placement not to a logical or rational understanding of the natural (geographic) or personal (group identity) imperatives of the region, but rather to political expediency and the military realities of the era of their creation. Thus, the equitable development and enforcement of laws has proven a nearly impossible task for groups that share few universal conceptions about the nature and function of law. On a fundamental basis, there is little evidence that any group within Afghanistan (with the possible exception of a minute intelligentsia) subscribes to a notion of law that supersedes their own local or tribal norms and customs. n6

n5. See William Maley, Interpreting the Taliban, in Fundamentalism Reborn?, supra note 4, at 5-7.


This Article examines the conundrum of minority rights within a "failed" state - a state whose internal governance structures carry little or no de facto legitimacy. Whether one prefers the jus gentium (law of nations) or jus inter gentes (law between nations) perspective of international law, the application of these laws still depends on the nation. However, if this nation does not exist, then who or what should assume the obligations and enforce the rights conferred by international law? A closer look at recent and historical institutions of governance in Afghanistan reveals that rather than a single state, multiple "nations" exist that closely resemble the type of unit that legitimately may be imbued with authority and responsibility.

Indeed, it is questionable whether continued treatment of Afghanistan as a state would benefit Afghanistan and its people. This primary uncertainty raises a host of further questions. Where government is unrepresentative and human
rights abuses against minorities are rampant, should the international community continue to value national sovereignty more highly than international human rights law? If not, how does the international community deal with, or fail to deal with, nonstate entities that function like states? These entities have not assumed the mantle of official state government, and therefore are free from the bounds of international treaties and customs. Without formal officials to subpoena, these entities lack accountability, and sanctions short of military force are unlikely to persuade them. In light of these uncertainties, the international community seems to lack the will to enforce its legal norms.

Parts II and III of this Article provide an overview of Afghanistan's human and political geography. Part IV examines minorities in Afghan and international law. The situation of the Hazara minority is discussed at length in Part V, in order to illustrate the predicament of a disenfranchised minority in Afghanistan, the changes wrought by instability, and possibilities for the future.

II. Afghanistan's Ethnic Landscape

Afghanistan is an uneven quilt of a country, comprising some twenty-one identifiable peoples. n7 In many countries, such heterogeneous populations present a significant challenge to social harmony and effective governance. Linguistic differences, for instance, create a host of practical problems involving intergroup communication, educational materials, media, and official proceedings and publications. The limited financial resources of developing countries tend to exacerbate the problem. At the extreme, religious and ethnic hatreds and the social and political divisions they engender have been the focus of this century's worst atrocities. Although genocide is not commonplace, persecution of minorities is ubiquitous. n8 Afghanistan is no exception.

While the areas inhabited by Afghanistan's various groups are not disputed (see Figure 1), and a total population of sixteen to twenty million is generally accepted, n9 significant disagreement exists regarding the breakdown of Afghanistan's population. Assertions about the proportional composition of the population vary widely and sometimes are advanced to promote an ethnic agenda.
For instance, the Pushtuns are estimated to constitute forty percent to sixty percent of the population, and the Hazaras from three percent to twenty percent. Empirical evidence is unavailable because the inaccessibility of numerous parts of Afghanistan, the migratory nature of a significant portion of the population, and the lack of competent national institutions have rendered a national census impossible.

n9. A 1979 study established a total population of 15-16 million persons which is a widely accepted baseline figure; however, determination of the present population is uncertain due to death, diaspora, and the lack of reliable data. International aid organizations generally estimate the current in-country population at 17-18 million, with an additional 2.5-3 million in Iran and Pakistan. An estimated 1 million people also are said to have perished in the war between 1979 and 1989, the years of Soviet occupation. See, e.g., Dupree, supra note 7, at 57-65; Harvey H. Smith et al., U.S. Gov't Printing Office, Area Handbook for Afghanistan 63 (4th ed. 1973) [hereinafter Area Handbook for Afghanistan]; United Nations, Afghanistan Consolidated Appeal for Assistance at vi (1997); Jawad, supra note 2, at 6.

n10. See Dupree, supra note 7, at 57-60. But cf. Ahmed Rashid, Playing Dirty, Far E. Econ. Rev., Nov. 27, 1997, at 26-28. Whereas Dupree estimates the Pushtun population at 6.5 million, and the Hazaras at 0.9 million in 1967, recent reports, including Rashid's, have set the Hazaras at 3-4 million, and the Pushtun at 8 million. Compare id. with Dupree, supra note 7, at 59-60 tbl.6. While the inaccessibility of the Hazarajat made it very difficult to count the Hazara in the 1960s and 1970s, it also protected the population from the Soviets. (The author worked in Hazarajat in 1994.) It has been suggested that due to the departure from Afghanistan of 5-6 million refugees during the years 1980-89, and the deaths of up to 1 million more, both of which disproportionately affected non-Hazara populations, the Hazara population has grown significantly in proportion to the rest of the population. Most objective estimates put the Pushtun population at no more than 50 percent of the overall population. See generally Alfred Janata, Afghanistan: The Ethnic Dimension, in The Cultural Basis of Afghan Nationalism 60 (Ewan W. Anderson & Nancy Hatch Dupree eds., 1990) (discussing the ethnic, religious, economic, and sociopolitical dimensions of the Afghan internal and refugee population); Jawad, supra note 2, at 7 (citing Pushtan population at 40 percent).

[*355]

[SEE FIGURE IN ORIGINAL] [*356]

[SEE FIGURE IN ORIGINAL] [*357]

[SEE FIGURE IN ORIGINAL] [*358] Why are these numbers meaningful? The historic lack of significant popular participation in government would seem to diminish the importance of the relative proportions of the population. However, political liberalization in 1964 strengthened the comparatively representational arena of provincial politics. These changes inspired a gerrymandering policy that limited the scope of non-Pushtun representation in the emerging provincial administrative structure (see figure 2 1) n11 The scope of representation and
location of provincial boundaries have remained issues of great concern that have formed the basis for discussions concerning political representation and autonomy in subsequent administrations. The shifting balance of power that followed the collapse of the Soviet-backed government has significantly affected the ratio of political influence to population size. The traditional bases for power distribution - the monarchy, tribe, land, and religious genealogy - have been upset by a massive influx of weaponry and concomitant political organization. n12

n11. See Rubin, supra note 1, at 73. Gerrymandering is a process of "redistricting" by which administrative boundaries are redrawn. This is often done to manipulate which population grouping will select governmental representatives. Gerrymandering can be used to increase or limit the voice of certain groups, such as African Americans in the United States, or the Hazaras in Afghanistan.

n12. For a detailed examination of the war's effects on traditional Afghan society, see Olivier Roy, Islam and Resistance in Afghanistan 149-71 (1986).

The following examination of Afghanistan's ethnic, religious, and linguistic landscape will provide a basis for the subsequent in-depth analysis of inter and intragroup relations.

A. Major Ethnic Groups

The four primary ethno-linguistic groupings in Afghanistan are Pushtun, Farsiban-Tajik, Turkic, and Hazara. The Pushtuns, the largest group, are subdivided into tribal groupings, differentiated within these tribes between village-based and nomadic groups. n13 The Pushtuns speak Pashto, with minimal dialectical differences across regions of Afghanistan and Pakistan. They are ethnically Indo-Iranian and Caucasian, with a strong Semitic appearance. n14 The Pushtuns are almost exclusively Sunni Muslims, and share an established code of behavior known as Pushtunwali, which deals with tribal conflict, hospitality, rights of refuge, and other basic norms of tribal relations. n15


n14. This has led to a popular Pushtun myth that they are a lost tribe of Israel; however, they are more accurately described as Aryans. See 1 Sykes, supra note 7, at 13-14; Ahman Pazhwak, Pakhtunistan A New State in Central Asia 7 (1960); Wilbur, supra note 7, at 40.

n15. Despite the apparent "Islamization" of Afghan society at various points in history, most conflicts have been cultural. In particular, conflicts have related to the strong conservative culture in Pushtun villages, and their resistance to "outside" influences, such as centralized government and modernization. In the tribal justice system, the Pushtunwali supersedes both
municipal and Islamic (sharia) law. It is often said that Pushtuns, by their own reckoning, are first Pushtuns, then Muslims, then Afghans.

The clearest unifying features of the Pushtun life are cultural. Their social system, social code, and sense of common history tend to draw them together more effectively than do ethnic considerations .... [The code of Pushtunwali] influence has been so pervasive in Pushtun life that in most respects it governs attitude and behavior more completely than does Islam's basic set of laws, the Shariah.


[*359] The second group are the Farsiban ("Farsi-speakers") and Tajiks. They share ethnic and linguistic bonds sufficient, except in remote areas, to comprise one grouping. The spread of the Persian language and people across northern Afghanistan and into Central Asia occurred over several centuries and resulted in a mixture of Persian speaking Farsiban and Tajiks. They share Dari, the Afghan dialect of Farsi, as their language, and are ethnically Persian with some Mongolian admixture. Most of the Tajiks are Sunni Muslims, whereas many of the Farsiban are Shi'ite.

n16. See Dupree, supra note 7, at 59.
n17. Id.

The third group, the Turkic peoples, live in northern Afghanistan and correspond ethnically to the Central Asian states they border. The Uzbeks, this group's largest segment, have a mixture of Indo-European and Mongolian ancestry, commonly known as Tartar. They speak Uzbek, a Turkic dialect similar to Turkish and Turkmen. The Turkmen make up the next largest subcategory of this group. Although physically and culturally distinct, the Turkmen share the Uzbeks' ethnic and linguistic origins, and both are predominantly Sunni.

n18. Id. at 61.
n19. See 1 Sykes, supra note 7, at 218-19.
n20. See Area Handbook for Afghanistan, supra note 7, at 77-79; Dupree, supra note 7, at 61.

