

5-4-2023

Operation Nation-Building: How International Humanitarian Law Left Afghanistan Open on the Operating Table

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Recommended Citation

Nina Griscelli, *Operation Nation-Building: How International Humanitarian Law Left Afghanistan Open on the Operating Table*, 77 U. MIA L. Rev. 830 ()

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Operation Nation-Building: How International Humanitarian Law Left Afghanistan Open on the Operating Table

NINA GRISCELLI*

Military campaigns often carry with them official names and underpinning objectives. In Afghanistan, these campaigns were known as Operation Enduring Freedom in 2001, and later, in 2015, as Operation Freedom Sentinel. In total, the United States and its allies remained in Afghan territory for 7,268 days, twenty years, in support of the “Global War on Terror.” Within that time, the democratic construction of a “free” Afghan society—also known as nation-building, regime change, or transformative military occupation—deeply transformed the status quo of the population. To the West, “Operation Nation-Building” became the most strategic and “hopeful alternative to the vision of the extremists.” Fast forward in 2021, however, this enterprise seemed to have failed entirely, for these very “extremists”—the Taliban—retook power immediately upon military withdrawal. Today, Afghanistan is facing an unprecedented humanitar-

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ian crisis with a very real risk of systemic collapse and human catastrophe—thereby reversing what many considered twenty years of societal gains, especially in regard to women’s rights.

As a legal backdrop to this forever war, International Humanitarian Law (“IHL”) and Human Rights Law complementarily attempted to protect civilians and ensure human dignity. This Note will solely focus on IHL. Indeed, by assuming that endings of “occupations”^{} remain conducts that occur during war, the scope of this Note falls well within *jus in bello* considerations. Accordingly, this Note does not assess the legitimacy of the war itself (*jus ad bellum*), nor does it suggest precise guidelines on how to terminate war (*jus post bellum*)—although it might shed light on the manner in which these guidelines should be considered.*

Without debating over the legitimacy and legality of nation-building within the framework of IHL, this Note stands for the proposition that foreseeably disastrous endings of nation-building enterprises, once identified, should trigger an additional legal duty under IHL—one of reasonable care—toward the population that is about to be left behind. To back up this logic, this Note will take a hard look at hard law—mainly the Fourth Geneva Convention—and discuss legal vacuums along the way.

* The word “occupation” is put in quotation marks here, as there are still debates as to whether the U.S.-led coalition’s military presence in Afghanistan still qualified as an occupation following certain developments in the war. The terms “foreign military presence” and “occupation” will be used interchangeably in the last Part of this Note since this Note is of the view that occupation law applied to the U.S.-led coalition up until it physically removed its troops from Afghan territory.

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INTRODUCTION

As the Taliban encircled Kabul on August 15, 2021, Fada Mohammad clung as hard as he could onto America’s wings.¹ The young dentist of twenty-four years did not make it beyond a rooftop four miles away from the airport before he plunged to his death from

¹ See Gerry Shih et al., *The Story of an Afghan Man Who Fell from the Sky*, THE WASH. POST (Aug. 26, 2021), <https://www.washingtonpost.com/world/2021/08/26/story-an-afghan-man-who-fell-sky/>.

one of the last U.S. Air Force C-17 aircrafts that took off from Afghanistan.² Fada was not the only Afghan who felt hopeless that day.³ Media reports shared widely across the world showed thousands of other people running alongside the plane in a last, desperate bid to flee the country.⁴

These images will remain among the most tragic and indelible in the final chapter of America's longest military intervention.⁵ They epitomize the United States' chaotic departure and abandonment of Afghan civilians and allies,⁶ as if the superpower wanted to quickly

² *Id.*

³ See *Afghans Cling to Moving US Air Force Jet in Desperate Bid to Flee*, AL JAZEERA (Aug. 16, 2021), <https://www.aljazeera.com/news/2021/8/16/afghans-cling-to-plane-defining-image>.

⁴ See Andrew Jeong & Dan Lamothe, *More Than 600 Afghans Cram into One U.S. Transport Flight, as Thousands Flee Taliban*, THE WASH. POST (Aug. 17, 2021), <https://www.washingtonpost.com/world/2021/08/17/afghans-us-transport-flight-photograph-cram/>.

⁵

“Operation Enduring Freedom” (“OEF”) was the official name used by the U.S. government to refer to the Global War on Terrorism and primarily refers to the war in Afghanistan (though it was also affiliated with counterterrorism in other countries, such as OEF-Philippines and OEF-Trans-Sahara). On December 28, 2014, President Barack Obama announced the end of Operation Enduring Freedom in Afghanistan. Subsequent operations by U.S. military forces, both non-combat and combat, occurred under the name of “Operation Freedom Sentinel.”

See Shih *supra* note 1; see also Dan Lamothe, *Meet Operation Freedom's Sentinel, the Pentagon's New Mission in Afghanistan*, THE WASH. POST (Dec. 29, 2014), <https://www.washingtonpost.com/news/checkpoint/wp/2014/12/29/meet-operation-freedoms-sentinel-the-pentagons-new-mission-in-afghanistan/>.

⁶ “The final days of the U.S. presence in Afghanistan were filled with chaos, bloodshed, desperation, fear and panic as troops attempted to stave off attacks by ISIS-K, while trying to coordinate a massive exodus of people out of the country.” Scott Neuman et al., *The Final U.S. Military Plane Has Left Afghanistan as America's Longest War Ends*, NPR (Aug. 30, 2021, 8:45 PM), <https://www.npr.org/2021/08/30/1032367184/rockets-kabul-airport-deadline-us-troops-bomb>.

wash its hands of a situation it had no interest to partake in anymore.⁷ The Doha Agreement,⁸ which established the U.S. negotiations for withdrawal exclusively with the Taliban, was identified as the deal that would seal a dire fate for Afghans.⁹ After the fall of Kabul, these predictions proved true, as tens of thousands of Afghan men and women were evacuated,¹⁰ hundreds died,¹¹ and millions

⁷ See *infra* note 250.

⁸ Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America, U.S.–Taliban, Feb. 29, 2020 [hereinafter “Doha Agreement”].

⁹ See Thomas Ruttig, *Nothing Is Agreed Until Everything Is Agreed: First Steps in Afghan Peace Negotiations*, AFG. ANALYSTS NETWORK (Feb. 4, 2019), <https://www.afghanistan-analysts.org/en/reports/war-and-peace/nothing-is-agreed-until-everything-is-agreed-first-steps-in-afghan-peace-negotiations/>.

¹⁰ Since the Taliban takeover, 124,000 people have been evacuated to the U.S., including 67,000 Afghan allies. Of those Afghans, 10,000 have been resettled with the help of nonprofit agencies in communities across the nation, according to the Biden administration. More than 12,000 evacuees remained at military sites in Germany, Spain, Italy, the United Arab Emirates, and Qatar. See Molly Hennessy-Fiske, *Why Are Most Afghan Evacuees Still Housed at U.S. Military Camps?*, L.A. TIMES (Nov. 1, 2021), www.latimes.com/world-nation/story/2021-10-30/why-have-afghan-refugees-been-held-for-months-on-u-s-bases; see also Camilo Montoya-Galvez, *Where Afghan Refugees Are Expected to Be Resettled, by State*, CBS NEWS (Sep. 16, 2021), <https://www.cbsnews.com/news/afghan-refugees-resettled-by-state/>.

¹¹ On August 26, 2021, an explosion occurred outside the Abbey Gate of Hamid Karzai International Airport. The Islamic State of Iraq and the Levant (“ISIS”) claimed responsibility for the attack. According to local health officials, at least 170 people were killed, and another 150 were wounded in the attack. See Helene Cooper et. al., *As U.S. Troops Searched Afghans, a Bomber in the Crowd Moved in*, THE N.Y. TIMES (Aug. 27, 2021), <https://www.nytimes.com/2021/08/27/us/politics/marines-kabul-airport-attack.html>; see also *Kabul Airport Attack: What Do We Know?* BBC NEWS (Aug. 27, 2021), <https://www.bbc.com/news/world-asia-58349010>.

now live under a threatening Taliban regime.¹² Those who have survived now face an uncertain and dangerous future, women and girls most notably.¹³

For many, this is just history repeating itself.¹⁴ The event is highly reminiscent of “The Day of the Last Helicopter Out of Saigon,”¹⁵ where civilians hastily flew out by U.S. fixed-wing aircrafts after the fall of the South Vietnam government.¹⁶ Indeed, critics have denounced the American “nation building” complex,¹⁷ which

¹² See Neuman et al., *supra* note 6; see also Aolain et al., *What Use Is International Law to Afghan Women?*, AM. SOC’Y OF INT’L L. (Oct. 27, 2021), <https://www.asil.org/events/what-use-international-law-afghan-women> [herein after ASIL].

¹³ See *Afghanistan: Women Call on the International Community to Support Women’s Rights Amid Ongoing Taliban Suppression*, AMNESTY INT’L (Nov. 25, 2021), <https://www.amnesty.org/en/latest/news/2021/11/afghanistan-women-call-on-the-international-community-to-support-womens-rights-amid-ongoing-taliban-suppression/>.

¹⁴ See Gillian Brockell, *The Fall of Saigon: As Taliban Seizes Kabul, the Vietnam War’s Final Days Remembered*, THE WASH. POST (Aug. 16, 2021), <https://www.washingtonpost.com/history/2021/08/15/saigon-fall-kabul-taliban/>.

¹⁵ The Fall of Saigon, also known as the Liberation of Saigon by the North Vietnamese, was the capture of Saigon, the capital of South Vietnam, by the People’s Army of Vietnam (“PAVN”) and the Viet Cong on April 30, 1975. See Kenneth T. Walsh, *The U.S. and Vietnam: 40 Years After the Fall of Saigon*, U.S. NEWS & WORLD REP. (Nov. 4, 2018), <https://www.usnews.com/news/articles/2015/04/30/the-us-and-vietnam-40-years-after-the-fall-of-saigon/>. The event marked the end of the Vietnam War and the start of a transition period from the formal reunification of Vietnam into the Socialist Republic of Vietnam. *Id.* The capture of the city was preceded by Operation Frequent Wind, the evacuation of almost all American civilians and military personal, along with tens of thousands of South Vietnamese civilians who had been associated with the Republic of Vietnam. *Id.* More than 7,000 people were evacuated by helicopters. *See id.*

¹⁶ *Id.*

¹⁷

Since World War II, on the pretext of nation-building and promoting democracy, the U.S. administration involved itself militarily in many parts of the world. In the span of seventy years, the U.S. had interfered in Korea (1950-53); Guatemala (1954, 1967-69), Indonesia (1958); Cuba (1956–60); the Belgian Congo (1960); Peru (1965); Laos (1964-73); Vietnam (1961-73), Cambodia (1979-70); Grenada (1983); Libya (1986); El Salvador (1982); Nicaragua (1980); Panama (1989); Iraq (from

seeks to set up new political regimes during occupation without considering either regime sustainability or post-withdrawal regional stability.¹⁸ In that regard, Afghanistan embodies yet another template of the military pattern that the United States, among other countries, has adopted on the international scene for almost a century.¹⁹

Considering the chaotic withdrawal from Afghanistan and its resulting consequences on the Afghan people,²⁰ a question of the utmost importance arises: what does international law, and more precisely, International Humanitarian Law (“IHL”), have to say about these quite narrow, yet reoccurring situations? And what can it do to prevent the often foreseeable and devastating consequences that nation building projects cause upon their ending?

In an attempt to address these issues, Part I will first explain the history of Afghanistan prior to the United States’ intervention and then delve into the historical and political foundation of *Operation Enduring Freedom*. Specifically, it will discuss the Bush administration’s decision to invade Afghanistan following the 9/11 attacks and affirm the nation building nature of the mission. To highlight the great changes that occurred following 9/11, this section will also analyze what twenty years of foreign military presence begot for the Afghan population at the political, cultural, and economic levels. The section then looks at the Doha Agreement in detail. Part II will lay out the relevant legal framework of the war in Afghanistan. Mainly, it will discuss the debates surrounding the applicability of occupation law to the United States and the coalition countries, as well as the potential over-reliance on Common Article 3 of the Geneva Conventions to regulate the conduct of warring parties and protect those not taking part in hostilities—in a world where most wars are now of a non-international character. Finally, Part III will explore the elaboration of an ad-hoc, “nation-building-specific”

1991); Bosnia (1995), Somalia (1992-95), Sudan (1998), Yugoslavia (1999); Afghanistan from (2001); and Iraq (from 2003).

See K.T. Thomas, *The Economic Roots of U.S. Intervention in Afghanistan*, 68 PROC. INDIAN HIST. CONG. 1215, 1215–24 (2007).

¹⁸ See generally Stephen Townley, *Perspectives on Nation-Building*, 30 YALE J. INT’L L. 357 (2005).

¹⁹ *Id.*

²⁰ *Id.*

mechanism, whose legal threshold might technically be applicable in the context of IHL.

I. BACKGROUND

A. *Operation Enduring Freedom*

1. AT THE INTERSECTION OF BATTLES BETWEEN WORLD POWERS

Contrary to popular belief, the Afghan War does not find its roots in the events of 9/11.²¹ Its roots sparked decades earlier, at the heart of the Cold War, with the Soviet invasion of Afghanistan in 1979.²² For the first time since 1948, the Soviet Union's (USSR) political influence moved outside its own borders—at the great and unsurprising concern of Washington D.C.—standing on the other side of the Cold War equation.²³ From that point on, Afghanistan found itself at the intersection of battles between world powers and became yet another canvas on which the binary conflict between capitalism and communism—good and evil—started to paint itself.²⁴

Enclaved in the mountainous Central Asian region, Afghanistan is a geopolitically and economically relevant state.²⁵ The country not only possesses several oil reserves in the north and strategic minerals in the south but is also an important transit area for “energy resources coming from Iran and Turkmenistan to Pakistan, India, and [] China.”²⁶

²¹ TURNING POINT: 9/11 AND THE WAR ON TERROR (Luminant Media 2021).

²² Thomas, *supra* note 17, at 1215.

²³ *See id.*

²⁴ *See id.*

²⁵ Miguel Angel Ballesteros Martin, *Geopolitical Analysis of Afghanistan*, Spanish Institute for Strategic Studies (IEEE), 12, https://www.ieee.es/en/Galerias/fichero/docs_analisis/2011/DIEEEA12-2011_Geopolitica_AFganistan_GBBallesteros_ENGLISH.pdf.

²⁶ *Id.*; see Mohammed Hussein & Mohammed Haddad, *Mapping Afghanistan's Untapped Natural Resources*, AL JAZEERA (Sep. 24, 2021), <https://www.aljazeera.com/news/2021/9/24/mapping-afghanistans-untapped-natural-resources-interactive>.

As the USSR invaded Afghanistan under the pretext of aiding communist President Mohammad Najibullah at the time, various factions of Afghans rose up on the basis of Islam to free their country from Soviet occupation.²⁷ The continuous conflict between the Soviet troops and the “mujahideen” rose to a fever pitch from the years 1984 to 1986, when U.S. policy makers decided to actively support, train, and arm those taking part in the jihad.²⁸ The Soviets succumbed to this increasingly robust opposition and withdrew from Afghanistan shortly thereafter, in 1989.²⁹

Although Najibullah remained at the helm of affairs following the USSR’s withdrawal, the U.S. promptly cut off aid to the rebel forces they had just helped.³⁰ With no thoughts given to aftercare in the case of a “U.S. victory,” different cliques of mujahideen still struggled for power, and concomitantly brought Afghanistan into virtual anarchy.³¹ When communist Kabul fell in April 1992, the civil war continued for four years and transformed Afghanistan into an arguably failed state.³²

²⁷ See Jaymi McCann, *Why Did Russia Invade Afghanistan? Soviet Invasion in 1979 Explained – and Timeline of What’s Happened Since Then*, WORLD (Aug. 19, 2021, 7:39 AM), <https://inews.co.uk/news/world/russia-afghanistan-why-invade-soviet-union-invasion-1979-timeline-what-happened-1156206>; see also Craig M. Karp, *The War in Afghanistan*, 64 FOREIGN AFFAIRS 1026, 1026 (1986).

²⁸ “Jihad” is the Muslim struggle against oppression dictatorship and non-Muslims who wanted to conquer Muslim territory. In 1984, ’85, and ’86, the U.S. gave billions of dollars to the mujahideen. TURNING POINT, *supra* note 21; Thomas, *supra* note 17, at 1215. “Mujahideen” is the plural form of “mujahid,” an Arabic term that broadly refers to Islamic guerillas who engage in jihad, interpreted in jurisprudence of Islam as the fight on behalf of God, religion, or the community (ummah). The Editors of Encyclopedia Britannica, *Mujahideen*, BRITANNICA (Nov. 17, 2021), <https://www.britannica.com/topic/mujahideen-Islam>.

²⁹ See Karp, *supra* note 27.

³⁰ See TURNING POINT, *supra* note 21.

³¹ *Id.* Through the rest of 1992, hundreds of rockets hit Kabul, thousands, mostly civilians, were killed, and half a million people fled the city. *Id.* According to Human Rights Watch, in the period between 1992 and 1995, five different mujahideen armies contributed to heavily damaging Kabul. See *Afghanistan: The Massacre in Mazar-I Sharif*, 10 HUM. RTS. WATCH (1998), https://www.hrw.org/legacy/reports98/afghan/Afrep0r0.htm#P35_500.

³² See TURNING POINT *supra* note 21.

A profiteering organization, the Taliban, emerged in 1994.³³ The word “Taliban” literally translates to “students” or “seekers” in Pashto, one of Afghanistan’s official languages.³⁴ Its members had been trained in the religious schools set up by the neighboring Pakistani government during the Soviet invasion with both U.S. and Saudi Arabian support.³⁵ Indeed, Saudi Arabia became one of the Taliban’s most important allies at the time—particularly in terms of funding and supplying weapons.³⁶ The country’s most infamous citizen, Osama Bin Laden, stirred the birth of this group by travelling to Afghanistan and remaining heavily influential on the ground, all while benefiting from physical protection as he attempted to win more recruits to the deadly cause of his newly founded organization: al-Qaeda.³⁷ With the additional help of the Pakistani army, the Taliban swept across an exhausted country, capturing power in 1996.³⁸

2. 1996–2001: AFGHANISTAN UNDER THE TALIBAN REGIME

While the Taliban put an end to the civil war, it imposed an objectively draconian and medieval form of “peace” on Afghan society.³⁹ At the onset, the new leaders faced significant resistance, especially after asserting their own interpretation of law and order.⁴⁰ The Taliban’s version of sharia law—the religious law forming part

³³ See Rashid Ahmed, *The Taliban: Exporting Extremism*, 78 FOREIGN AFFS. 22, 24 (1999).

³⁴ See *id.*; see also David Hughes, *What Does Taliban Mean? English Meaning of Afghanistan Militant’s Group Name Explained, and How it Started*, I NEWS WORLD (Aug. 23, 2021), <https://inews.co.uk/news/world/taliban-meaning-what-mean-english-name-how-started-afghanistan-explained-1156589>.

³⁵ Hughes, *supra* note 34.

³⁶ See Carlotta Gall, *Saudis Bankroll Taliban, Even as King Officially Supports Afghan Government*, THE N.Y. TIMES (Dec. 6, 2016), <https://www.nytimes.com/2016/12/06/world/asia/saudi-arabia-afghanistan.html>.

³⁷ In fact, Bin Laden was known for hiding out in the Tora Bora mountains. See TURNING POINT *supra* note 21.

³⁸ *Id.*; Ahmed, *supra* note 33, at 32.

³⁹ TURNING POINT, *supra* note 21.

⁴⁰ Ahmed, *supra* note 33, at 36.

of the Islamic tradition based on the Quran and the Hadith⁴¹—represents a strict religious ideology.⁴² At its epicenter is a mixture of Deobandi traditionalism, the leading Muslim theology of India, and Wahabi puritanism,⁴³ to which Saudi Arabia heavily subscribes.⁴⁴ By offering ultra-conservative interpretations of Islamic scriptures, and despite strong opposition from the population,⁴⁵ the Taliban regime successfully imposed a controversial form of imperialism that pretended to universalize a particular version of Islam and a specific understanding of sharia law.⁴⁶

To the international community, the Taliban's ideology led to grave humanitarian and human rights breaches.⁴⁷ Taliban command-

⁴¹ *Id.*

⁴² *Id.*; see Sumit Ganguly & Sohel Rana, *Taliban's Religious Ideology—Deobandi Islam—Has Roots in Colonial India*, THE CONVERSATION (Aug. 25, 2021), <https://theconversation.com/talibans-religious-ideology-deobandi-islam-has-roots-in-colonial-india-166323>.

⁴³ Ganguly & Rana, *supra* note 42.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See id.*

⁴⁷ See Shannon A. Middleton, *Women's Rights Unveiled: Taliban's Treatment of Women in Afghanistan*, 11 IND. INT'L & COMP. L. REV. 421, 454 (2001); see also Azadah Raz Mohammad et al., *Standing with Afghanistan: Women's Rights and the Role of International Law*, OPINIO JURIS (June 8, 2021), <http://opiniojuris.org/2021/08/06/standing-with-afghanistan-womens-rights-and-the-role-of-international-law/>.

ers have, for example, publicly claimed responsibility for many deliberate attacks⁴⁸ on civilians and the destruction of protected sites,⁴⁹ such as hospitals, schools, and mosques.⁵⁰

Most disreputable is the Taliban's trample on women's rights. From one day to the next, women were deprived of access to basic education and medical care.⁵¹ Reports have also shown that women

⁴⁸ Among other things, attacks have involved forcibly displacing residents, looting, and burning down people's homes through massacre campaigns. Other examples include the Taliban's denial of United Nations food supplies to over 160,000 civilians and a policy of scorched earth, burning vast areas of fertile land. See Middleton, *supra* note 47; see also *Afghanistan: Taliban Massacres Detailed*, HUM. RTS. WATCH (Feb. 19, 2017, 7:00 PM) <https://www.hrw.org/news/2001/02/19/afghanistan-taliban-massacres-detailed>; *Taliban Uses Food as Weapon*, CBS NEWS (Sep. 22, 2001), <https://www.cbsnews.com/news/taliban-uses-food-as-weapon/>; James Meek, *Scorched Earth Legacy of Vanished Regime*, THE GUARDIAN (Nov. 16, 2001, 8:31 PM), <https://www.theguardian.com/world/2001/nov/17/afghanistan.terrorism7>.

⁴⁹ The Taliban committed a "cultural genocide" by destroying numerous non-Islamic relics and monuments. See Jinit Jain, *The Destruction of Bamiyan Buddhas: How the Taliban Obliterated the 6th-Century Monuments to Deny Their Own Past*, OPINDIA (Aug. 16, 2021), <https://www.opindia.com/2021/08/the-destruction-of-bamiyan-buddhas-how-the-taliban-obliterated-the-6th-century-monuments-to-deny-their-own-past/>. The most notable example includes the destruction of the famous 1500-year-old Buddhas of Bamiyan. See *id.*

⁵⁰ Media and various activities such as paintings, photography, and movies were banned. The Taliban also harshly discriminated against religious and ethnic minorities such as the Hindus, Sikhs, and Christians. See Charles Recknagel, *Afghanistan: Kabul Artists Tricked Taliban to Save Banned Paintings*, RADIO FREE EUR. (Dec. 13, 2001), <https://www.rferl.org/a/1098240.html>; see also Pamela Constable, *Taliban on Idolatry Makes a Country Without Faces*, THE WASH. POST (Mar. 26, 2001), <https://www.washingtonpost.com/archive/politics/2001/03/26/taliban-ban-on-idolatry-makes-a-country-without-faces/>; Rhea Mogul, *Afghanistan's Religious Minorities Live in Fear of Taliban, Brace for Persecution*, NBC NEWS (Aug. 29, 2021), <https://www.nbcnews.com/news/world/afghanistan-s-religious-minorities-live-fear-taliban-brace-persecution-n1277249>.