The fourth group are the Hazaras, the largest group of Shi'ite Muslims among the major ethnic groups. Of Mongolian and Tajik ancestry, they speak a dialect of Farsi called Hazaragi, and inhabit Afghanistan's isolated central region. A detailed discussion of their history and background is included below.
B. Language

With the exception of major urban centers, n23 most Afghans live in ethnically segregated communities, maintaining linguistic and cultural distinctions. The variants of Persian spoken in Afghanistan - Dari and Hazaragi - have become Afghanistan's lingua franca, despite the fact that native Persian speakers are a minority. Although Pashto, the language of the dominant Pushtun minority, is an official language, for centuries Persian has been Afghanistan's primary language of commerce and study. Classical Persian differs quite significantly from spoken Dari, which has a common and limited vocabulary; however, the former is used in official broadcasting and government speeches. As a result, much of the state-sponsored material is not understood by most people outside the capital and major urban centers. n24

n23. See Area Handbook for Afghanistan, supra note 7, at 94-95; Dupree, supra note 7, at 161-64. The category of major urban center includes Kabul, Herat, Mazar-i-Sharif, and to a lesser extent Qandahar and Herat. Even in these cities, however, the population is fairly segregated along ethnic lines.

n24. See generally M. Alam Miran, The Functions of National Languages in Afghanistan 2-3 (Afg. Council of the Asia Soc'y, Occasional Paper No. 11, 1977) (discussing language barriers to cultural integration in Afghanistan). I personally experienced this language barrier; while fully able to conduct business in Persian with officials, speeches and news broadcasts were virtually incomprehensible to me.

C. Religion

The various Muslim sects or mazhab ("schools") have a tradition of maligning each other through stories and myths. Because of the struggle between sects as Islam began to spread, relatively small differences became ingrained in the liturgy to the point of demonization. In the battle to lead the Muslim empire, Muslims viewed "pretenders" to the mantle of Islam as greater enemies than competing non-Islamic religions. As a result, religious and political leaders have stretched the differences between Sunnism and Shi'ism to accommodate charges of blasphemy and incitement to sectarian violence.

For example, during the reign of Amir Abdur Rahman, n25 who was heralded by some as the father of modern Afghanistan, the Shi'a were excoriated in an attempt to unify the primarily Sunni population. Shi'ism has not been more
accommodating to the Sunni, and Afghanistan's Shi'ite minorities have borne the effects of this friction. "As a matter of dogma, the Shi'ites heap scorn upon the first three Caliphs, Abu Bakr, Omar, and Asman, for Shi'ite dogma insists that Ali and his family alone have the right to lead the Muslim Community.... Amir Abdur Rahman ... once banned Shi'ite books for this reason." n26 Such religious sectarianism continues to cause severe discrimination.

--- Footnotes ---


n26. Robert L. Canfield, Religious Myth as Ethnic Boundary, in Ethnic Processes and Intergroup Relations in Contemporary Afghanistan, 40 (Jon W. Anderson & Richard F. Strand eds. (Afg. Council of the Asia Soc'y, Occasional Paper No. 15), 1977). Interestingly, Afghanistan's rulers usually have shown tolerance for the minuscule non-Muslim religious minorities in Afghanistan, mostly consisting of small Sikh, Hindu, and Jewish enclaves. While such tolerance accords with Muslim teachings, it also reflects these minorities' status as traders. Recently, when asked why Sikhs are permitted to play live music, which is currently prohibited in Kabul, the Taliban defended the special treatment of a handful of religious minorities in Kabul, on the grounds that the Taliban are most concerned with making Muslims into good Muslims. See Kathy Gannon, Afghan Religious Minorities Say They are Left in Peace, Fort Worth Star-Telegram, Dec. 7, 1997, at 24, available in 1997 WL 11923975.

--- End Footnotes ---

D. Ethnic Self-Identification

Self-identification has played an important role in the overall context of Afghans' identification with the state. In this regard, it is significant to note that the term "Afghan" originally referred to the Pushtuns, and the majority of the citizens of Afghanistan continues to use it in this manner. n27 While educated city dwellers or Afghan citizens abroad will almost invariably refer to themselves as "Afghan," the majority of non-Pushtuns in Afghanistan refer to the Pushtuns as "Afghan," and to themselves by their ethnic group. n28 At the same time, the Pushtuns refer to themselves as "Pushtun" to non-Pushtun, and by their tribal grouping to other Pushtuns. The view of non-Pushtun groups that the Pushtuns are the real Afghans has supported the belief that Afghanistan is not their state, in the sense of ownership and representation in the government.

--- Footnotes ---


n28. See Gregorian, supra note 25, at 25.

--- End Footnotes ---
III. Afghanistan's Political Geography

As ethnicity, language, and religion define and differentiate groups, political divisions define the relationship between these groups. The creation of the Afghan state simultaneously created international borders that divided affinity groups and lumped disparate groups together in one administrative entity. The scars of these divisions and subordination of some groups to others within Afghanistan caused discrimination, recrimination, and the ultimate failure of the state.

A. Border Formation and Creation of the Afghan State

The first notion of an "Afghan" state evolved in the early 1700s. The recession of the Persian and Mughul empires, which dominated the region until the mid-1700s, left the territory comprising most of modern Afghanistan free of any imperial influence. The Persian collapse caused an ethnic awakening among the Pushtun tribes, who, with their Persian military training, were able to assert control over large parts of the territory. A state named Afghanistan was officially formed in 1747; however, early Afghan Amirs did not have even nominal control over many parts of the lands they claimed. n29


Modern Afghanistan's physical boundaries originated in the period of the "Great Game," the Anglo-Russian contest for domination of Central and South Asia. n30 This two hundred year struggle led to a series of treaties and battles that defined borders without concern for the viability of the state created thereby.

n30. See generally 2 Sykes, supra note 29; Gregorian, supra note 25 (providing scholarly accounts of this period); Peter Hopkirk, The Great Game (1990) (providing an entertaining look at the intrigue and the players involved).

British policy in Afghanistan fluctuated between invasion, retreat, and support of whichever leader could assert control in the vacuum created by British withdrawal. This policy aimed to secure Afghanistan's formidable mountains as a permanent buffer for British India and to prevent unrest among the Pushtuns and other Muslims in the British colony. n31 British Indian forces alternately attempted to occupy Afghanistan's eastern frontier and capital and to cajole Afghan leaders by plying them with money and arms. n32 Through direct support to the Amir, the Pushtuns monopolized such foreign military aid and thereby entrenched their dominance in Afghanistan.
The Amirs of the era starting in the 1840s played on competition between the
empires to garner much-needed resources for their own internal struggles. In
addition to Russian and British encroachment on Afghanistan's northern and
eastern frontiers, much of what is now central and western Afghanistan was not
yet under the control of Kabul. In the 1880s, Amir Abdur Rahman, in a bid to
unify Afghanistan, implemented a campaign of conquest through brutal subjugation
of areas not under centralized control. He then forced population movements into
these newly subjugated areas to disperse his enemies and establish ethnic
Pushtun strongholds throughout the country. n33 Finally, he established a new
system of provinces by installing "local" leaders from these imported
communities as governors, in the British colonial model, to represent his
interests. n34 His quest to establish a coherent state and fear of a complete
British or Russian takeover deepened the Amir's despotism. n35

Because he required British support to continue his westward expansion, Amir
Rahman could not resist their demands to formalize the eastern border with the
British empire. n36 This official cession of land to British India is still a
source of considerable controversy today, but at the time, the Amir gained
considerably from the deal. His reign was threatened by border tribes that had
been instrumental in the revolts that dislodged his predecessors. n37 The
campaign of western expansion, culminating in the capture of Herat from the
Persians and the subjugation of the Hazarajat, was paramount to the Amir and
outweighed his desire to squabble with the British over an essentially
uncontrollable area. n38 To this day, the border between Afghanistan's and
Pakistan's "tribal areas" exists only as a few border posts. n39 A series of

--- Footnotes ---

n31. See Gregorian, supra note 25, at 91-98; W.K. Fraser-Tytler, Afghanistan: A Study of Political Developments in Central and Southern Asia 186-87 (1967).

n32. The British occupied Kabul and the eastern frontier in the first two of three Anglo-Afghan wars, first from 1838 to 1842, and again from 1878 to 1881. In both cases, the British left bloodied and then quickly reverted to a more conciliatory policy. See 1 Sykes, supra note 7, at 1-12, 110-19.


n34. See Poladi, supra note 21, at 184; Gregorian, supra note 25, at 133-34.

n35. The Amir [Abdur Rahman] developed a doctrine of royal authority which rejected tribal election as too restrictive of his powers. He claimed that he ruled by divine right .... This argument asserted that the sovereignty residing in the Afghan people was a creation of God and the authority of the ruler whom they elected was, therefore, sacred. It enabled him to combine the sentiment of nationality with resentment against the British. Newell, supra note 15, at 44.

--- End Footnotes ---
agreements between Russia and Great Britain in 1873 and 1887 fixed Afghanistan's northern border. n40

n36. In 1893, the Amir signed a treaty demarcating the border between British India and Afghanistan, or the "Durand Line." See 2 Sykes, supra note 29, at 177.

n37. See Fraser-Tytler, supra note 31, at 181-222; Gregorian, supra note 25, at 132-34.

n38. See Fraser-Tytler, supra note 31, at 189.


n40. See Fraser-Tytler, supra note 31, at 167-68. See generally Hopkirk, supra note 30 (providing a complete account of this final chapter of the Great Game).