⁵¹ At the immediate taking of Kabul for example, the Taliban closed women's universities and forced nearly all women to quit their jobs. As such, women and young girls were quickly reduced to poverty and illiteracy. See Cora Engelbrecht & Sharif Hassan, *At Afghan Universities, Increasing Fear that Women Will Never Be Allowed Back*, THE N.Y. TIMES (Sep. 17, 2021), <https://www.nytimes.com/2021/09/27/world/asia/taliban-women-kabul-university.html>. The Taliban also enforced a restrictive dress code, and limited women's ability to move about the city without a male relative. *Id.* Windows were required to be

were often victims of rape, abduction, forced marriages, and would get publicly executed or whipped for violating the new leaders' rules.⁵² Despite having been internationally condemned for the enforcement of their harsh interpretation of sharia law,⁵³ by 2001, the Taliban controlled all but a small section of northern Afghanistan.⁵⁴

The Soviet–Afghan War was the pivotal point in history that nobody foresaw and, by the same token, that everybody undermined.⁵⁵ Its effects did not only affect the rest of the twentieth century, but also impacted the opening decade of the twenty-first.⁵⁶ Underappreciated is the “fusion of politics and religion that took place during this period of time.”⁵⁷ In Afghanistan, the U.S. failed to understand how the “numerous calls on Muslims from throughout the world to come fight with and give financial support to the mujahideen actually transformed the nature of terrorism.”⁵⁸ What happened during this period was “definitively not the closing act of terrorism,” as George H. W. Bush believed, “but a prelude to something far more serious and far more consequential.”⁵⁹

painted over so as to prevent men from seeing women inside their homes. *Id.* In most hospitals, male physicians could only examine a female patient if she was fully clothed, ruling out the possibility of meaningful diagnosis and treatment. *Id.* Inadequate medical care for women also meant poor medical care and a high mortality rate for Afghan children. *Id.* Before the United States occupation, Afghanistan had one of the world's highest rates of infant and child mortality. *See id.*; *see also Health*, UNICEF: AFG., <https://www.unicef.org/afghanistan/health> (last visited Feb. 28, 2022).

⁵² Middleton, *supra* note 47, at 454.

⁵³ *See id.*

⁵⁴ The main opposition was the Northern Alliance. *See Ahmed, supra* note 33, at 36. Saudi Arabi, along with Pakistan and the United Arab Emirates, were the only countries that recognized the Taliban regime. *See Adam Zeidan, Taliban, Definitions, History, and Facts*, BRITANNICA (Sept. 28, 2001), <https://www.britannica.com/topic/Taliban>.

⁵⁵ *See TURNING POINT, supra* note 21.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ As an echo to this event was the significant response of the U.S., among other countries, after Saddam Hussein's invasion of Kuwait in 1990. *Id.* By dispatching warships and ground forces to “protect” Saudi Arabia and the rest of the Arabian Peninsula from a potential Iraqi monopoly over the world's oil supplies,

3. THE “GLOBAL WAR ON TERROR”

The smoking towers of the World Trade Center in the Manhattan skyline will remain engraved in the memories of many generations. Nearly “3,000 people were killed in the series of attacks that took place on that ill-fated Tuesday.”⁶⁰

Initiated by Bin Laden, 9/11 was the pinnacle of the retaliation against the U.S.’ support of Israel, its involvement in the Persian Gulf War, and its continued military presence in the Middle East.⁶¹ On the night of the tragedies, Bush declared on national television, “[w]e will make no distinction between the terrorists who committed these acts and those who harbor them.”⁶² Through these words, the American public heard that while al-Qaeda was directly responsible for the devastating attacks, the Taliban provided them with a safe haven, thereby justifying the need to intervene in Afghanistan for self-defense purposes under international law.⁶³ On September

the Persian Gulf War successfully provided Bin-Laden with a religious justification for fighting Western influence and dominance. *Id.* In his narrative, the U.S. was no different than the Soviets: “protecting” the Middle East was but a ruse used to subjugate Muslim people and seize control over Muslim lands, holy places, and precious natural resources. *Id.* For Bin-Laden, this was the perfect opportunity to wake up the Muslim world and declare jihad on the United States. *Id.*

⁶⁰ Azad Essa, *9/11 Attacks: Why Netflix’s Turning Point Documentary Is a Let-Down*, MIDDLE E. EYE (Sept. 3, 2021), <https://www.middleeasteye.net/discover/september-11-attacks-turning-point-netflix-documentary-let-down-why>.

⁶¹ See *September 11 Attacks*, HISTORY (Aug. 24, 2018), <https://www.history.com/topics/21st-century/9-11-attacks>.

⁶² George W. Bush, *Address to the Nation on the Terrorist Attacks*, 2001 Pub. Papers 1099, 1100 (2001).

⁶³ Lindsay Maizland, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN RELS. (Aug. 22, 2022), <https://www.cfr.org/background/taliban-afghanistan>. The use of force in international law is legal if done for self-defense purposes under U.N. Charter, Article 51, which provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present

18, 2001, Congress allowed military action against the “nations, organizations, or persons” that “authorized, committed, or aided the terrorist attacks.”⁶⁴ The United Nations Security Council also condemned the attacks, adopting two resolutions in September 2001: Resolution 1368, which signaled that the attacks constituted a threat to the peace,⁶⁵ and Resolution 1373, which sought to prevent the organization, movement, and fundraising activities of terrorist groups.⁶⁶ In October 2001, *Operation Enduring Freedom* commenced an aerial bombing campaign against the Taliban and al-Qaeda in Afghanistan.⁶⁷ In total, twenty-seven coalition countries (mainly NATO allies) deployed more than 14,000 troops in support of the “global war on terror.”⁶⁸

Two months after the U.S.-led coalition set foot in Afghanistan, the Taliban regime fell.⁶⁹ But with al-Qaeda leaders, especially Bin Laden, continuing to hide out in Afghanistan’s mountains and under the protection of the Taliban, the United States justified remaining in the country for an unspecified term.⁷⁰ While speaking of this accomplishment, George W. Bush announced: “We continue to help the Afghan people lay roads, restore hospitals and educate all of their children.”⁷¹

Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. Charter art. 51.

⁶⁴ Authorization for Use of Military Force, Pub. L. No. 107-40 § 2, 115 Stat. 224 (2001); Elizabeth Grimm Arsenault, *Geneva Convention Compliance in Iraq and Afghanistan*, in *DO THE GENEVA CONVENTIONS MATTER?* 142 (Matthew Evangelista & Nina Tannenwald eds., 2017).

⁶⁵ S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sep. 12, 2001).

⁶⁶ S.C. Res. 1373, ¶ 2, U.N. Doc. S/RES/1373 (Sep. 28, 2001).

⁶⁷ See Arsenault, *supra* note 64, at 142.

⁶⁸ *Id.*

⁶⁹ See Steven Morris & Ewen MacAskill, *Collapse of the Taliban*, THE GUARDIAN (Nov. 16, 2001), <https://www.theguardian.com/world/2001/nov/17/afghanistan.terrorism10>.

⁷⁰ See *The U.S. War in Afghanistan 1999–2021*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/timeline/us-war-afghanistan/> (last visited Mar. 6, 2023).

⁷¹ *Bush Makes Historic Speech Aboard Warship*, CNN (May 1, 2003), <https://www.cnn.com/2003/US/05/01/bush.transcript/>.

Along with the help of the international community,⁷² the U.S. occupation in fact found early “successes.”⁷³ In 2002, the coalition installed a pro-Western government made up of major Afghan factions.⁷⁴ The new system succeeded in checking presidential powers by assigning major authorities to the elected parliament, such as the power to veto senior official nominees and to impeach a president.⁷⁵ The Afghan Constitution of 2004 also established important democratic rights for the Afghan people.⁷⁶ Thousands of young girls, barred from education under Taliban rule, could now attend school,⁷⁷ while women, largely confined to their homes, could go to college, join the work force, and serve in government.⁷⁸ New schools, hospitals, and other public facilities were built, and a vigorous, independent news media also emerged.⁷⁹ Between 2002 and

⁷² See Alyssa McGrail, *Facts on Foreign Aid Efforts in Afghanistan*, THE BORGEN PROJECT, <https://borgenproject.org/foreign-aid-efforts-in-afghanistan/> (last visited Feb. 28, 2023).

⁷³ See generally SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, WHAT WE NEED TO LEARN: LESSON FROM TWENTY YEARS OF AFGHANISTAN RECONSTRUCTION (2021) [hereinafter “SIGAR”].

⁷⁴ The newly installed government was first led by Hamid Karzai until 2014, and then by Ashraf Ghani, who fled the country as soon as the Taliban took over on August 15, 2021. See *The U.S. War in Afghanistan 1999–2021*, *supra* note 70.

⁷⁵ *Id.*

⁷⁶ See CONSTITUTION OF AFGHANISTAN Jan. 3, 2004, Ch. 2; see also Aolain et al., *supra* note 12.

⁷⁷

In 2003, fewer than 10 percent of girls were enrolled in primary schools; by 2017, that number had grown to 33 percent—not enough, but progress still—while female enrollment in secondary education grew from six percent in 2003 to 39 percent in 2017. Thus, 3.5 million Afghan girls were in school with 100,000 studying in universities Women’s life expectancy grew from 56 years in 2001 to 66 in 2017, and their mortality during childbirth declined from 1,100 per 100,000 live births in 2000 to 396 per 100,000 in 2015.

John R. Allen & Vanda Felbab-Brown, *The Fate of Women’s Rights in Afghanistan*, BROOKINGS (Sept. 2020), <https://www.brookings.edu/essay/the-fate-of-womens-rights-in-afghanistan/>.

⁷⁸ *Id.*

⁷⁹ “The post-Taliban regime constructed 3,135 functional health facilities by 2018, giving 87 percent of Afghan people access to a medical facility within two hours of distance—at least in theory, because intensifying Taliban, militia, and

2021, the United States Congress and foreign allies also appropriated over two hundred billion dollars in humanitarian and reconstruction assistance, thereby ensuring Afghanistan some degree of economic, social, and political stability.⁸⁰ With a disrupted status quo, the population's way of living, especially in the capital, shifted completely.⁸¹

Unfortunately, the democratic reconstruction of distant, theocratic, and culturally unfamiliar states is only rarely successful.⁸² Despite accession of rights and gains for the population, corruption in government was rampant, with hundreds of millions of dollars in reconstruction money stolen or misappropriated.⁸³ The government in place, highly dependent on American forces, proved unable to meet the most basic needs of its citizens.⁸⁴ Often, its authority evaporated outside major cities.⁸⁵ Increasingly, the presence of Western forces elicited animosity.⁸⁶ Indeed, portraying the occupation as an

criminal violence has made travel on roads increasingly unsafe." *Id.*; see David Zucchini, *The U.S. War in Afghanistan: How it Started and How it Ended*, THE N.Y. TIMES (Oct. 7, 2021), <https://www.nytimes.com/article/afghanistan-war-us.html>; *Afghanistan's Media Landscape: Before and After the Taliban Takeover*, WHAT'S NEW IN PUBLISHING (Aug. 2021), <https://whatsnewinpublishing.com/afghanistans-media-landscape-before-and-after-the-taliban-takeover/>.

⁸⁰ See McGrail, *supra* note 72; see also Mohammad Qadam Shah, *What Did Billions in Aid in Afghanistan Accomplish? 5 Questions Answered*, THE CONVERSATION (Oct. 26, 2021), <https://theconversation.com/what-did-billions-in-aid-to-afghanistan-accomplish-5-questions-answered-166804>.

⁸¹ "The post-Taliban constitution in 2004 gave Afghan women all kinds of rights, and the post-Taliban political dispensation brought social and economic growth that significantly improved their socio-economic condition." Allen & Felbab-Brown, *supra* note 77.

⁸² See Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 580 (2006) [hereinafter Roberts 1].

⁸³ The U.S. government's independent oversight authority on Afghan reconstruction, the Special Inspector General for Afghanistan Reconstruction, reported on October 20, 2021, that 19 billion of the total 63 billion that the U.S. has spent on Afghanistan's reconstruction since 2002 was lost to waste, fraud, and abuse. See SIGAR, *supra* note 73, at 9.

⁸⁴ See *id.*; see also Zucchini, *supra* note 79.

⁸⁵ SIGAR, *supra* note 73, at 9.

⁸⁶ *Id.*

invasion from the West was an effective way for the Taliban to regain power among those unconvinced by the Western Agenda.⁸⁷

4. PUTTING THE (NATION-BUILDING) MISSION THROUGH THE DUCK TEST

If it looks like a duck, swims like a duck, and quacks like a duck . . . then what is it?

Although there was a general consensus that *Operation Enduring Freedom*'s original goal was to eradicate the Taliban and al-Qaeda leaders,⁸⁸ some debates surrounding the actual nature of the U.S. mission in Afghanistan emerged.⁸⁹ Due to its imperialist connotation, "nation-building" is a rather taboo term, concisely defined as the use of military force to underpin a process of democratization in another territory.⁹⁰ In actuality, the White House never officially used the term "nation-building" to describe its mission.⁹¹ To the contrary, the term was used when the administration sought to explain what the U.S. was *not* doing.⁹²

In 2009, former United States Secretary of Defense Robert Gates attempted to clarify that the U.S. intervention had a "narrower focus tied more tightly to [the] core goal of disrupting, dismantling and

⁸⁷ See Ian Spears, *The U.S. Occupation of Afghanistan Was Colonialism that Prevented Afghan Self-Determination*, THE CONVERSATION (Sept. 26, 2021, 8:18 AM), <https://theconversation.com/the-u-s-occupation-of-afghanistan-was-colonialism-that-prevented-afghan-self-determination-167615>.

⁸⁸ See Robert Kagan, *Opinion: It Wasn't Hubris that Drove America into Afghanistan. It was Fear*, THE WASH. POST (Aug. 26, 2021), <https://www.washingtonpost.com/opinions/2021/08/26/robert-kagan-afghanistan-americans-forget/>; see also Glenn Kessler, *Biden's Claim that Nation-Building in Afghanistan "Never Made Sense to Me"*, THE WASH. POST (Aug. 23, 2021), <https://www.washingtonpost.com/politics/2021/08/23/bidens-claim-that-nation-building-afghanistan-never-made-any-sense/>.

⁸⁹ See Louis Jacobson, *Joe Biden Says U.S. "Is Not Engaged in Nation-Building" in Afghanistan*, POLITIFACT (Jul. 20, 2010), <https://www.politifact.com/factchecks/2010/jul/20/joe-biden/joe-biden-says-us-not-engaged-nation-building-afgh/>.

⁹⁰ *Id.*; see generally JAMES DOBBINS ET AL., AMERICA'S ROLE IN NATION BUILDING FROM GERMANY TO IRAQ 1 (2003).

⁹¹ Jacobson, *supra* note 89.

⁹² *Id.*

eventually defeating [al-Qaeda] by building the capacity of the Afghans”⁹³ In other words, “because the goal of strengthening civil society in Afghanistan [was arguably] secondary to the narrower goal of taking on the [terrorist threat] . . . and because the U.S. [was not going to keep] personnel on the ground indefinitely,”⁹⁴ succeeding administrations contended they were not engaging in nation-building.⁹⁵ However, there seems to be a “substantive overlap between what goes under the traditional definition of nation-building and what the U.S. [undertook during its time] in Afghanistan.”⁹⁶

Key policy documents, such as Obama administration’s National Security Strategy release of May 2010, outlined a variety of duties that would “seem to fit well within [the]definition of nation-building.”⁹⁷

It declared that the U.S. would:

[C]ontinue to work with our partners, the United Nations, and the Afghan government to improve accountable and effective governance. As we work to advance our strategic partnership with the Afghan Government, we are focusing assistance on supporting the President of Afghanistan and those ministries, governors, and local leaders who combat corruption and deliver for the people. Our efforts will be based upon performance, and we will measure progress. We will also target our assistance to areas that can make an immediate and enduring impact in the lives of the Afghan people, such as agriculture, while supporting the human rights of all of Afghanistan’s people—women and men. This will support our long-term commitment to a relationship between our

⁹³ *Id.*; see also *Text of Secretary Gates’s Prepared Testimony*, THE N.Y. TIMES (Dec. 2, 2009), <https://www.nytimes.com/2009/12/03/us/politics/03/gatestxt.html>.

⁹⁴ Jacobson, *supra* note 89.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

two countries that supports a strong, stable, and prosperous Afghanistan.⁹⁸

If this statement seems to match the idea of nation-building, General David Petraeus' 2006 Army's Counterinsurgency Field Manual confirms that it does.⁹⁹ In a few sentences, the former U.S. top commander in Afghanistan explicitly admits that nation-building was in fact the mission's goal: "Everyone has a role in *nation-building*, not just the Department of State and civil affairs personnel."¹⁰⁰

The final hit on the nail's head, however, comes from George W. Bush himself.¹⁰¹ Even though the former President had campaigned in 2000 as opposing nation-building by the military,¹⁰² he later indicated that the 9/11 attacks "had led him to shift course":¹⁰³

[A]fter 9/11, I changed my mind: Afghanistan was the ultimate nation-building mission We had liberated the country from a primitive dictatorship, and we had a *moral obligation to leave behind something better*. We also had a strategic interest in helping the Afghan people build a free society . . . because a democratic Afghanistan would be a hopeful alternative to the vision of the extremists.¹⁰⁴

⁹⁸ *Id.*; The White House, *National Security Strategy* 21 (May 2010), https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

⁹⁹ Jacobson, *supra* note 89; See Department of the Army Field Manual 3–24, 27 (2006) [hereinafter "FM 3–24"].

¹⁰⁰ FM 3–24 *supra* note 99, at 27 (emphasis added). Interestingly, the same Army Field Manual, issued in 2014 this time, explicitly removed the taboo word "nation-building" and replaced this sentence with the following: "All unified actions partners have a role in *support efforts to enable governance to counter an insurgency*, not just Department of State or civil affairs personnel." Department of the Army Field Manual 3–24, Chapter 7, page 2 (2014) (emphasis added).

¹⁰¹ Kessler, *supra* note 88; GEORGE W. BUSH, *DECISION POINTS* 205 (2010).

¹⁰² See BUSH, *supra* note 101, at 205.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (emphasis added).

Most recently, President Joseph Biden admitted the United States ended up engaging in nation-building, but argued it did not make any sense to do so:

We went there for two reasons One, to get Bin Laden, and two, to wipe out as best we could, and we did, the al-Qaeda in Afghanistan. We did it. Then what happened? [We] [b]egan to morph into the notion that, instead of having a counterterrorism capability to have small forces there in — or in the region to be able to take on al-Qaeda if it tried to reconstitute, we decided to engage in nation-building. . . . That never made any sense to me.¹⁰⁵

Yet to many scholars, and as President Bush himself accurately pointed out,¹⁰⁶ the U.S.' desire to eradicate terrorism necessarily meant it *had* to engage in nation-building.¹⁰⁷ To succeed in eliminating the enemy, U.S. counterinsurgency needed to ensure the safety and security of the civilian population through the implementation of its own view of democracy.¹⁰⁸ Indeed, avoiding excessive

¹⁰⁵ ABC News, *Full Transcript of ABC News' George Stephanopoulos' Interview with President Joe Biden*, GMA (Aug. 19, 2021) <https://www.goodmorn-ingamerica.com/news/story/full-transcript-abc-news-george-stephanopoulos-interview-president-79535643>.

¹⁰⁶ See BUSH, *supra* note 101, at 205.

¹⁰⁷ Madiha Afzal, *Biden Was Wrong on Afghanistan*, BROOKINGS (Nov. 9, 2021), <https://www.brookings.edu/blog/order-from-chaos/2021/11/09/biden-was-wrong-on-afghanistan/>.

¹⁰⁸ To eradicate terrorism also implied the need to comply with the Geneva Conventions:

When the United States approached Iraq and Afghanistan as purely counterterror operations, the goal was to disrupt the enemy, however, with a shift to a population-centric counterinsurgency mission, noncompliance with the Geneva Conventions equated to mission failure The shift from counterterrorism to counterinsurgency increased US sensitivity to civilian casualties Civilian deaths, civilian injuries, and civilian property damage lessened the likelihood that progovernment forces would because they provided fodder for antigovernment elements' rhetoric and hurt local support for US and International Security Assistance Force . . . troops.

force, guaranteeing civilians' rights, and treating captured individuals humanely challenged the Taliban's and al-Qaeda's narratives.¹⁰⁹ To dissociate one goal from the other was to deny the mission's objective as a whole. Accordingly, the differences between the U.S.' alleged "policy in Afghanistan and nation-building [was], to a certain extent, one of nomenclature."¹¹⁰

B. *Operation Freedom Sentinel*

1. CARVING THE PATH TO ENDING THE WAR

In May 2011, the United States eliminated Osama Bin Laden in Abbottabad, Pakistan,¹¹¹ where he escaped shortly after the U.S. coalition set foot in Afghanistan.¹¹² In June of that year, President Obama announced he would begin to bring American forces home and progressively hand over security duties and training to the Afghan government.¹¹³ This marked the transition from *Operation Enduring Freedom* to *Operation Freedom Sentinel* in 2015: a new mis-

Arsenault, *supra* note 64, at 138.

¹⁰⁹ *Id.*

¹¹⁰ Jacobson, *supra* note 89.

¹¹¹ See Macon, Phillips, *Summary: President Obama Addresses the Nation to Announce that the United States Has Killed Osama Bin Laden, the Leader of Al-Qaeda*, THE WHITE HOUSE PRESIDENT BARACK OBAMA (May 2, 2011), <https://obamawhitehouse.archives.gov/blog/2011/05/02/osama-bin-laden-dead>.

¹¹² "Northwest Pakistan has been considered a safe haven for terrorists since December 2001, when the fall of the Taliban in Afghanistan pushed many of its members, along with al-Qaeda, across the border into Pakistan." ERIC ROSENBAUGH & AKI J. PERITZ, CONFRONTATION OR COLLABORATION? CONGRESS AND THE INTELLIGENCE COMMUNITY, TERRORIST SAFE HAVENS, AND THE INTELLIGENCE COMMUNITY (2009); see Yaniv Barzilai, *How Osama Bin-Laden Escaped Afghanistan: Lessons for Future Counter-Terrorism Missions*, BROOKINGS (Jan. 23, 2024), <https://www.brookings.edu/events/how-osama-bin-laden-escaped-afghanistan-lessons-for-future-counter-terrorism-missions/>.

¹¹³ See Lisa Curtis, *How the Doha Agreement Guaranteed US Failure in Afghanistan*, HOOVER INST.: THE CARAVAN NOTEBOOK 1 (Nov. 2, 2021) https://www.hoover.org/sites/default/files/research/docs/curtis_webreadypdf.pdf.

sion faced with hurdles due to the weakness of the Afghan government and the simultaneous strengthening of a Taliban group progressively able to rebuild its fighting capabilities.¹¹⁴

In 2017, President Trump, in a speech unveiling a new anti-terrorist strategy, rightly acknowledged the risks associated with a precipitous withdrawal.¹¹⁵

[T]he consequences of a rapid exit are both *predictable and unacceptable*. 9/11, the worst terrorist attack in our history, was planned and directed from Afghanistan because that country was ruled by a government that gave comfort and shelter to terrorists. A hasty withdrawal would create a vacuum [that] terrorists, including . . . Al-Qaeda, would instantly fill, just as happened before September 11.¹¹⁶

Cynically, this very scenario would specifically play out four years later.¹¹⁷ In fact, many find that the Trump administration's

¹¹⁴ See Mara Liasson, *Obama Announces Decision to Delay Withdrawal of U.S. Troops from Afghanistan*, NPR (Oct. 15, 2015), <https://www.npr.org/2015/10/15/448981003/obama-announces-decision-to-delay-withdrawal-of-u-s-troops-from-afghanistan>; see also Zucchini, *supra* note 79.

¹¹⁵ See Curtis, *supra* note 113, at 1.

¹¹⁶ *Full Transcript and Video: Trump's Speech on Afghanistan*, THE N.Y. TIMES (Aug. 21, 2017), <https://www.nytimes.com/2017/08/21/world/asia/trump-speech-afghanistan.html> (emphasis added); see White House, *Remarks by President Trump on the Strategy in Afghanistan and South East Asia* (Aug. 21, 2017), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-strategy-afghanistan-south-asia/>; David Nakamura & Abby Phillip, *Trump Announces New Strategy for Afghanistan that Calls for a Troop Increase*, THE WASH. POST (Aug. 21, 2017), <https://www.washingtonpost.com/politics/trump-expected-to-announce-small-troop-increase-in-afghanistan-in-prime-time-address/2017/08/21/eb3a513e-868a-11e7-a94f-3139abce39f5story>.