Ironically, the great power struggle that threatened to swallow Afghanistan ultimately ensured its continued existence. The establishment of Afghanistan as a buffer state, informally for some thirty years, then formally through the Anglo-Russian Convention of 1907, finally defined the new Afghan state's territory. The treaty was not so much a formal recognition of Afghan statehood as it was an agreement by each power not to encroach upon the other's established domains. n41

n41. The Convention opens as follows:

The High Contracting Parties, in order to ensure perfect security on their respective frontiers in Central Asia and to maintain in these regions a solid and lasting peace, have concluded the following Convention:

Article 1 His Britannic Majesty's Government declare that they have no intention of changing the political status of Afghanistan.

His Britannic Majesty's Government further engage to exercise their influence in Afghanistan only in a pacific sense, and they will not themselves take, nor encourage Afghanistan to take, any measures threatening Russia.

The Russian Government, on their part, declare that they recognize Afghanistan as outside the sphere of Russian influence ....


The final treaties of significance during this period are those of 1919 and 1921, which followed the third Anglo-Afghan war in 1919 and provided for final
d. Visions of a Pluralistic Future

The Hazaras' best hope for a stable future lies in finding a balance between the pre-1979 and post-1992 models of Afghan society: On the one hand, they require a national government to promote military reintegration, economic development, and foreign relations; on the other, they also require autonomous local governments to ensure representation, cultural integrity, and protection of minorities. The current ethnic fighting may produce a "winning faction" in the narrow sense of fleeting, nominal dominance, but history has clearly shown that no single group can successfully rule or even regulate Afghanistan for a sustained period of time. Current volatile circumstances further undercut the prospect that a single faction could establish a stable regime. Throughout the country, each group possesses its own weaponry and has expressed a willingness to use it to defend its territory. Consequently, a nonrepresentative government in Kabul would necessarily depend on force and bribery for control, and, as a result, conflict would never be far beneath the surface.

Alternatively, one can imagine Afghanistan breaking up altogether. However, while other minorities with complementary states can secede from Afghanistan and accede to another state, the Hazaras in Afghanistan's center have no such recourse. Furthermore, the possibility of a major regional confrontation in the event of Afghanistan's complete disintegration motivates regional powers such as Pakistan and India to maintain the fiction of an Afghan state for as long as necessary. It is unlikely that the Hazarajat could even meet the traditional qualifications for statehood - defined territorial boundaries and permanent population, effective governance, and the capacity to engage in foreign relations. But while these more stringent criteria might not be satisfied, there is no reason to believe that the Hazaras could not attain a degree of autonomy.

--- Footnotes ---

n177. Montevideo Convention on Rights and Duties of States, supra note 3, at 19 (outlining criteria for statehood).

--- End Footnotes ---

The reformation of Afghanistan into a federation, with limited but substantial autonomy for the provinces, may be the only reasonable long term solution. To be successful, however, authority should be conferred provincially rather than ethnically or regionally. Regional divisions would likely produce large-scale migration among ethnic groups, and attempts to draw regional boundaries would doubtless disturb whatever fragile peace currently exists. Similarly, allocation of power based strictly on ethnicity would only exaggerate current differences and needlessly worsen ethnic strife. As Richard Newell notes, "while there are measurable differences among [the ethnic] groups [in Afghanistan] ... their life styles [sic] ... are essentially the same. Thus, while distinctions persist and the psychological significance of perceptions of difference is important, it is possible to exaggerate the importance of ethnic differences." A province-based autonomy program could have another advantage over alternative systems. If the local political process successfully produces a representative local government, it also may generate national delegates. This process would in turn create a representative national
While the Defence Ministry contended that "the Islamic State of Afghanistan fully respects the rights and life of the noble Hazara nationality," n173 its rhetorical attacks on the rebel Hazara faction helped to create a favorable climate for persecution of all Hazaras. The Ministry stirred the emotions of the population by declaring that "the faction of Mazari has committed innumerable crimes in areas under his control, among which the senseless massacre of the people, the imprisonment of people in dungeons, violation of the honour of the people [rape] and the selling of children could be cited." n174 The government condemned the opposition as "treacherous to Islam and the high values of faith," having "stained the honour and prestige of mojahedin and the heroic people of Afghanistan ...." n175 Many Muslims in Afghanistan could have [*384] perceived Hezb-e-Wahdat Eslami as pitting the Hazara nation against all the Muslim people, and government allegations such as those mentioned above may well have contributed to the increased ethnic persecution.


n174. Id.


Frequently shifting alliances between mujahideen groups also have negatively impacted on ethnic politics. On the one hand, factional leaders have shrewdly demonized only the leadership of other factions rather than any ethnic group as whole to preserve the potential for future alliances with parties representing other ethnic groups. On the other hand, factional leaders (and the central government) have used ethnic appeals to split existing alliances, pointing out one opposition ally's past injustices against the other. n176

n176. For example, the central government used this tactic to prevent the Hazaras from supporting the rebel military faction led by Golboddin, accusing the latter of past abuses against the Hazaras:

The opportunistic and irresponsible faction of Hezb-e-Wahdat [Shi'ite Islamic Unity Party] has joined hands with the bloodthirsty and criminal Golboddin and, thus, wants to sacrifice the blood of the poor and persecuted Hazara nationality .... In the past Golboddin has never refrained from any measure against the Hazara nationality. He was proud of crushing and killing Hazaras and opposition to their participation in the political affairs of the country.

Id. (alteration in original).
Following the collapse of the Najibullah government in 1992, all semblance of centralized government disappeared. Rebel mujahideen parties divided the country and fought vicious battles for control of major population centers, especially Kabul. The various factions of the Afghan resistance have used ethnicity to divide their opposition and to build their own support networks. The Hazaras were a focal point of this activity, having emerged as a strong, well-organized, and independent group and therefore a key factor in the shifting power alliances.

n170. See Rubin, supra note 1, at 265-80. An interim government was established in 1992 and appointed first Sigtabullah Mojadedi, then Burhanuddin Rabbani, as its president. This government, however, never functioned in practice, as the president, prime minister, and defense minister were literally at war with one another. See id. at 271-74.

Beginning in 1992, the Hazara leadership and U.N. officials accused President Burhanuddin Rabbani's faction of extremely discriminatory treatment of the Hazaras. These accusations resulted from "mopping-up operations" carried out by Rabbani's forces in the city of Kabul and aimed at what the Ministry of Defence termed "rebellious elements." The government's targets included the Hezb-e-Wahadat Eslami party, a Hazara faction led by Mazari, which had joined military forces with the rebel faction led by Golboddin, another enemy of the state.

n171. Ministry of Defence Offers Reassurance to Hazara Citizens of Kabul, BBC Summary of World Broadcasts (Mar. 16, 1993). These "mopping-up" efforts aimed to eject the Hazara Hezb-e-Wahadat party faction from Kabul. Because the fighting in Kabul lasted several years, and the Hazara neighborhood that housed the party's stronghold bore the brunt of the violence, this campaign appeared to many in Kabul at the time to be a form of "ethnic cleansing."

In justifying the military operations, the Minister of Defence announced that the strikes against Mazari and Golboddin "were in no way a measure against our noble Hazara nation," and that "our Hazara brothers ... should continue their normal life without any concern." Likewise, President Rabbani in his public rhetoric carefully distinguished the contentious Hazara factions from the rest of the Hazara people: "Our fraternal nationality and the oppressed people of Hazara are a brother and oppressed and mojahed nation .... We cannot register the act of a number of people as the act of the Hazara nation and accuse this nation as a whole." n172

plans, the setting up of security defence units, the setting up of a local legislative council and the creation of socio-cultural foundations and institutions and all other mechanisms [*382] necessary for a local autonomous state administration shall be provided. The local administration should be in harmony with the central government. But this does not mean interference in the working of the autonomous local administration.

The political, social and cultural rights of the people shall be ensured and broad economic aid shall be rendered to the people .... The rights and local autonomous administration of the Hazara people shall not be made complete with a view to depriving them of a proportionate role in the central government ....

I should remark that there is a legal basis for the official recognition of both principal demands of the Hazaras and Shi'as in this country .... Article 2 of the constitution declares Islam to be the religion of the people of Afghanistan. There is no mention of the sect. n166

During his presidency, Najibullah advocated the improvement of minority rights and living conditions in the Hazarajat. He promised equality, nondiscrimination, freedom of religion, free education, medical facilities, access to mass media, promotion of cultural activities, government jobs, high-level political appointments, and redistricting to promote greater political representation. n167


n167. See, e.g., End of Hazara Jerga; Closing Speech by Najib, BBC Summary of World Broadcasts (Sept. 23, 1987).