¹¹⁷ See Curtis, *supra* note 113, at 2; see also *The Power of America's Example: The Biden Plan for Leading the Democratic World to Meet the Challenges of the 21st Century*, BIDEN HARRIS (2020), <https://web.archive.org/web/20201122195609/https://joebiden.com/americanleadership/> ("Biden will end the forever wars in Afghanistan and the Middle East, which have cost us untold blood and treasure. As he long argued, Biden will bring the vast majority of our troops home from Afghanistan and narrowly focus our mission on Al-Qaeda and ISIS. And he will end our support for the Saudi-led war in Yemen. Staying entrenched in unwinnable

missteps in the 2018–2020 peace negotiations with the Taliban were the genesis of the ease with which the Taliban retook the country in August 2021.¹¹⁸ “By the spring of 2018 . . . President Trump began to lose confidence in his own strategy and signaled his desire to start withdrawing US troops.”¹¹⁹ Hence, any “positive momentum” to talk with the Taliban was viewed as an opportunity to egress.¹²⁰

For example, although short-lived, the first-ever ceasefire that occurred between the Afghan government and the Taliban was interpreted by U.S. diplomats¹²¹ as solid “grassroots support for peace among the Afghan population as well as the Taliban rank and file.”¹²² In fact, the so-called “Afghanistan papers—confidential documents published by the Washington Post in December 2019 show[ed] how U.S. military leaders often [embellished virtually meaningless events] and provided rosy assessments of the military situation or told political leadership that the United States had ‘turned a corner’ in the fight against the Taliban, when facts showed otherwise.”¹²³ Ironically, the “. . . predilection to rely on mistaken beliefs, rather than facts on the ground” conveniently allowed to define peace talks with those who, a decade earlier, were considered the West’s sworn enemies.¹²⁴

ble conflicts only drains our capacity to lead on other issues that require our attention, and it prevents us from rebuilding the other instruments of American power.”).

¹¹⁸ Curtis, *supra* note 113, at 2.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Ambassador Khalilzad, in particular,

proved too eager to close a deal with the Taliban, allowed his single-minded focus to cloud his judgment on the negative impact of his concessions to the Taliban on the future of the country and on US fundamental national security interests. It is true that Trump’s repeated statements about wanting to withdraw US forces from the country undermined Khalilzad’s leverage with the Taliban; however, instead of conceding almost everything the Taliban requested, the U.S. negotiator should have considered whether no deal was better than a bad deal.

Id. at 2.

¹²² *Id.*

¹²³ Curtis, *supra* note 113, at 3.

¹²⁴ *Id.*

2. THE DOHA AGREEMENT

In February 2020, with a rushed view to end the war, the U.S. and the Taliban concluded the “Agreement for Bringing Peace to Afghanistan” in Doha, Qatar.¹²⁵ The agreement discussed four central elements.¹²⁶ First, the “[n]egotiators agreed to a temporary reduction in violence and decided that a lasting cease-fire among U.S., Taliban, and Afghan forces [would] be part of intra-Afghan negotiations.”¹²⁷ Second, the United States agreed to “reduce its troop presence in the country from roughly 12,000 to 8,600 within 135 days.”¹²⁸ If the Taliban were to follow through on their commitments, “all U.S. forces and other foreign troops [would] leave Afghanistan within 14 months.”¹²⁹ Third, the Taliban had to agree to “start talks with the Afghan government in March 2020.”¹³⁰ Finally, the Taliban had to guarantee that “Afghanistan [would] not be used by any of its members, other individuals, or terrorist groups to threaten the security of the United States and its allies.”¹³¹

¹²⁵ Some inquired of the legal basis for international agreements between states and non-state entities.

The law of treaties, namely the Vienna Convention on the Law of Treaties of 1969 (“VCLT”), provides for a ‘*savings clause*’ in the form of Article 3, which states that while the VCLT does not apply to agreements concluded between States and other subjects of International Law, its non-application (in those cases) shall not: 1. The legal force of such agreements; 2. The application to them of any of the rules set forth in the . . . [Vienna] Convention to which they would be subject under international law independently of the Convention. Therefore, it can be safely concluded that without prejudice to the provisions of the VCLT, an agreement between a State and other subjects of International Law can have legal force.

Ahsan Qazi, *The US–Taliban Peace Deal and International Law*, RSCH. SOC’Y INT’L L. (May 13, 2020), <https://rsilpak.org/2020/the-us-taliban-peace-deal-and-international-law/> (last visited Feb. 2, 2022) [hereinafter “RSIL”].

¹²⁶ See generally Doha Agreement, *supra* note 8.

¹²⁷ *Id.* at Part I, ¶ C.

¹²⁸ *Id.* at Part I, ¶ A.

¹²⁹ *Id.* at Part I, ¶ C.

¹³⁰ *Id.* at Part I, ¶¶ C, D, E.

¹³¹ See generally *id.*

Considering the “vague Taliban pledges made to enter peace talks with the Afghan authorities and prevent terrorists from attacking the United States and its allies,” many find that it “provid[ed] the Taliban with practically everything they wanted without their having to concede much of anything.”¹³² For human rights’ activists, the alarm bell should have gone off at that point in time.¹³³

This is especially so considering that no Afghan government official was invited to the negotiation table:¹³⁴

When the White House made the decision to pursue . . . direct talks with the Taliban to jump-start a more comprehensive peace effort, the intention was to quickly bring the Afghan government into that process. No [U.S.] official at the time envisioned the United States signing a deal with the Taliban without the involvement of the Afghan government, which is precisely what happened nineteen months later.¹³⁵

. . .

By signing a deal with the Taliban that demanded few concessions, the [U.S.] negotiator signaled to the Afghan authorities that the United States was ready to cut and run from the country and provide international legitimacy to the enemy while doing so.¹³⁶

. . .

[Overnight, the Doha Agreement] was shaping up to be less of a “peace agreement” and more of a poorly masked surrender agreement.¹³⁷

¹³² Curtis, *supra* note 113, at 4.

¹³³ ASIL, *supra* note 12.

¹³⁴ Curtis, *supra* note 113, at 4.

¹³⁵ *Id.* at 3.

¹³⁶ *Id.*

¹³⁷ *Id.* at 2.

In 2021, the Biden Administration “had an opportunity to change course on peace talks when it assumed power,” but instead chose to adhere to the Agreement as it was.¹³⁸

3. THE TALIBAN TAKEOVER

During their first week back in power, “Taliban leaders went to great lengths to try to show the world their movement had evolved on issues of governance, terrorism, and women’s rights since they ruled the country twenty years ago.”¹³⁹ “Taliban spokesperson Zabiullah Mujahid held a press conference in Kabul in which he offered amnesty to those who worked for the government of [former Afghan] President Ashraf Ghani, vowing there would be no reprisal killings.”¹⁴⁰ In fact, “[h]e said women would be allowed to work, [] study, and [] participate in society[,] [though] within the bounds of Islamic law.”¹⁴¹

Yet, “[c]ontrary to Mujahid’s early statements, women were later told to stay in their homes until the Taliban rank and file were instructed how to treat women properly.”¹⁴² Today, women and girls are banned from attending school.¹⁴³ The United Nations (“UN”)

¹³⁸ *Id.* at 6.

¹³⁹ *Id.* at 9; see Ahmad Seir et al., *Taliban Vow to Respect Women, Despite History of Oppression*, AP NEWS (Aug. 17, 2021), <https://apnews.com/article/afghanistan-taliban-kabul-1d4b052ccef113adc8dc94f965ff23c7>.

¹⁴⁰ See Zeerak Khurram et al., *Taliban Spokesman Says US Will not Be Harmed from Afghan Soil*, NBC NEWS (Aug. 17, 2021), <https://www.nbcnews.com/news/world/taliban-announces-amnesty-urges-women-join-government-n1276945>.

¹⁴¹ *Id.*

¹⁴² *Id.*; see *Protests Spread to Kabul as Taliban Struggle to Govern*, THE N.Y. TIMES (Aug. 30, 2021), <https://www.nytimes.com/live/2021/08/19/world/taliban-afghanistan-news#the-taliban-intensify-a-search-for-people-who-worked-with-us-and-british-forces-a-un-document-says>; see also Heather Barr, *List of Taliban Policies Violating Women’s Rights in Afghanistan*, HUM. RTS. WATCH (Sept. 29, 2021), <https://www.hrw.org/news/2021/09/29/list-taliban-policies-violating-womens-rights-afghanistan>.

¹⁴³ See Sune Engel Rasmussen & Jalal Nazari, *Afghanistan’s Taliban Prohibit Girls from Attending Secondary School*, THE WALL ST. J. (Sept. 19, 2021),

reports that over a hundred ex-Afghan officials (mostly police and military officials) have been slain since the takeover.¹⁴⁴ Many Afghans worry the situation will only worsen.¹⁴⁵

“Unwilling to work with a Taliban government given its reputation for brutality during its previous rule . . .” the international community froze Afghanistan’s assets abroad and halted all funding.¹⁴⁶ The aid-dependent country is now spiraling into a vortex of poverty,¹⁴⁷ thus exacerbating the already alarming health crisis caused by COVID-19 a few months earlier.¹⁴⁸ More than ever, the country is on the brink of a humanitarian catastrophe, with nearly 23 million people also facing acute food insecurity¹⁴⁹ and with many Afghan families finding themselves forced to sell their children, especially their young girls, to feed other family members.¹⁵⁰

<https://www.wsj.com/articles/afghanistans-taliban-prohibit-girls-from-attending-secondary-school-as-boys-return-to-classrooms-11631951310>.

¹⁴⁴ Curtis, *supra* note 113, at 9; The Associated Press, *U.N. Says Over 100 ex-Afghan Official Have Been Slain Since the Taliban’s Takeover*, NPR (Jan. 31, 2021, 2:11 PM), <https://www.npr.org/2022/01/31/1077003325/united-nations-afghanistan-taliban-takeover-extrajudicial-killings> [herein The Associated Press U.N.].

¹⁴⁵ See Kyber Crevasse, *Afghans Are More Pessimistic About Their Future Than Ever*, THE ECONOMIST (Jan. 29, 2022), <https://www.economist.com/asia/2022/01/29/afghans-are-more-pessimistic-about-their-future-than-ever>.

¹⁴⁶ The Associated Press, *Parents Selling Children Shows Desperation in Afghanistan*, NPR (Dec. 31, 2021) <https://www.npr.org/2021/12/31/1069428211/parents-selling-children-shows-desperation-in-afghanistan> [herein The Associated Press NPR].

¹⁴⁷ *Id.*

¹⁴⁸ See Mohammad Yasir Essar et al., *COVID-19 and Multiple Crisis in Afghanistan: An Urgent Battle*, BMC (Sep. 17, 2021), <https://conflictandhealth.biomedcentral.com/articles/10.1186/s13031-021-00406-0>.

¹⁴⁹ See Afzal, *supra* note 107.

¹⁵⁰ See The Associated Press NPR, *supra* note 146.

“[G]iven the enormous costs of the war,”¹⁵¹ “the thousands of U.S. and NATO troops lost,”¹⁵² and “the scale of destruction and loss of life of both civilians and Afghan security forces,”¹⁵³ the outcome of the twenty-year long military presence can objectively be described as nothing less than agonizing.¹⁵⁴

II. RELEVANT LEGAL FRAMEWORK

A. *International Law of Belligerent Occupation*

The framework of IHL—also called the “laws of war,” the “laws of armed conflict” or, traditionally, *jus in bello*—places belligerent occupation at the thrust of its engine.¹⁵⁵ These laws, mainly embodied in the Geneva Conventions of 1949,¹⁵⁶ reflect the mood of a post-

¹⁵¹ In total, the war cost American taxpayers \$2.5 trillion, killed over two thousand U.S. military personnel, and more than forty-five thousand civilians (the death toll is possibly higher due to unaccounted deaths by “disease, loss of access to food, water, infrastructure, and/or other indirect consequences of the war”). See Deirdre Shesgreen, “War Rarely Goes as Planned:” *New Report Tallies Trillions US Spent in Afghanistan, Iraq*, USA TODAY (Sept. 1, 2021), <https://www.usatoday.com/story/news/politics/2021/09/01/how-much-did-war-afghanistan-cost-how-many-people-died/5669656001/>; see also Neta C. Crawford et al., *Costs of War*, BROWN UNIV.: WATSON INST. INT’L & PUB. AFFS. (July 2021), <https://watson.brown.edu/costsofwar/costs/human/military/killed>.

¹⁵² Afzal, *supra* note 107.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Belligerent occupation is also known as “military occupation” or simply “occupation.” The ruling power is often called the “occupant.” See YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 6 (2019); Roberts 1, *supra* note 82, at 580.

¹⁵⁶ DINSTEIN, *supra* note 155, at 3, 6. Although the Fourth Geneva Convention is the main focus of this Note, it is important to bear in mind that “[i]nternational law on belligerent occupation does not address the question of the legality of occupation [(addressed by *jus ad bellum*)]. Its rules apply to any occupying power for the sole fact that it is in control of a foreign territory, whatever the reason for this situation.” Amnesty Int’l, *Iraq: Responsibilities of the Occupying Powers* 3, AI Index: MDE/14/089/2003. Accordingly, “[r]ecognizing the applicability of such a law to a given situation does not constitute a judgment on the legal status of the territory concerned.” *Id.* “The provisions of the law on belligerent occupation are found in international humanitarian law As such, they take into the

World War II climate scarred by the atrocities and abuses perpetrated by a German-occupied Europe.¹⁵⁷ The dire need to further regulate the behavior of belligerents in war prompted reflection on what occupiers would be allowed to do, in what occupied state, and for what purpose.¹⁵⁸

At its base, the law of belligerent occupation must have “an international texture: two or more States must be pitted against each other in an armed conflict.”¹⁵⁹ Organically, IHL not only defined occupation as the occupant’s invasion, but also required there be a firm “control”—meaning “the provisional control by a ruling

account the military and security concerns of the occupying power, balancing them against the rights of those who find themselves under its authority.” *Id.* Additionally,

[t]he sources for the obligations under international humanitarian law applicable to belligerent occupation are found in: The Hague Convention (IV) respecting the Laws and Customs of War on Land (Hague Convention) and its annexed Regulations respecting the Laws and Customs of War on Land (Hague Regulations) of 18 October 1907 [(an international treaty concerned with the rules of combat and the legality of weapons)]; The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) of 12 August 1949 [hereinafter “GC IV”]; Article 75 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); Rules of customary international law.

Id.

“In line with international humanitarian law, any occupying power is also under the obligation to respect the provisions of the human rights treaties to which the country whose territory is partially or totally occupied is a party . . .” *Id.* at 4.

¹⁵⁷ See DINSTEIN, *supra* note 155, at 10; Nina Tannenwald, *Effects and Effectiveness of the Geneva Conventions*, in *DO THE GENEVA CONVENTIONS MATTER?* 7 (Matthew Evangelista & Nina Tannenwald eds., 2017); Int’l Comm. Of the Red Cross, *Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949*, IHL DATABASES (Aug. 12, 1949), <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949>.

¹⁵⁸ Indeed, the Geneva Regime was initially state centered. “At the time the 1949 Conventions were drawn up, the legislators were principally concerned with wars between states.” See Tannenwald, *supra* note 157, at 8.

¹⁵⁹ DINSTEIN, *supra* note 155, at 37.

power”¹⁶⁰—over a foreign, enemy territory, without claim of a formal sovereignty.¹⁶¹ Said notion of control requires a further *de facto* inquiry and can only exist when two conditions are satisfied: “first, the invader has rendered the invaded government incapable of publicly exercising its authority; and second, the invader has successfully substituted its own authority for that of the legitimate government.”¹⁶²

The requirement that occupants shall never claim formal sovereignty resulted in the classic understanding that occupation should *always* be temporary in nature¹⁶³ and “respect the existing laws and economic arrangements [of] the occupied territory”¹⁶⁴ The laws of force, therefore, made a “restrictive assumption” that belligerent occupiers may only “make as few changes as possible.”¹⁶⁵

At the same time, the international laws of belligerent occupation are subsumed under the initially *jus ad bellum* principles of proportionality and necessity.¹⁶⁶ Indeed, “the sentiment identified in the eighteenth century by Emer de Vattel—not to multiple the evils of

¹⁶⁰ The “radius of occupation of is determined by the effectiveness of control; occupation must be actual and effective.” See JEFF A. BOVARNICK ET AL., LAW OF WAR DESKBOOK 113 (Brian J. Bill, ed., 2010).

¹⁶¹ Article 42 of the Hague Regulations informs of the “control” requirement: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” Hague Convention IV Respecting the Laws and Customs of War on Land, art. 42, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; Department of the Army Field Manual 27–10 ¶ 351 [hereinafter “FM 27–10”]. Further, Article 47 explicitly prohibits “any annexation [of the whole or part of the occupied territory] by the [Occupying Power]” Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 47, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Interestingly, this also includes the “establishment of puppet governments.” BOVARNICK ET AL., *supra* note 160, at 115.

¹⁶² BOVARNICK ET AL., *supra* note 159, at 113; see FM 27–10, *supra* note 160, at ¶ 355.

¹⁶³ Such assumption can be made due to three aspects of the law relating to occupied territory: “the prohibition of annexation, the rules regarding the occupant’s structure of authority, and the rules regarding the maintenance of existing legislation in occupied territory.” See Roberts 1, *supra* note 82, at 582.

¹⁶⁴ *Id.* at 580, 587.

¹⁶⁵ *Id.* at 580.

¹⁶⁶ See JAN KLABBERS, INTERNATIONAL LAW 212 (3d ed. 2021); Tannenwald, *supra* note 157, at 9.

war—still informs the laws of armed conflict to this day.”¹⁶⁷ The conceptual idea was that warfare—on top of being respectful of the balance between the objective of the attacks perpetrated during an occupation and the means and methods used in its “successful” completion¹⁶⁸—should not cause unnecessary suffering.¹⁶⁹ Within these conditions resides the pivotal *principle of distinction*: “parties to an armed conflict [must] distinguish at all times between civilians and soldiers, and between civilian and military objects, and to direct their military operations only at the latter.”¹⁷⁰

Two specific considerations of IHL are worth acknowledging. First, the framework mainly purports to protect against direct and indiscriminate attacks occurring during armed conflict.¹⁷¹ By negation, this means that more indirect, less wanton, and slyer kinds of violence against protected persons are not necessarily contemplated.¹⁷² The Fourth Geneva Convention, whose “paramount purpose . . . is to lend enhanced protection—either inclusively or *inter alia*—to the civilian population of occupied territories[.]”¹⁷³ spells

¹⁶⁷ KLABBERS, *supra* note 166, at 224.

¹⁶⁸ *See id.*; *see also* DAVID KENNEDY, *OF WAR AND LAW* 128–43 (2006). This is also called the *principle of proportionality*, which, as explained, “requires that a balance be struck between the achievement of a military goal and the costs in terms of civilian lives.” Tannenwald, *supra* note 157, at 9.

¹⁶⁹ *Id.*

¹⁷⁰ Tannenwald, *supra* note 157, at 9. “The [International Court of Justice] has underlined the relevance of these principles in its opinion on the legality of nuclear weapons, referring to them as ‘intransgressible principles of international customary law.’ KLABBERS, *supra* note 166, at 224; *see* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, I.C.J. Rep. 35, ¶ 79 (July 8).

¹⁷¹ “Attackers must balance the *concrete* and *direct* military advantage of an attack against the risk of harm to civilians.” Tannenwald, *supra* note 157, at 9 (emphasis added). “Civilians and civilian objects should be clearly protected against *direct* and *indiscriminate* attack in all circumstances.” ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* 111 (2010) (quoting Minimum Humanitarian Standards: Analytical Report of the Secretary-General Submitted pursuant to Commission on Human Rights Res. 1997/21, UN Doc. E/CN.4/1998/87, 5 January 1998 (emphasis added)).

¹⁷² *Id.*

¹⁷³ DINSTEIN, *supra* note 155, at 6.

out in great detail the obligations of combatants toward these protected persons caught in the conflict zone.¹⁷⁴

Article 27 is a key provision in IHL, as “it outlines the obligations to respect the fundamental rights of those under occupation, such as the right to human treatment and non-discrimination”¹⁷⁵

It provides that:

[p]rotected persons are entitled in all circumstances, to respect to their persons, their honor, their family rights, their religious convictions and practices, and their manner and customs. They shall at all times be humanely treated and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.¹⁷⁶

Other relevant articles for purposes of this Note are Article 32, which forbids “actions causing physical suffering, intimidation, or extermination; including murder, torture, corporal punishment, mutilation, [and] brutality;”¹⁷⁷ Article 50, which focuses on the rights of children and explains that the “[o]ccupant should facilitate proper working of institutions devoted to care and education of children;”¹⁷⁸ and finally, Article 89, which warrants that civilians should have access to “sufficient food, water and clothes.”¹⁷⁹

Second, the precise contours of the proportionality—or necessity—“calculations” remain hotly debated and deeply controversial.¹⁸⁰ For some, they remain the most pragmatic way to go about

¹⁷⁴ *See id.*

¹⁷⁵ Amnesty Int’l, *supra* note 156, at 3.

¹⁷⁶ GC IV, art. 27.

¹⁷⁷ *See id.* at art. 32.

¹⁷⁸ *See id.* at art. 50.

¹⁷⁹ *See id.* at art. 89.

¹⁸⁰ “Needless to say, [the principle of proportionality] becomes an especially tricky judgment call when the line between military forces and civilian groups is

limiting suffering in war.¹⁸¹ The comment made by Corporal Mikael McIntosh when evaluating the necessity of certain military actions in the Iraq war of 2003 provides a strong example of such pragmatism, for it almost reminds us of the rather rational Hand-Rule formula used in our tort law vernacular: “if the risks outweigh the losses, then you don’t take the shot.”¹⁸²

For the most pessimistic, a set of darkly ironic truths seems to apply to these calculations: inhumanity and subjectivity.¹⁸³ “The 9/11 attacks did, after all, take place on a single day. [But] [t]he ensuing wars under the rubric of the ‘War on terror’ were a life-defining series of events that have lasted 20 years, cost the lives of close to a million.”¹⁸⁴ Indeed, closely connected to this observation is the immensely complex inquiry: “[h]ow *should* we evaluate the irreducibly imaginary quality of the promise that costs and benefits will be weighed, that warfare will be proportional, its violence necessary?”¹⁸⁵ This question surfs on, and “encourages a kind of *strategy*, and ethic, by metaphor: the metaphor of weighing and balancing.”¹⁸⁶

In fact, it is most likely through the muscle movements of this subjective mechanism that IHL is routinely “invoked to refer to [a] zone of *discretion* rather than limitation.”¹⁸⁷ Professional opinions and decisions about whom to kill seem to transform into judgments, all while remaining “the solid grounds on which the acts of [war] planners, and ultimately the deaths of many thousands, can remain legitimized.”¹⁸⁸ Accordingly, there is a notion that the laws of war are interchangeably the best weapon and the best shield for warring parties. Within these calculations, “there will always be something

increasingly blurred, as it is in many guerrilla and civil wars.” Tannenwald, *supra* note 157, at 9.

¹⁸¹ See KENNEDY, *supra* note 168, at 144.

¹⁸² *Id.*

¹⁸³ See Essa, *supra* note 60.

¹⁸⁴ *Id.*

¹⁸⁵ KENNEDY, *supra* note 168, at 144 (emphasis added).

¹⁸⁶ *Id.* at 143 (emphasis added).

¹⁸⁷ *Id.* at 106 (emphasis added).

¹⁸⁸ *Id.* at 107.

to put on the other side—some military objective or other, unless,”¹⁸⁹ as explained earlier, “the violence is *truly* wanton.”¹⁹⁰ This now grey area turns into an almost uncontrollable, slippery-slope terrain on which political and military campaigns strategically strive on.¹⁹¹

B. *Non-International Armed Conflicts and the Peculiar Case of Afghanistan*

In an almost counterintuitive fashion, it has become imperative to examine IHL in the context of non-international armed conflicts, which the war in Afghanistan arguably morphed into.¹⁹² Back in 1949, drafters of the Geneva Convention themselves considered the legal inclusion of armed conflicts reaching beyond the confines of

¹⁸⁹ *Id.* at 145.

¹⁹⁰ *Id.* (emphasis added).

¹⁹¹ *See generally id.* at 99–164.

¹⁹² “We believe that the armed conflict in Afghanistan [was] governed by the customary and treaty rules applicable to armed conflicts of a non-international character.” Annyssa Bellal, Gilles Giacca & Stuart Casey-Maslen, *International Law and Armed Non-State Actors in Afghanistan*, 93 INT’L REV. RED CROSS 1, 5 (2011). “This point of view is widely shared.” *Id.* at 5 n.21. “[For example, the UK and Germany both] qualifie[d] the conflict as being non-international in character.” *Id.* (quoting DAVID TURNS, ISRAEL YEARBOOK ON HUMAN RIGHTS 236 (2009); Christian Schaller, *Military Operations in Afghanistan and International Humanitarian Law*, GERMAN INST. FOR INT’L & SEC. AFFS. (Mar. 2010)). “Afghanistan is experiencing armed conflict across a broad swath of its territory. In legal terms, this is a non-international armed conflict between the Government, supported by international military forces (IMF), and various armed groups.” *Id.* (quoting Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Mission to Afghanistan, A/HRC/11/2/Add. 4, ¶ 1).

strictly international situations,¹⁹³ and rightly so. Today, most of the world's conflicts are of non-international character.¹⁹⁴

¹⁹³ See CULLEN, *supra* note 171, at 25 (“Prior to the formulation of the four Geneva Conventions of 1949, there existed no substantive provision of international humanitarian law specific to situations of non-international armed conflict. The ‘Marten’s clause,’ a provision situated in the preamble of the Hague Regulations of 1907, stipulated that in cases not included in the Regulations ‘the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.’ While this provision clearly covered situations of internal conflict, it is a provision of general nature and not specific to situations of non-international armed conflict. Article 3 common to the four Geneva Conventions of 1949 was the first provision of its kind to deal specifically with humanitarian protection in situations of non-international armed conflicts.”).