Never before had the central government sanctioned such a potently pro-autonomy stance. However, Najibullah's Soviet ties engendered division among the Hazaras over whether to cooperate with the government. On one hand, legitimizing the push for autonomy was much more important for the Hazaras than the Soviet conflict. n168 On the other hand, the Hazara leadership risked its own legitimacy by cooperating with a communist and non-Islamic government. Many Hazaras did choose to work with Najibullah, creating further rifts within the Hazara community. n169 Ultimately, due to the war and a lack of funds, cooperation, and possibly insincerity, Najibullah's egalitarian vision remained mere rhetoric.

n168. See supra note 140.

n169. See id.

c. The Ethnicization of the Conflict After 1992
At the same time, the Hazarajat was being ravaged by conflict between various mujahideen groups, and such an overture had never been made to the Hazaras before. n162 This unprecedented policy of outreach to the Hazaras continued. Najibullah retained the Hazara prime minister, Sultan Ali Keshtmand, when he assumed the presidency in 1986. n163 Although the prime minister exercises no real power (his position is largely ceremonial), the sustained campaign to gain Hazara support for the Soviet-backed regime bore fruit. As he negotiated the Soviet troop withdrawal, Najibullah introduced a national reconciliation plan designed to preserve his government after the withdrawal of Soviet forces. This plan created organizations charged with representing the various ethnic and mujahideen groups that were developing proposals for regional autonomy. n164

n162. See supra note 140.

n163. See Poladi, supra note 21, at 180.

n164. See Rubin, supra note 1, at 174. The mujahideen viewed this move as a hollow attempt by the embattled government to appear both national and Islamic as it struggled to widen its base of support. Even after his government's collapse, however, Najibullah continued to advocate the creation of a federated state with semi-autonomous provinces and a representative central government. Interviews with Najibullah, in Kabul, Afghanistan (1995-96).

In 1989, the Najibullah government invited Hazara representatives to open a National Mobilization Center and to develop a plan for an autonomous Hazarajat. n165 Shortly after the center opened, the Chairman of the Executive Committee of the Council of Ministers, Sultan Ali Keshtmand, made a speech outlining the goals for Hazara autonomy that presented a clearly articulated platform for this cause:

n165. See "Mobilisation Centre" for Hazara Nationality Set Up, BBC Summary of World Broadcasts (Feb. 23, 1989).

The fundamental issue for the Hazaras is national autonomy .... [A] propitious historic opportunity has come about for the Hazaras to attain this right, which is the long-standing and substantial demand of the Hazara people .... The unity among forces and organisations operative in the Hazara area and the practical and public readiness of those forces is necessary for its official recognition so that it can manifest its effectiveness and viability .... In that situation all objective facilities for the ensuring of local sovereignty, not in its complete form but in the form of the creation of administrative units inside the autonomous region, the setting up of local state administration at different levels, the drawing up and implementation of local socioeconomic budgets and
Roy notes, are willing to put aside internal feuds to pursue freedom and equality:

n157. Conditions in the Hazarajat since the Taliban takeover in 1998 are not well documented. See generally Human Rights Watch, supra note 98 (describing brutality targeted specifically against the Hazaras throughout Afghanistan).

In the resistance movement, the Hazara have gained control over their own land: the Pushtun nomads have disappeared or are forced to deal with the Hazara administration on equal footing. The resistance has meant that the Hazara have achieved what they dearly wanted to achieve for more than a century: to be self-contained and independent. n158

The country's increasingly pronounced divisions and the coming of age of Hazara political leadership have prompted young Hazaras recently to agitate for "Haziristan," an independent state. However, the Hazara leadership have remained "adamant about keeping Afghanistan united." n159 Rather than advocate secession, they have continuously demanded fair representation in the government. As a former official said recently, "We don't want the presidency, we want equality." n160

n158. Roy, supra note 12, at 145.

n159. Rashid, supra note 10, at 28.

n160. Telephone Interview with Khadem Sharza, a source with Hezb-e Wahadat (Nov. 30, 1997). Mazari has said "we demand a 25% share in all areas of Government," based on his assessment that the Hazaras constitute "approximately 26% of the population of Afghanistan." Wahadat News Bulletin, No. 7, Interview with Mr. Mazari 3 (Dec. 1993).

b. Afghan Government Policy Toward the Hazaras from 1980 to 1992

The Soviet-backed government, headed by Babrak Karmal, tried to expand beyond its base of urban support into the rural areas where the mujahideen parties held sway. Government officials used typical Soviet anti-imperialist rhetoric to draw the Hazaras: "Henceforth not one of our toiling Hazara brothers will be subject to insults and racism, [*381] and...their equality of rights including political, economic, social, cultural, military and religious freedom, and their state and Party rights, will not only be observed, but will be guaranteed in practice." n161

a. The War and the Establishment of an Autonomous Region

The Soviet invasion devastated the Hazarajat's already underdeveloped economy. However, the invasion and subsequent resistance restored to the Hazaras something they had lost a century before: independence. n152 The Soviets never made great inroads into the region, n153 largely because of the Hazarajat's mountainous terrain, sparse population, limited strategic value, and well-organized resistance. Thus, control of the Hazarajat passed to a shura composed of diverse secular and religious factions. n154

n152. See Roy, supra note 12, at 145.

n153. See id. at 141, 145.

n154. Id. at 141.

The lack of Soviet interference in the region and the influx of military aid generated a series of internal power struggles that continue to [*380] the present day. After several years of internecine conflict between Iranian-backed radical Islamic parties and an alliance of the mirs and educated Maoist youth groups, n155 the charismatic leader Abdul Ali Mazari formed Hezb-e Wahadat (Unity Party). Mazari failed to unify all of the Hazara factions, but his military strength and broad appeal to the Hazaras in Kabul and in the Hazarajat enabled him to transform Wahadat into a strong political and military force. n156

n155. Id. at 140-41. Roy implies that this odd coalition resulted from the fact that many of the educated youth were fathered by the wealthy mirs. While either antifeudal or antireligious sentiments may have dominated the Hazara Maoist ideology, one could argue that kinship bonds trumped both.

n156. The author acquired this knowledge from working in Afghanistan in 1993-96.

The Hazaras maintained their autonomy from any centralized, non-Hazara government for nearly eighteen years. n157 While their internal struggles have exacted a cost both in lives and political cohesion, most Hazaras, as Olivier
The birth of socialist thinking in Afghanistan and brewing superpower competition produced unrest, as radical and conservative forces clashed over ideology and policy. Many Hazaras joined the communist cause in the early 1970s, in response to Pushtan oppression and to the feudal land tenancy system that kept most Hazaras in extreme poverty. The ouster of King Zahir Shah in 1973 led to the creation of a republican government under Mohammad Daoud, the king's cousin and former prime minister.

Daoud's government never included the Hazaras in a meaningful way or furthered their interests. For example, the government enacted a socialist modernization plan that included a land redistribution and agricultural support scheme, but this plan in effect excluded the Hazara areas. The statute directed the resources of the Agricultural Development Bank toward "the credit needs of deserving persons who may receive lands in areas where, in accordance with the provisions of this law, land distribution is undertaken." The landholding patterns of the Hazarajat, however, resulted in ownership of lots too small to require redistribution under the provision. While perhaps not directly discriminatory, for all practical purposes, the statute excepted the entire Hazarajat from receiving the limited agricultural assistance available.

The Afghan state began to collapse altogether following the Saur Revolution, the 1978 communist coup. The widespread uprisings of 1978 and 1979 sparked a process of regional isolation within Afghanistan that never reversed itself. Not surprisingly, the Hazaras seized the opportunity to reassert local authority in the Hazarajat. "In three central provinces - Bamiyan, Wardak and Uruzgan, west of Kabul - they ... established a primitive administration which claimed to have begun issuing travel documents, establishing courts, appointing district and provincial governors and collecting taxes." Finally, the Soviet invasion in December 1979 drove a wedge into every religious, ethnic, cultural, and political fault line. Regional isolation grew as political factions were used to advance Cold War rivalries and "allied" forces struggled for dominance within the resistance.
local administrative system based on the shura emerged but was quickly sidelined as power shifted from landholders to political leaders and warlords.

--- Footnotes ---

n136. See Roy, supra note 12, at 139-45.

n137. Although not a formal or democratic institution, the shura (roughly analogous to a local council or coalition) is a powerful participatory mechanism for decisionmaking, with a limited capacity to enforce norms and sanction community members. See Rubin, supra note 1, at 229-30.

n138. See id. at 226-33. The billions of dollars of weaponry that have poured into Afghanistan in the last 18 years have radically altered the economic and military power balance. Almost overnight, weapons became the most valuable commodity in Afghanistan, significantly influencing the barter-based economy. See id. at 196-203. For further discussion of the effects of international military assistance on Afghanistan's political structure, see id. at 203-46.

--- End Footnotes ---

4. The Quest for Autonomy

During the period of liberalization under King Zahir Shah in the 1960s, many of the king's representatives in the region were in fact Hazaras. At that time, Hazara political organizations sought to secure two goals: greater political representation in Kabul, and greater autonomy in the local administration of the Hazarajat. The 1964 constitutional reforms, along with Afghanistan's participation in the United Nations, led Hazara organizations in Afghanistan to hope for greater participation in the domestic political process. Massive increases in foreign aid from the United States and the Soviet Union gave the Kabuli government unprecedented latitude to fund social programs. However, political infighting in Kabul over the use of foreign aid and relations with the Soviet Union hindered the government's modernization effort.

--- Footnotes ---

n139. A better educated youth led to a period of political organization and the creation of two Hazara leftist/nationalist parties: one in Afghanistan called Hizb-i-moghol (party of Mongols), and another among the large emigre population in Pakistan called Tanzim-i-nasl-i-now-i hazara-yi-moghol (organization of the new Mongol Hazara generation). See Roy, supra note 12, at 140.

n140. The author worked with community leaders throughout the Hazarajat as a representative for Oxfam in 1994.

n141. Id.

n142. Rubin, supra note 1, at 65.

n143. See id. at 73.
n126. See id. at 5.
n127. See id. at 6.
n128. Id.

The Amir rejected a Hazara proposal to become tributary vassals in exchange for internal autonomy, n129 and bitter and brutal fighting continued until 1893. n130 The Amir lifted his ban on slavery to allow the "infidel" Shi'a Hazaras to be sold into slavery by the thousands. n131 Many Hazaras fled their homes, and the Afghan government gave or sold their lands to non-Hazaras. Rights to the summer pastures fell to the Kochi (Pushtun nomads), which precluded the Hazaras, in certain areas, from raising livestock, their primary economic activity. n132

n129. See id at 7.
n130. See id. at 3.
n131. Id. at 8-9.
n132. See id.

3. Hazara Political Organization

Several systems of political organization, often in tension, have dominated Hazara political life in this century. These include provincial government, religious organizations, n133 village councils, and the post-1978 military and political resistance groups. The provincial government represented central authorities in Kabul and offered little or no representation for the Hazaras. n134 The central government was essentially a minimalist system of taxation, conscription, and information-gathering; it invested little in the region's infrastructure and economic development. n135

n133. See Roy, supra note 12, at 139-40. Unlike Sunnism, the hierarchical nature of Imami and Isma'ili Shi'ism lends significant local authority to the pirs, shaykhs, sayyeds, and mullahs.

n134. See Poladi, supra note 21, at 371-72; Rubin, supra note 1, at 246; Roy, supra note 12, at 140.

n135. See Poladi, supra note 21, at 374-75.

In 1978, the communist coup d'etat in Kabul sparked a resistance movement in the Hazarajat. The emergence of military leadership in the resistance gave rise to a power struggle that persisted for several years between the two traditional power bases, the religious leaders (supported by Iran) and the mirs. n136 A
Throughout much of the eighteenth and nineteenth centuries, Afghan rulers had limited success in bringing areas of the Hazarajat under their control. n118 The central government imposed taxes and appointed hakims, or subgovernors, over the Hazaras. n119 Although they paid revenues to the central government, the tribes continued to be ruled directly by their own mirs, or elders. n120 By 1879, however, most of the Hazarajat had been brought more closely under Afghan rule. Only a small group of Hazaras in the southeast remained independent. n121

In 1890, Amir Abdur Rahman Khan sent firmans (royal proclamations) to the elders of the independent Hazaras, asking them to submit unconditionally to his authority, because "their further insistence on rebellion, in view of the proximity of the Christian powers, would be injurious to Afghanistan." n122 The Hazaras believed that the terms of the Amir's offer "included autonomy for the Hazaras and no revenue to the government for several years to come." n123 With this understanding, the Hazaras agreed to submit, and a large army of the Amir entered the independent region of the Hazarajat in the spring of 1891 largely unopposed. n124

The Amir ordered the army to disarm the Hazaras and to remove the mirs and religious leaders from the Hazarajat. In response to these policies and abuses perpetrated by the Amir's army, the Hazaras rebelled the following year. n125 The Hazara rebellion intensified religious animosity between the Sunni and Shi'ite populations that still resonates today. The Hazara leaders proclaimed a jihad, or religious holy war, against the Afghan government. n126 During this period of religious hostility, the ulema (clergy) in Kabul led a campaign that demonized the Hazaras. The Amir ordered his forces to seize rather than simply occupy lands captured from the Hazaras. n127 These "words of the "shadow of God' [the Amir], and the representatives of Islam, promising plunder and heaven, stirred the Sunni Muslims to genocide." n128

n118. See Kakar, supra note 33, at 3.
n119. See id.
n120. See id.
n121. See id.
n122. Id. at 4.
n123. Id.
n124. See id.
n125. See id. at 4-5.
The origin and history of the Hazaras figure prominently in their politics of self-identification and their mythmaking. Occupying Afghanistan's remote central highlands for anywhere from 700 to 2000 years, the Hazaras have evolved into a people distinct from much of the rest of the population. The mountainous region where they live is known as the Hazarajat. "Hazarajat" is a geographical rather than an administrative term, and its borders have never been formally defined. The Hazaras are popularly believed to be descendants of the armies of Genghis Khan, the Mongol warrior whose troops conquered Afghanistan in the mid-thirteenth century. The Hazaras allegedly became assimilated to their new habitat by mixing with neighboring Tajiks over the next several centuries.

After a period of relative isolation, the Hazaras came under the influence of the Persian King Abbas I (1588-1629). During this period, "the Shi'ite faith of Islam likely began to replace the shamanism of the Hazara," who, due to their isolation, had not converted to the Sunni sect of Islam like most of their eastern and northern neighbors. The Hazaras' adoption of the Shi'ite faith in an already predominantly Sunni land augmented their distinctiveness as a group and served as a safeguard against integration.
particular family branch has lived in the city for generations. Urban dwellers maintain connections to the watan through extended family and land ownership. Afghan nationalists have appropriated watan to mean "the Afghan nation" as a whole. n103 Ironically, although most of Afghanistan's peoples have not experienced a "national" sense of belonging, the notion of watan seems to produce internal schism but external cohesion. n104

n103. After the Soviet withdrawal, President Najibullah changed the name of his party, the Peoples' Democratic Party of Afghanistan (PDPA), to the Hizb-i Watan (Homeland Party), in conjunction with his national reconciliation plan. See Rubin, supra note 1, at 148.

n104. See Amin, supra note 57, at 62.

Attempting to reconcile this paradoxical sense of belonging and separation, several ethnic groups have forgone talk of secession in favor of pushing for a future Afghanistan that combines broad-based central government with regional autonomy. One group for whom such a government remains the most desirable option is the ethnic and religious Hazara minority.

A. The Case of the Hazaras

The following case study of the Hazaras illustrates the status of minorities in the "failed state" of Afghanistan and provides insight into the possible evolution of their rights. In a land of minorities, the Hazaras in particular are a people in need of a framework of laws to provide protection and remedies against discrimination and its consequences. According to one scholar, "the Hazara are the most alien and most remote of the major ethnic groups in Afghanistan .... The Hazara have been considered and treated by the Pashtuns as inferiors, fit only for hard labor." n105 Isolated in Afghanistan's remote interior, the Hazaras inhabit an inhospitable and agriculturally unproductive region. n106 Since their subjugation by Amir Abdur Rahman Khan and the resulting inclusion in the Afghan state in the late nineteenth century, the Hazara have faced slavery, taxation without representation, exploitation of their natural resources, and chronic economic underdevelopment.


n106. The author lived and worked in the Hazarajat in 1994.

1. The Hazara People and Hazarajat

Resisting complete subjugation until the end of the nineteenth century, n107 the Hazaras developed an independent political consciousness that persists
rights crises. The community of nations is accustomed only to dealing with its peers; nonstate actors do not offer the types of pressure points or consistent dialogue partners governments need in order to address problems. The various nonstate actors that the international community attempts to engage are not accountable in the international system due to their extra-governmental status, the tenuous nature of their authority, and the exigencies of war. As Bosnia illustrates, for example, only with tremendous will and resources can the norms of the international community be brought to bear upon nonstate actors whose constituency is unclear, whose territory is shifting, and who are not accountable to their own people or to the international community.

International intervention in Afghanistan is unlikely, given the relative disinterest of the international community and the extreme hostility toward foreign intervention in Afghanistan. Moreover, serious consideration of basic linguistic, religious, and cultural rights must likely wait until the most basic of all rights, the right to be free from the threat of violent death, is addressed. The international community helped create the crisis in Afghanistan, but is now unwilling to commit the resources necessary to implement a solution. In the post-Cold War world, only when opium and terrorism begin to flow across Afghanistan's borders does the world take serious notice of the country. Meanwhile, individual groups in Afghanistan hope that a better future will emerge from this *desolation*. For many people that vision is not a strong Afghanistan, but (your ethnic group's name here)-istan, an autonomous region where religious rights, cultural norms, and tribal laws are unchallenged.

V. Afghan Nationalism and the Quest for Self-Determination

Ethnic nationalism and the concomitant push for autonomy has furthered Afghanistan's disintegration into a shifting federation of regional and ethnic fiefs. The lumpy, fraying quilt of Afghanistan, with its hodgepodge of peoples, shards of nations, and conglomerations of fiercely independent tribes, can hardly be understood as a "state." The central government has rarely extended its reach beyond the few urban centers n100 and the powers of taxation and raising an army. n101 However, several factors have thus far prevented any one group from taking the extreme step of seceding from territorial Afghanistan: pressure from the international community, fear of being subsumed by neighboring states, and the desire to control Kabul. n102

n100. Only 10% of the population inhabited urban centers prior to 1979. See Dupree, supra note 7, at 161.

n101. Control of the capital is valuable for the international recognition, foreign aid, and investment opportunities it brings to whomever controls it. Author's personal knowledge as U.N. representative in Kabul from 1995 to 1996.

Afghanistan's tenuous cohesion also is due to an idealized Afghan notion of watan, or homeland. Most Afghans define watan as one's limited area of origin, identified as a valley, or most expansively a province. Even today, most of the Kabuli population continue to identify themselves by their watan, even if their
Reports by international, governmental, and news agencies have consistently accused the Taliban, in particular, of gross human rights violations. Other factions have gone to great lengths to deny allegations of abuses such as torture, mistreatment of civilians, and summary justice. The Taliban, however, have openly announced policies that are perceived to constitute systematic violations of human rights rather than uncontrollable abuses by renegade soldiers. The Taliban's openness about their policies has presented a serious dilemma to the international community. Insofar as other groups denied violating human rights abuses, the international community could look the other way. With the Taliban, the international community must deal with a group that openly and defiantly proclaims its impolitic views.