¹⁹⁴ See *id.* at 1 (“Although the majority of armed conflicts that have occurred since the Second World War may be characterized as non-international, research on the application of international humanitarian law to such situations has been sparse.”).

This led to the creation of Common Article 3,¹⁹⁵ which applies to any “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”¹⁹⁶

¹⁹⁵ See *id.* at 25. The text of Common Article 3 provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

In substance, Common Article 3 functions like a “mini-Convention”¹⁹⁷ within each of the four Geneva Conventions and establishes—in a condensed format—the minimum protections, as well as the essential, albeit limited rules from which no derogation is permitted.¹⁹⁸ In 1977, “[h]aving recognized that the rules contained in [C]ommon [A]rticle 3 ‘needed to be confirmed and clarified,’ the initiative was taken to expand on the protection provided by the Geneva Conventions to situations of non-international conflict.”¹⁹⁹ This led to the creation Additional Protocol II, which attempted to, but failed for some,²⁰⁰ to put “flesh on the bare bones of Common Article 3”²⁰¹

The *travaux préparatoires* of Common Article 3 showcase some disagreements over its intended scope.²⁰² To apply IHL to internal conflicts initially felt excessive in light of state sovereignty, among

GC IV, art. 3.

¹⁹⁶ *Id.*

¹⁹⁷ “[C]ommon Article 3 encapsulated the main body of international humanitarian law governing situations of non-international armed conflict, hence its description as a ‘[c]onvention in miniature.’” *See* CULLEN, *supra* note 171, at 86.

¹⁹⁸ *Id.*

¹⁹⁹

For Adam Roberts and Richard Guelff, the need for a new instrument applicable to non-international armed conflict had been evidenced by the way in which “experience demonstrated the inadequacy of the common article. While its provisions do extend certain fundamental humanitarian protections to non-combatants, they do not provide any definitive codification of the laws of war for non-international armed conflicts. Moreover, the provisions are so general and incomplete that they cannot be regarded as an adequate guide for the conduct of belligerents in such conflicts.”

Id. at 87; *see* Arsenault, *supra* note 64, at 8 (“As civil wars and wars of national liberation began to command growing international attention in subsequent decades, states negotiated the 1977 Additional Protocols to fill the gaps left by the Conventions and to extend some humanitarian protections to wars *within* states.”).

²⁰⁰ CULLEN, *supra* note 171, at 87.

²⁰¹ *Id.*

²⁰² *See generally id.* at 25–61.

other things.²⁰³ Accordingly, the term “armed conflict not of an international character,” was, advisably, never explicitly defined.²⁰⁴ Overall, however, it is generally accepted that conflicts within a contracting state,²⁰⁵ either between the Government and the rebel forces or between rebel forces themselves, may be contemplated by Common Article 3.²⁰⁶

With this in mind, a legal vacuum arises as to whether the laws of belligerent occupation—meaning those laws only applicable in a purely international context—actually applied to the situation in Afghanistan.²⁰⁷ Considering the extremely complex circumstances in

²⁰³ *Id.*

²⁰⁴ *See id.* at 60 (“While it was prudent not to define the term at the Diplomatic Conference, in order to avoid narrowing the applicability of the Conventions, the ambiguity in common Article 3’s field of application has allowed some states an opportunity to deny the applicability of international humanitarian law by not recognizing the existence of an armed conflict. As there is no internationally agreed mechanism for determining the applicability of common Article 3, its implementation has in many cases been dependent upon the will of parties to acknowledge the applicability of international humanitarian law. This is perhaps the most problematic aspect of the law governing situations of non-international armed conflicts.”). *But see* Bellal, Giacca & Casey-Maslen, *supra* note 192, at 1 (“While the applicability of Common Article 3 of the 1949 Geneva Conventions to the conflict is not controversial, how and to what extent Additional Protocol II applies is more difficult to assess, in particular in relation to the various armed actors operating in the country.”).

²⁰⁵ M. Ghandi, *Common Article 3 in the Geneva Conventions, 1949 in the Era of International Criminal Tribunal*, ISIL Y.B. INT’L HUMANITARIAN & REFUGEE L., <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html>.

²⁰⁶ In other words, it is understood that international armed conflicts—under which the laws of belligerent occupation fall—belong to the Hague and Geneva regimes, while non-international conflicts solely belong to Common Article 3 and Additional Protocol II. *Id.*

²⁰⁷ *See* Dana Wolf, *Transnational Post-Occupation Obligations Under the Law of Belligerent Occupation*, 27 MINN. J. INT’L L. 5 22, 23 (2018) (“The case of Afghanistan is another example of military troops remaining in a former occupied territory, although in this case the occupation was never formally recognized, and the law of belligerent occupation did not technically apply Their stay . . . is acceptable to the legitimate local government, and the foreign presence is therefore no longer considered to be akin to an occupying power with obligations according to the law of belligerent occupation. The pertinent question is whether the consent between the parties to the ongoing presence of the former occupying power in the territory would negate the requirements of the law of belligerent occupation if occupation had been formally declared.”).

which the war evolved, there is an overall disagreement on the legal status of the United States in particular, and whether, following certain developments during the war, the bulk of the Fourth Geneva Convention ceased to apply and protect Afghan civilians.²⁰⁸

In fact, a large number of scholars argue that the situation in Afghanistan stopped having an international texture when the United States established an Afghan government upon their arrival.²⁰⁹ Accordingly, between October and December 2001, “there was patently an international armed conflict between the U.S. and the Taliban-led Afghanistan. To the extent that there were American ‘boots on the ground,’ in effective control of Afghan territory, the U.S. could be regarded as an occupying power of that territory.”²¹⁰ But when the international coalition crafted by U.S. forces engaged in fighting the Taliban only with the consent and at the invitation of the Government they just had created, the conflict arguably became internal, and the belligerent occupation as such came to an end.²¹¹ Interestingly, there is no consensus as to when exactly the new Afghan government was created,²¹² and therefore no agreement as to when the belligerent occupation might have ended.²¹³ Under this view, the newfound, non-international character of the conflict only allowed Afghanistan to benefit from the protections guaranteed by the frameworks of Common Article 3 and Additional Protocol II.²¹⁴

²⁰⁸ *See id.*

²⁰⁹ *See* Bellal, Giacca & Casey-Maslen, *supra* note 192, at 5 n.21.

²¹⁰ DINSTEIN, *supra* note 155, at 12–13.

²¹¹ *See* Bellal, Giacca & Casey-Maslen, *supra* note 192, at 4–5.

²¹² *Id.* at 6, n.24 (“There are at least five possible dates. The first of these is the establishment of an Interim Authority in December 2001 by the Bonn Agreement The second possibility is the appointment of Karzai by the Loya Jirga (grand assembly) in June 2002 as President of the Transitional Authority. The third possibility is the adoption of the new constitution in January 2004. The fourth possibility is the presidential election of Karzai in October 2004. The fifth possibility is the parliamentary election in 2005.”) (citations omitted). The view of the International Commission of the Red Cross (“ICRC”) is that the occupation of the United States-led forces ended with the establishment of the Afghan transitional government of June 19, 2002. *See International Humanitarian Law and Terrorism: Questions and Answers*, ICRC (Jan 1, 2011), <https://www.icrc.org/en/doc/resources/documents/faq/terrorism-faq-050504.htm>.

²¹³ *See generally* Bellal, Giacca & Casey-Maslen, *supra* note 192 at 6–17.

²¹⁴ *See id.*

This position, however, does not enjoy consensus among international lawyers.²¹⁵ Yoram Dinstein, a prominent authority on the laws of war, argues that “the continuing armed hostilities between international forces and the insurgency might be considered as a *prolongation* of the international armed conflict that started in October 2001 with the U.S.-led military intervention against the former Taliban.”²¹⁶ According to him, therefore, the conflict “[had] remain[ed] international until the Taliban [were] defeated, alongside a separate armed conflict of a non-international character between the Taliban and the government that replaced them.”²¹⁷

In truth, it would be somewhat problematic for the law of belligerent occupation not to apply to a twenty-year long “foreign military presence,” simply because the U.S.-led coalition itself established what could easily be perceived as a “puppet” government.²¹⁸ The drafters of the Geneva Conventions themselves tried to consider the wide range of circumstances “in which occupations had come about, and the variety of forms in which occupants had exercised authority.”²¹⁹ Article 2, in particular, attempted to meet this need by clarifying the definitions of occupations to “encompass cases in which occupations were militarily unopposed . . .” by the official Government.²²⁰ These elements point to the treaty’s desire to bound any

²¹⁵ *Id.* at 51 n.21.

²¹⁶ *Id.* (emphasis added) (quoting YORAM DINSTEIN, ISRAEL YEARBOOK ON HUMAN RIGHTS 325 (2009); ERIC DAVID, PRINCIPES DE DROIT DES CONFLITS ARMÉS 175 (2008)).

²¹⁷ *Id.*

²¹⁸ A puppet government is a government that is endowed with the outward (de jure) symbols of authority but in which direction and de facto control are exercised by another power. Puppet governments go against the principles established in Article 47 of the Fourth Geneva Convention. *See* BOVARNICK ET AL., *supra* note 160.

²¹⁹ Adam Roberts, *Occupation, Military, Termination of*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW VOL. 7, 930 ¶10 (2009) [herein Roberts 2].

²²⁰ *Id.* The 2020 ICRC commentary on Article 2 clearly explains:
[T]he fact that an incumbent government has been defeated does not in itself divest the armed conflict of its initial international character, nor does the establishment of a puppet government by the victorious belligerent. The only possible way the

party in a wide range of circumstances, even those that do not technically qualify as an “occupying power.”²²¹

Other indicators can help determine whether a particular situation “should be considered to fall within the category of military occupation, at least as far as the application of the law on occupation is concerned.”²²²

For example, in scenarios where “foreign forces not only remain, but are active in dealing with internal insurrection, [as was the case in Afghanistan,] it is inevitable that critics will depict the situation as one of continued occupation.”²²³ This is exactly what happened during the Iraq-United States War of 2003:

More than any other case, Iraq provides an illustration of the salience of the question of whether occupation law may continue to apply in post-occupation phase. Although the [U.S.]-lead occupation was proclaimed to have ended on [June 28, 2004], the [U.S.]-led forces not only remained in the country, but were deeply involved in counter-insurgency and other activities. Significantly, UN Security Council Resolution 1546 of [June 8, 2004], which set the framework for the end of the occupation in Iraq, took account of the prospect that there would be both continuing conflict in Iraq, and continuing significant similarities with an occupation. A preambular clause, inserted fairly late in the long negotiations over the text, recognized the continued application of international

nature of the armed conflict could change as a result of the defeat of the former government is to ascertain that the new government is effective and consents to the presence or military operations of foreign forces in its territory, unless, however, it is instituted by an Occupying Power.

Int’l Comm. Of the Red Cross, *Convention (III) Relative to the Treatment of Prisoners of War*. Geneva, 12 August 1949, IHL DATABASES ¶266 (2020), <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-2/commentary/2020>.

²²¹ Roberts 2, *supra* note 219; see Derek Jinks, *The Applicability of the Geneva Conventions to the Global War on Terrorism*, 46 VA. J. INT’L L. 165, 178 (2005).

²²² Roberts 2, *supra* note 219 at ¶4.

²²³ *Id.* at ¶34.

humanitarian law: “Noting the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law, and to co-operate with relevant international organizations.” The inclusion of this clause can be interpreted as one way of conceding that, even if the occupation was theoretically over, the likelihood remained that uses of force—perhaps even exercises of administrative authority that closely resembled a situation of occupation—would occur.²²⁴

Of central importance is the aforementioned notion of “control,” which, as explained earlier, defines the metrics of the Geneva Conventions.²²⁵ Beyond the debated end of the occupation in Afghanistan, foreign troops, like in Iraq, continued to exercise some effective control similar to the control exercised by an “official” occupant: The United States kept stabilizing the country’s regime and ran counter-insurgency operations, such as policing functions—up until it physically removed its military troops from the territory in 2021.²²⁶ Overlooked, however, is the Geneva assumption that occupation is mainly synonymous with physical and territorial control, when other forms of control prove just as much relevant. This could be considered a lacuna—one that further blurs the application of IHL to increasingly complex circumstances in war.