However, the Taliban have been less forthright concerning their policies and practices towards minorities, particularly the Shi'ite Hazaras. There are contradictory reports concerning Taliban enforcement of restrictions on the Shi'a, such as prohibiting different times, methods, and locations for prayer. This indicates that the Taliban still have not established a centralized authority, and that what the leadership does in one area it may not do in another. Much more serious has been the Taliban's ethnic persecution of Hazaras and Panjshiris (Tajiks) in and around Kabul, as these groups correspond ethnically to the primary opposition groups. Allegations that Taliban soldiers massacred Hazara noncombatants surfaced following recent advances into Hazara ethnic enclaves in Mazar-i-Sharif and Bamiyan. n99

The lack of a coherent and competent Afghan government is the fundamental problem the international community faces as it attempts to address the human
The first step toward addressing human rights grievances, in either a court of law or a "truth commission" type setting, is establishing a reliable and credible record of abuses. Since 1985, a U.N. Special Rapporteur for Afghanistan has been engaged in both cataloging human rights abuses and discussing how to implement human rights agreements with successive Afghan governments. n92 Human rights monitoring groups also have issued reports on Afghanistan since the Soviet invasion, and continue to do so. An examination of the status of Afghanistan's minorities in past years, and the efforts that have been made to ameliorate their situation, will help to identify what measures are most relevant and realistic in the future.

n92. See reports cited supra note 2.

C. The Current Situation in Afghanistan

Various international organizations have thoroughly documented the consistent and widespread violations of basic human rights in Afghanistan. n93 The period of Soviet occupation produced dozens of books exhaustively listing the abuses perpetrated by the Soviets and the Kabul regime. These books offer a political slant, failing to report the abuses committed by the mujahideen. n94 Since 1992, the United Nations and concerned international agencies have made a concerted effort to portray the situation more objectively. Since the Soviet withdrawal, the U.N. Special Rapporteur for Human Rights to Afghanistan has traveled widely in Afghanistan, facilitating these efforts. The Special Rapporteur generally has been given access to all areas of the country, including many identified prisons. n95 The International Committee of the Red Cross (ICRC) has successfully maintained access to prisoners throughout the country, although many observers believe that numerous small or hidden prisons exist away from international scrutiny. n96 Amnesty International also has released several reports on Afghanistan; its access has been limited, however, due to its organizational requirement of permission from the "government." n97

n93. See sources cited supra note 2.

n94. See, e.g., Jeri Laber & Barnett Rubin, A Nation is Dying (1988). Following the Soviet withdrawal, greater access to the country and a depoliticized environment produced more objective accounts, such as the report cited supra note 85.

As a member of the League of Nations, a charter member of the United Nations, and an active member of the Non-Aligned Movement, Afghanistan has eagerly participated in the international community. n87 Afghanistan has ratified the following human rights instruments: International Convention on the Elimination of All Forms of Racial Discrimination (1966); International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and Convention on the Prevention and Punishment of the Crime of Genocide. n88 Afghanistan has not, however, implemented the provisions of many of the human rights treaties it has ratified. A chasm remains between its stated intentions and its performance. If incorporated into and, more importantly, enforced through Afghan law, the framework of rights these instruments establish would allow Afghanistan's minorities to flourish within the state. n89 However, the absence of a coherent state structure has prevented such meaningful implementation.

Individuals do not have standing before international legal institutions to claim violations of international law. Therefore the only international sanction for Afghanistan's failure to adhere to international conventions that it has ratified has been the limited moral opprobrium of "watchdogs" such as a few Afghan exile groups, Amnesty International, Human Rights Watch, and the U.N. Human Rights Rapporteur. n90 Moreover, in recent years, the absence of any credible government has left Afghanistan without accountable authorities. The fragmentation of the country has led to the primacy of nonstate actors who have done almost nothing to implement any form of governance. n91

n86. See Human Rights Watch, supra note 85, at 79-82; Rubin, supra note 1, at 168; Amin, supra note 57, at 135.

n87. See Newell, supra note 15, at 193-94; Smith et al., supra note 9, at 219.


n89. These conventions contain a series of broad-brush provisions to ensure protections for "peoples," "ethnic minorities," "national minorities," "nationals," or "citizens." They provide for the use of native languages in schools, courts, government offices and government employment; freedom of religion; and political and professional representation within government. In addition to group rights, the equal enforcement of individual rights would also help to eliminate disparities.

n90. See reports cited supra notes 2 and 85.
The lack of a stable legal foundation in Afghanistan is certainly both a factor in, and a result of, its fractious history. Not surprisingly, an essentially secular legal document has proven inadequate to meet the legislative, religious, and cultural needs of the entire Afghan community, particularly given continued tribal resistance to a modern, centrally administered authority. n80 Provisions for a system of laws to accompany the 1921 Constitution existed, but the laws never materialized. n81 Due to public pressure, in the form of tribal and provincial opposition to reform, Islamic law continued to dominate criminal and penal law. n82 A de facto deference to customary or "tribal" law throughout the country prevented the formulation or implementation of any extensive or uniform civil codes. n83 Such resistance has continued to pose a powerful impediment to developing a functioning legal system in Afghanistan.

n80. See id. at 48, 66.

n81. The few laws codified during Amanullah's reign were abrogated in 1929. See id. at 75, 88-89.

n82. See id.

n83. See id. at 18, 66, 76.

--- End Footnotes ---

B. International Law

Afghanistan's embryonic and unstable system of laws cannot effectively institute a regime of international laws and norms, particularly in the realm of human rights. Despite the good intentions behind several of the constitutions discussed above, particularly those of 1964 and 1990, the rights provisions in these constitutions were never codified. n84 Throughout recent history, Afghan governments have violated basic rights in favor of state security, by repeatedly imposing martial law and national states of emergency. n85 Although Afghanistan has an independent judiciary, its powers have never been properly enacted; thus Afghan citizens have little opportunity to appeal injustices. n86

n84. Id. at 45; Magnus, supra note 62, at 61; Rubin, supra note 1, at 168.

health and social security, and travel, rights to hold government posts, freedom
to perform religious rites, and freedom from torture and mistreatment. n74
Citizens may address the court in their native language, and translation would
be provided for citizens unfamiliar with the national languages. n75

n72. Id. at 12-13 (arts.13, 14).
n73. Id. at 18 (art. 38).
n74. See id. at 17-24(arts. 39-60).
n75. See id. at 41 (art. 114).

In short, the 1990 Constitution makes significant progress toward securing
rights for both individuals and minorities. n76 However, it makes no provision
for proportional representation, even though representatives to the national
assembly are to be chosen through "general, equal, free, secret and direct voting." n77 While addressing provincial administration and establishing
provincial councils, the constitution does not delineate their functions. This
omission gives cause for concern, since the provincial administrations are known
to be discriminatory.

n76. See supra notes 68-75. There are a few odd exceptions, both obvious and
hidden. Article 73 states that the president must be a Muslim and must have a
wife who is born of Afghan parents. Afg. Const. of 1990, art. 73, in
Constitutions of the Countries of the World, supra note 69, at 27. Other
provisions affirming laws enacted during the Soviet occupation, which granted
certain emergency powers to the president, remain in place. For example, Article
144 provides for the suspension of certain basic rights in a state of emergency.
See id. at 49 (art. 144).

n77. Afg. Const. of 1990, art. 79, in Constitutions of the Countries of the
World, supra note 69, at 30.

Two other important problems face the constitution, which is not in force but
has yet to be replaced. First, there have not been meaningful [*370] attempts
to implement its provisions, because of the constant "state of emergency"
proclaimed by each subsequent administration. n78 Second, the current leadership
believes that communism taints the notions of rights and progress embodied in
this constitution. n79 This mental association renders unlikely the inclusion of
such provisions in a future constitution.

n78. Most recently, the Taliban administration has repeatedly claimed that
its severe strictures on individual rights, particularly those placed on women,
will be altered once security is established in Afghanistan. See Nancy Hatch
After the withdrawal of Soviet troops and material support in 1990, the Najibullah government struggled to maintain power by presenting itself as both Afghan and Islamic. The government sought to find a resolution to internal disputes that would incorporate the mujahideen parties. In May 1989, elections were held in government-controlled areas. The evolving military stalemate convinced the government that it could co-opt popular support, and possibly the support of the mujahideen parties, by opening the political process. To this end, the Najibullah government reworked the constitution to include broader provisions intended to foster democracy. The government also supplemented the constitution's human rights provisions, leading the U.N. Human Rights Rapporteur to remark that "the catalogue of human rights is a remarkable text." n71

n71. Id. at 4.

The 1990 Constitution stresses the rights to participation and equality in the political and economic system of all of Afghanistan's national minorities. Chapter Two: Foundations of the Socioeconomic System contains the following articles:

(Article thirteen)

The Republic of Afghanistan is a multi-national country. The State shall follow the policy of allround [sic] growth, understanding, friendship, and cooperation between all nationalities, clans and tribes of the country for ensuring political, economic, social and cultural equality and rapid growth and development of regions that are socially, economically and culturally backward. The state shall gradually prepare the grounds for the creation of administrative units based on national characteristics.

(Article fourteen)

The state shall adopt necessary measures for the growth of culture, language and literature of the people of Afghanistan as well as preserve and develop the worthy cultural, traditional, linguistic, literary and folkloric legacy of all nationalities, clans and tribes. n72

Chapter Three: Citizenship, Basic Rights, Freedoms and Duties of Citizens guarantees equal rights for men and women "irrespective of national, racial, linguistic, tribal, educational and social status, religion creed [sic], political conviction, occupation, kinship, wealth, and residence." n73 This chapter further enumerates rights to life, assembly, work, rest, free education,
government. In fact, provisions to allow provincial elections for parliamentary representatives were accompanied by a gerrymandering policy designed to promote Pushtun hegemony in as many provinces as possible (see Figure 2). In addition, despite the opening of the state, several provisions institutionalized discriminatory and undemocratic policies, such as those requiring that the king be a follower of the Hanafi doctrine and that he not be "accountable." n65 The constitution also exhorts that "it is the duty of the State to prepare and implement an effective program for the development and strengthening of the national language Pashto," although Dari and Pashto are both designated official - not national - languages in Article 3. n66

--- Footnotes ---

n65. Id. at 8 (art. 15).

n66. Id. at 7 (arts. 3, 8, 15, 35).

--- End Footnotes ---

The liberalization during this period saw a corresponding rise of leftist political parties. In 1973, the king was deposed by his cousin, and Afghanistan became a republic. With the republic came an extended period of martial law, and finally a new constitution in 1977. This constitution established a one-party state and a presidency with wide-ranging powers, while significantly limiting the powers of the legislature and judiciary.

A series of coups in 1978 and 1979 led to the Soviet invasion, installation of the Karmal n67 government, and the formation of the Democratic Republic of Afghanistan (DRA). The new government enacted a constitution in 1980 that reflected the regime's political leanings. That instrument established a Marxist-Leninist socialist system and a Soviet-style ruling council or politburo. In 1986, the head of the state security apparatus, Najibullah, usurped power from Karmal. In 1987, a new constitution was ratified that contained a combination of traditional and modern provisions intended to foster national reconciliation. n68 While reinstating provisions regarding the position of Islam, and the supremacy of the Loya Jirga ("grand assembly") as the "highest manifestation of the will of the people of Afghanistan," n69 the new constitution also enshrined an extensive system of basic freedoms, rights, and responsibilities for all citizens. Chapter Twelve of the constitution refers to the U.N. Charter and the Universal Declaration of Human Rights. n70

--- Footnotes ---

n67. Babrak Karmal was the leader of the Parcham (flag) faction of the People's Democratic Party of Afghanistan (PDPA) and was installed by the Soviets as the leader of the DRA shortly after the 1979 invasion. See Rubin, supra note 1, at 82, 122.

n68. See Rubin, supra note 1, at 146-47.


n70. See id. at 46 (art. 133).
These are useful guides or checklists for evaluating the human rights protections of a constitution or statutory code.

[367] Considering Afghanistan's nascent statehood and the government's tenuous authority, the 1921 Constitution was a liberal and modern document for its times. This constitution established basic rights of citizenship, declaring all citizens "Afghans," n59 and allowing some religious freedom. n60 Amanullah's broad reforms proved too liberal for his conservative, rural subjects, and led to his ouster in 1929. n61

n59. For a discussion of self-identification, see Part II, supra.

n60. However, the constitution established the Hanafi school, the most common of the four subsets of Sunnism Islam, as the controlling school of jurisprudence in Afghanistan. See Amin, supra note 57, at 40.

n61. Afghanistan (or Kabul) was briefly ruled by a Tajik bandit from the outlying mountains of Kabul named Bacha Saqqao. See 2 Sykes, supra note 29, at 314-21; Fraser-Tytler, supra note 31, at 215-22.

The reestablishment of the monarchy in 1931 led to a new constitution. Apart from the introduction of a rubber-stamp bicameral legislature, there were few changes. It was not until 1964, under the reign of King Zahir Shah, that the constitution, freshly rewritten with broad regional participation, attempted to provide any solid legal framework for citizens' rights and participation in government. n62 This period was called the "New Democracy," n63 and it represented the first real attempt at national development and integration. The 1964 Constitution provided for the supremacy of constitutional and statutory law over Sunni Hanifite jurisprudence, as well as an extensive list of individual rights. n64


n63. See Leon Poullada, The Search for National Unity, in Afghanistan in the 1970s, supra note 62, at 34; Rubin, supra note 1, at 71.

n64. See Afg. Const. of 1964, art. 102, in Constitutions of Nations, supra note 57, at 24.

However, the constitution did not acknowledge the rights of specific groups, nor did it address imbalances in group representation in Afghanistan's
International law bears even less relevance to the situation of most peoples in Afghanistan. The international community is generally responsible for the establishment and codification of human rights law. n55 Afghanistan's limited ability to function as a state has made it an infrequent participant in the international legal system. Without a stable national or municipal legal foundation, administration and enforcement of international legal instruments or standards cannot occur. Although there has been some "human rights" language in Afghan law, these laws speak more to the theory than the practice of human rights law in Afghanistan. This becomes clear when one compares the existing normative framework of rights with the situation in Afghanistan.

--- Footnotes ---


--- End Footnotes ---

A. The Afghan Constitution

By 1919, Afghanistan had internationally recognized borders and a monarchy, but its government lacked structure and performed few functions outside of the capital. The new king, Amanullah, assumed power after the third Anglo-Afghan war in 1919. Schooled in western notions of statehood and modernity, and buoyed by Ataturk's successes in Turkey, he began an ambitious but ultimately disastrous course of modernization. n56 Afghanistan adopted its first constitution in 1921, n57 and has enacted six more since. Provisions concerning basic rights have varied greatly among these constitutions according to the political impetus that gave rise to each rewriting. The following paragraphs examine and compare some of these provisions; however, it is critical to note that rarely, if ever, has a regime successfully implemented, or even attempted to implement, these provisions. Furthermore, the state's inability to codify a coherent nationwide system of laws applied - whether based on Islamic, constitutional, or customary tribal law - exacerbated this failure. n58

--- Footnotes ---

n56. Ataturk had engineered a harsh but effective campaign of modernization and secularization in post-Ottoman Turkey. Amanullah attempted to emulate these reforms, albeit without the centuries-old, highly sophisticated centralized power apparatus that Turkey had inherited from the Ottoman era. See Gregorian, supra note 25, at 226-74.


n50. See Ahmed Rashid, Pakistan and the Taliban, in Fundamentalism Reborn?, supra note 4, at 72-73.

n51. See Shahrani, supra note 4, at 213.

In the center of Afghanistan, the Hazaras stand alone as a unique ethnic group with no direct ethnic ties to any complementary group. However, in recent years, Afghanistan's ethnic and religious antagonism has produced a sort of "complementary" bond between the predominantly Shi'ite Hazaras and Iran's Shi'ite government. n52

n52. See Anwar-ul-Haq Ahady, Saudi Arabia, Iran and the Conflict in Afghanistan, in Fundamentalism Reborn?, supra note 4, at 122-31; Rubin, supra note 1, at 273.

A fourth complementary group relationship is that of the nomadic population. This group enjoys a unique position in that they are intentionally stateless, their chief demand being the right to ignore the strictures - boundaries, taxes, national service - of the state. While they lack support from a complementary group in any state, they are supported through either ethnic or economic ties to the populations along their trading and migration routes. n53

n53. The Kochi ("movers") in Afghanistan are predominantly Pushtun, and have often enjoyed the support of the Afghan government in matters concerning the pursuit of their cultural practices, which necessitates crossing Afghanistan's borders. See Dupree, supra note 7, at 164-80.

IV. Minority Rights in Afghan and International Law

The persistent weakness of the Afghan state has prevented the implementation of a positive legal order to protect Afghanistan's disenfranchised minorities. Pushtun hegemony, chronic economic underdevelopment, and physical and cultural isolation have marginalized certain [*366] groups and thwart any group attempts to form a state. What "national" laws in existence since the 1920s at best have applied only to Kabul and a few other urban centers. n54

n54. For a discussion of the relationship between Kabul and the rest of the country between World War II and the Soviet invasion, see Rubin, supra note 1, at 62-80.
Afghanistan displays many versions of the interstate complementary relationships. In the north, the Uzbek, Tajik, and Turkmen minorities each can look to a neighboring state bluntly named after their respective peoples—Uzbekistan, Tajikistan, and Turkmenistan. However, until the recent breakup of the Soviet Union, these minorities in Afghanistan anticipated little in terms of state support from the Soviet republics that shared their ethnic heritages.\(^46\) However, once independent from the Soviet Union, the ruling elite of those states immediately took up the cause of nationalism to replace the vacuum left by Sovietism. For example, shortly after independence, Turkmenistan announced citizenship \([*365]\) for all persons of "identifiable" Turkmen descent.\(^47\) More significantly, the Central Asian states, and Uzbekistan in particular, have become partisan backers of the Afghan parties affiliated with their respective ethnic groups.\(^48\)

In the east, the Afghan Pushtuns share a contested boundary with Pakistan and its nondominant Pushtun minority. Before the Soviet invasion of Afghanistan in 1979, the typical relationship consisted of support from Afghan Pushtuns (dominant) to Pakistani Pushtuns (nondominant).\(^49\) However, after 1979, the roles reversed, culminating in Pakistani Pushtun support for various Afghan Pushtun groups, and eventually the Taliban,\(^50\) in a quest to reestablish Pushtun dominance of Afghanistan.\(^51\)

\(^45\) See Hannum, supra note 8, at 178-202, 370-406.

\(^46\) On the contrary, the fact that a significant number of Turkic Afghans came to inhabit northern Afghanistan, as a result of first Czarist then Cossack expansion and repression, left a mutual antagonism between the communist Central Asian republics and their southern Afghan kin. Gregorian, supra note 25, at 266, 332, 334, 474 n.43.

\(^47\) While unable to locate the law establishing what "identifiable" means, Mr. Abdul Zahir, an Afghan-Turkman who traveled to Ashkabad seeking a passport, reported that an interview and language test were all that was necessary at the time. Telephone Interview with Abdul Zahir, Afghan Turkman and scion of prominent carpet-trading family in northern Afghanistan and former UNHCR consultant (Nov. 1997).

\(^48\) See Rubin, supra note 1, at 273.

\(^49\) See Grant M. Farr, Afghan Refugees in Pakistan: Definitions, Repatriation and Ethnicity, in The Cultural Basis of Afghan Nationalism, supra note 10, at 141. See generally Pazhwak, supra note 14 (detailing Afghan government support for the largely revanchist Pushtun "separatist" movement in Pakistan).
settlement and reaffirmation of borders. In Article 5 of the 1919 Treaty, the Afghan government accepted the Indo-Afghan frontier accepted by the late Amir. They further agreed to the early demarcation by a British Commission of the undemarcated portion of the line west of the Khyber, where the recent Afghan aggression took place, and to accept such boundary [as the British Commission may lay down.]

Apart from this rather lopsided formulation concerning the end of border disputes, the great significance of the treaty can be found in an attached letter declaring Afghanistan "officially free and independent in its internal and external affairs." These principles were again affirmed in the 1921 Treaty, which stated in Article 1 that "the British Government and the Government of Afghanistan mutually certify and respect each with regard to the other all rights of internal and external independence."


n43 While the Afghans celebrate the signing of the 1919 Treaty as their Independence Day, they have continued to question the validity of the borders agreed to therein, claiming that they were the product of duress. Id. at 7.

n44 Anglo-Afghan Treaty of 1921, Aug. 1921, Afg.-Gr. Brit., in Pak-Afghan Discord, supra note 41, at 63. While it seems obvious that this provision is directed toward noninterference by Britain in Afghanistan's affairs, the British were also greatly concerned about Afghan incursions into British India, due to uprisings in British India at the time and the toll that World War I had had on British resources. The newly crowned King Amanullah declared the 1919 Anglo-Afghan War perhaps in hopes of catching the British off guard and regaining some of the territory signed away by his grandfather. 2 Sykes, supra note 29, at 270-71.

"Complementary" States and Populations

The preceding discussion demonstrates that the Afghan "state" has always been viewed in the context of its neighbors. These neighboring states represent not only adjacent swathes of sovereignty, but also a collage of ethnic groupings. The relationship of a minority group to the state is largely affected by the existence of a significant community of the same minority in another, usually neighboring, state. Such a grouping could be considered a "complementary" state or population vis-a-vis the minority group in question. Whether that complementary group is the dominant group in the neighboring state also is significant. Compare the establishment of protections for Russian, German, and Swedish "ethnics" in states neighboring Russia, Germany, and Sweden with the situation of the Kurdish people, a jack of many states, but master of none.
government and thus would reduce the need for mandated proportional representation on the national level. Afghanistan's peaceful future depends on a national government's ability and willingness to balance Hazara demands for autonomy against its own centralizing impulses.

n178. However, even provincial devolution of autonomy might spark serious controversy, because it may be necessary to gerrymander some of the provinces to remedy previously discriminatory boundaries. See supra note 11 and accompanying text.


In the short term, however, hope for ethnic pluralism and tolerance in Afghanistan seems very dim. The Taliban continue to press their campaign of total domination into non-Pushtun ethnic strongholds, including the Hazarajat. Where successful, they impose a rigid interpretation of sharia based on the cultural and religious practices of rural, southern Pushtuns. The Taliban's repressive policies and arrogant attitude have engendered deep resentment and a sense of foreign occupation among non-Pushtun groups. These groups, including the Hazaras, believe that the Taliban are supported by Pakistan, and the increasing presence of Pakistani talibs among the Afghan Taliban has served to increase non-Pushtun animosity toward them. n180

n180. Talibs are literally religious students. Taliban is the plural form of Talib.

[386] Another long term issue, the related question of an independent state of Pushtunistan, may affect internal and external relations. n181 Afghan Pushtun leaders have consistently protested Afghanistan's established eastern borders with British India, calling for the creation of a Pushtun state, or Pushtunistan, in territory currently held by Pakistan. n182 Pushtun irredentists exhibit no sympathy for Hazara demands for autonomy. Unlike the Hazaras' quest for autonomy, the Pushtuns' drive for their own state arises not in protest against any discrimination or disenfranchisement, but rather from a will to consolidate power and historical territory. Thus, while Afghan Pushtuns continue to press for an independent state, there is less likelihood of cooperation among the various ethnic groups, which in turn hinders the possible creation of a representative national government.

n181. For a somewhat biased historical accounting of the issues surrounding Pushtunistan (also called Pakhtunistan), see generally Pazhwak, supra note 14. In 1947, Afghanistan was the only nation in the United Nations to object to Pakistan's entry as a member. Afghanistan and Pakistan severed diplomatic ties.
in 1961 over the Pushtunistan issue and resulting border disturbances. See Dupree, supra note 7, at 491.

Evidence suggests that the Pushtuns in British India and in today's Pakistan exercised (albeit in limited way) their right to self-determination by first joining Pakistan and not agitating for secession. In the referendum on Pakistan's creation in 1947, "an overwhelming majority of the Frontier [Pushtun] electors voted for union with Pakistan." Syed Abdul Quddus, Afghanistan and Pakistan: A Geopolitical Study 95 (1982). At the time of Indian independence and partition, there was a strong movement against partition within the Indian Pushtun community. However, time solidified the borders and afforded Pushtun participation in the political and military affairs of Pakistan. Pushtun political organization for secession in Pakistan has since been very limited. Therefore, some observers argue that by consistently failing to support moves to create a Pushtunistan or to rejoin Afghanistan, Pakistani Pushtuns have exercised their rights to self-determination in favor of remaining in Pakistan. Id. at 96.

While the Pushtunistan question remains a controversial political issue in the background of Afghanistan's ethnic conflicts, the current Taliban movement has more significance for the territorial integrity of Pakistan and Afghanistan. The Taliban have taken affirmative steps to spread their influence; while they have not threatened the security of Pakistan per se, because the movement was founded in the madrassa, or religious schools, of Pakistani tribal areas, it is already firmly established there. n183 These madrassa continue to supply the Taliban with soldiers and ideological guidance, and Pakistan's radical pro-sharia, anti-Shi'a Islamic parties grow in number and influence.

VI. Conclusion

Externally, internationally recognized borders and fear of regional strife have kept Afghanistan whole. Internally, the existence of a "state" that can hardly be described as anything more than a patchwork of cohesive tribal confederations surrounded by international boundaries has paradoxically left both a power vacuum and a return to order. The international community's search for a single, central Afghan government [*387] and the increased stakes in terms of the legitimacy conferred by such recognition has augmented the zeal of the various groups seeking to control Kabul. n184 Minority groups such as the Hazaras now take the cause of self-determination into their own bloodied hands. Local structures of governance have thrived in the past twenty years, although this experiment has been badly tainted by the divisive politics of war and global patronage.
Increasingly, the international community views conflicts like those in Afghanistan as an inconvenience to the global economy. The often quoted axiom that two countries with McDonald's franchises have never been at war with each other has led some observers to conclude that world peace will ensue if McDonald's franchises simply proliferate. The day the Taliban seized Kabul, the only two international entities to recognize the movement as Afghanistan's government were Pakistan (blamed for creating and funding the Taliban), and UNOCAL (a company negotiating a deal with the Taliban to build an energy pipeline through Afghanistan).

Order has returned due to the ability of cohesive communities, based on ethnicity, language, and religion, to "freely determine their political status and freely pursue their economic, social, and cultural development." Further regional development will come only when a truly representative government replaces the status quo of war, blockade, and ethnic animosity. If a central government were to implement the measures contained in Afghanistan's various constitutions since 1964, and at the same time observe international covenants and declarations on minority rights, Afghanistan could become an international model for the devolution of power. For the moment, though, continued fighting and the Taliban's ethnic and religious discrimination will likely deepen age-old schisms and resentment.

The international community faces two fundamental problems in dealing with Afghanistan. First, the international legal system does not know how to respond to nonstate entities. These entities have not assumed the mantle of state government, and therefore are unconstrained by international treaties and customs. Without formal officials to subpoena, entities such as the current Afghan regime lack accountability. Because such regimes are primarily military organizations, few sanctions short of military force can effectively persuade them. Therefore, absent the means to enforce international laws, these laws remain little more than ideals.

Second, the international community also lacks the will to enforce its legal norms. If other states would impose upon Afghans a responsibility to uphold its people's fundamental human rights, the international community must impose upon
itself a corresponding duty to ensure the enforcement of its system of laws. While such a system could be increasingly interventionist, objections thereto assume that the international community makes treaties, covenants, and declarations with no intention [*388] of enforcing them. Are such legal instruments for internal consumption only? If so, why make them international conventions rather than simply part of the domestic legal order? If states do not plan to enforce these agreements, expecting Afghanistan's factions to adhere to their underlying principles is both hypocritical and naïve.

The potential for harmony in Afghanistan lies in increased global unity of purpose on the one hand, and increased local governance on the other. If the international community can learn to work with nonstate entities such as the Hazara leadership and the Taliban, then perhaps such entities can learn to work with each other.