Indeed, following certain developments, especially after the elimination of Bin Laden, the U.S.’ control on Afghan ground had less to do with the physical, territorial dominance and more with the threat of the use of force against the “rebels” and the decision-making abilities over Afghanistan’s governance and economic development.²²⁷ This is a new, and subtler twist of the understanding of control. Accordingly, it is not hazardous that both the United States and

²²⁴ *Id.* at ¶48 (citations omitted).

²²⁵ *See supra* note 160.

²²⁶ *See generally The U.S. War in Afghanistan 1999–2021, supra* note 70.

²²⁷ *Id.*; *see* TURNING POINT, *supra* note 21.

the Taliban, as the objectively two main players of this war, reciprocally treated the Afghan government as mainly irrelevant during peace negotiations.²²⁸ Likewise, it is not benign that the Afghan government fell to the hands of the Taliban or that the country economically collapsed at the immediate departure of the U.S.-led coalition.²²⁹ To the contrary, it is the clear indication of the Afghan Government's high dependence on the United States' forces, and therefore the quintessence of the latter's control over the destiny of the country.

With this new understanding of control, it seems unfair for the establishment of the Afghan government and, by the same token, the birth of a non-international conflict—to have a dispositive impact on the technical status of the United States as an “occupier,” and therefore on the full applicability of the Geneva Conventions.²³⁰

Thankfully, it appears “[t]reaty provisions have evolved in the direction of accepting a broadened concept . . . of occupation itself and of the circumstances in which the law applies”²³¹ An occupation can have many different administrative forms and “does not end just because it is pronounced not to be an occupation.”²³² In many cases, “the end of occupation is a process, not a moment; and, so far as the law on occupations is concerned, the question of determining the precise moment of termination of occupation may be of reduced significance.”²³³

Perhaps Common Article 3 itself, together with customary international law, should merely be seen as the opening gates through which IHL—as a whole—may apply to non-international conflicts. Scholar Michael N. Schmidt backs up this point of view, and although he confirms that the conflict in Afghanistan had become non-international, he nonetheless clarifies that:

[International Humanitarian Law] norms governing attacks during international armed conflicts, on one hand, and non-international armed conflicts, on the

²²⁸ See Curtis, *supra* note 113, at 4.

²²⁹ *Id.*

²³⁰ See Roberts 2, *supra* note 219 at ¶15.

²³¹ *Id.*

²³² *Id.* at ¶12.

²³³ *Id.* at ¶56.

other, have become nearly indistinguishable. In particular, the foundational IHL principle of distinction, which requires those involved in hostilities to “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives,” applies equally in all conflicts. That being so, the humanitarian law governing international armed conflict always serves as an appropriate benchmark against which to measure targeting practices.²³⁴

Evidently, the Geneva Conventions’ sophistication and adaptability to the changing nature of war are not to be undermined. Although unclear, this Note favors the idea that the duties and protections established by the Geneva Conventions applied to the U.S.-led coalition and benefited Afghan civilians, whether said intervention technically qualified as an occupation or not.

But *jus in bello* still leaves more question marks behind. The exclusion of more indirect yet clearly foreseeable harms from the aegis of IHL,²³⁵ added with incredibly vague concepts of proportionality, necessity, and distinction,²³⁶ has arguably shaped the laws of war into a legal sieve through which most, if not all arguments may validly be heard.²³⁷

III. TOWARD A STRATEGIC DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

The common critique that international law, especially in relation to war, is but “naked power,” is one hard to face.²³⁸ After all,

²³⁴ Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 85 INT’L L. STUD. 307, 308 (2009).

²³⁵ See *supra* note 171.

²³⁶ See *supra* note 180.

²³⁷ See generally, Roberts 1, *supra* note 82, at Chapter 3.

²³⁸ E.g. Joshua Kleinfeld, *Skeptical Internationalism: A Study of Whether International Law is Law*, 78 FORDHAM L. REV. 2451, 2452 (2010) (“There is an intuition that international law is not law at all, that though it goes by the name of ‘law’ it is in fact closer to politics, or moral exhortation, or aspiration, or pretense.”).

Carl Von Clausewitz correctly predicted that war itself was “a true political instrument, a continuation of political intercourse, carried on with other means.”²³⁹ It is unsurprising, then, that IHL shadows this prediction.²⁴⁰ At the heart of IHL lies the subjective and often dangerous notion of “morality.” As author Kennedy points out, “we know how easily moral clarity calls forth violence and justifies warfare; it is a rare military campaign today that is not launched for some humanitarian purpose.”²⁴¹ Yet, current IHL makes it “difficult to address the motives of war and devise alternative policies.”²⁴² Hard law documents in particular—such as the Fourth Geneva Convention—are known for their “historical inability to effectively *predict* new developments and to proactively develop laws to deal with them.”²⁴³ In this respect, IHL possesses a reactive quality, rather than a predictive, preventive, or deterring one.²⁴⁴

One of the motives for war, either denied or, to the contrary, used as a cover up by their belligerent catalysts, is the common and inherently political “violence” not adequately envisaged by IHL: the aforementioned “nation-building.”²⁴⁵ Thus far, “ideas about sovereignty, the limits of the UN Charter, core humanitarian commitments to the renunciation of empire, all placed regime-change outside legitimate debate.”²⁴⁶ To the contrary, author Kennedy argues, the UN Charter vocabulary offers an “easy and irresponsible way out.”²⁴⁷ In the case of the war on terror, the United States, along with other Western countries, never needed to ask, “*how or should* the Middle East . . . be changed.”²⁴⁸ This, in turn, “moved legal warfare

²³⁹ CARL VON CLAUSEWITZ, *ON WAR* 87 (Michael Howard & Peter Paret eds., 1832).

²⁴⁰ See KENNEDY, *supra* note 168, at 108.

²⁴¹ *Id.*

²⁴² *Id.* at 162.

²⁴³ EMILY CRAWFORD, *NON-BINDING NORMS IN INTERNATIONAL HUMANITARIAN LAW* 1 (2021).

²⁴⁴ See *id.* at 1–2.

²⁴⁵ See Roberts 1, *supra* note 82. Nation-building is also known as “regime change” or “transformative military occupation.”

²⁴⁶ See KENNEDY, *supra* note 168, at 162–63.

²⁴⁷ *Id.* at 163.

²⁴⁸ See *id.*

further away from the experience of political responsibility and accountability.”²⁴⁹

A. *Leaving Afghanistan Open on the Operating Table: The Indirect Harms of a Chaotic Withdrawal*

Although the American people appeared in favor of withdrawal from Afghanistan,²⁵⁰ there was little debate that the execution of the withdrawal, in and of itself, was mishandled.²⁵¹ On its face, one could even speak of a withdrawal “chaotic *per se*.”

At the root of this mishandling mainly, some point at the peace deal negotiated in Doha, Qatar back in 2017.²⁵² Author Lisa Curtis addresses three principal mistakes which, according to her, “sow[ed] seeds of surrender under [the] guise of peace.”²⁵³ First, the exclusion of the Afghan government from the peace talks;²⁵⁴ second, the abrupt removal of intelligence and air support from Afghan security forces;²⁵⁵ and last, the lack of concessions to be made on the Taliban’s end.²⁵⁶ All three combined made a “recipe for disaster:”²⁵⁷ the combination “of withdrawing US forces and military support at the same time we were making a political deal with the enemy of the

²⁴⁹ See *id.* at 163–64.

²⁵⁰ “54% of U.S. adults say the decision to withdraw troops from the country was the right one, while 42% say it was wrong, according to a Pew Research Center survey conducted Aug. 23–29.” Ted Van Green & Carroll Doherty, *Majority of U.S. Public Favors Afghanistan Troop Withdrawal; Biden Criticized for its Handling of Situation*, PEW RSCH. CTR. (Aug. 31, 2021), <https://www.pewresearch.org/fact-tank/2021/08/31/majority-of-u-s-public-favors-afghanistan-troop-withdrawal-biden-criticized-for-his-handling-of-situation/>.

²⁵¹ See *id.*; Ariel Edwards-Levy, *Most Americans Favor Afghanistan Withdrawal But Say It Was Poorly Handled*, CNN (Aug. 23, 2021), <https://www.cnn.com/2021/08/23/politics/polls-afghanistan-biden/index.html>.

²⁵² “[T]he poorly negotiated and weak US-Taliban Doha agreement, concluded during the Trump administration, sealed the fate of a US mission that cost America tremendous blood and treasure.” Curtis, *supra* note 113, at 1; Afzal, *supra* note 107.

²⁵³ Curtis, *supra* note 113, at 2.

²⁵⁴ *Id.* at 3.

²⁵⁵ See *id.* at 6; Afzal, *supra* note 107, at 4.

²⁵⁶ Curtis, *supra* note 113, at 3.

²⁵⁷ *Id.* at 5.

government meant we ended up handing the country to the Taliban like a birthday cake.”²⁵⁸

Curtis opines that a more reasonable alternative would have been for the U.S.-led coalition to negotiate its withdrawal “directly with the Ghani government, something Ghani had proposed in early 2019.”²⁵⁹ That way, the “United States would have avoided [undermining and] demoralizing its Afghan partners even as it pulled back its support to the Afghan security forces.”²⁶⁰

Economist Madiha Afzal echoes this perspective, as she believes the choice to withdraw, presented as “a dichotomous one between staying indefinitely or leaving [immediately]—misse[d] a third way.”²⁶¹ In her view, however, that third way “would have been to leave once an intra-Afghan peace deal . . . between the Taliban and the Ghani government . . . was reached.”²⁶² Although it is true that the “Doha deal contained provisions for the intra-Afghan government to be set in motion,” the issue is that it was not “*conditional* on an intra-Afghan peace deal.”²⁶³ Former secretary of state Henry Kissinger himself confirmed the fact that U.S. actions in Afghanistan “culminated in what amount[ed] to an *unconditional* American withdrawal by the Biden administration.”²⁶⁴

The text of the Doha agreement likewise indicates that human rights and civilian protection were not the central preoccupations of the negotiations.²⁶⁵ The complete absence of key words such as “people,” “civilians,” “women,” “children,” or “population” in the literal language of the text, exemplifies this fact.²⁶⁶ For example, the U.S. did not push for “Afghan women and girls to retain their basic rights to an education and to employment . . . rights now greatly

²⁵⁸ *Id.* at 6.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 5–6.

²⁶¹ Afzal, *supra* note 107, at 3.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Henry Kissinger, *The Future of American Power: Henry Kissinger on Why America Failed in Afghanistan*, THE ECONOMIST (Aug. 25, 2021), <https://www.economist.com/by-invitation/2021/08/25/henry-kissinger-on-why-america-failed-in-afghanistan> (emphasis added).

²⁶⁵ See generally Doha Agreement, *supra* note 8.

²⁶⁶ *Id.*

jeopardized, and for Afghanistan to have a functioning economy that would ensure Afghans don't starve to death . . . as is the danger presently."²⁶⁷

What could or should have been done during the Doha negotiations is beyond the scope of this Note: it would not only fall more within the realm of *jus post bellum* considerations, but also achieve little but speculation. What can be more clearly identified however, is that alternative avenues—such as the aforementioned establishments of power-sharing agreements—were clearly available to go about a more reasonable exit to this war.²⁶⁸ On this particular topic, there is a deafening silence: IHL does not establish a legal standard through which future endings occupations should be considered.

This is where the foreseeability, or “indirectness” of the harms come into the picture. As U.S. Presidents themselves admitted,²⁶⁹ a negligent withdrawal almost ensured the immediate takeover of the Taliban. This unequivocal takeover, in turn, guaranteed the destruction of the occupation's protections and nation-building efforts, which, in the case of Afghanistan, created positive societal “gains.”

Pushing the syllogism further, the rippling effect of this negligent withdrawal foreseeably deprived Afghans of their Article 27 rights. For example, in the span of six short months following the Taliban takeover, Afghan civilians and allies, in particular women, Afghan civilians have arguably “lost respect for their persons, their honor, and their family rights.”²⁷⁰ Children, especially young girls, are now being sold to live with strangers.²⁷¹ Women are getting publicly whipped and executed for protesting the all-male government,²⁷² and Afghan allies are being chased down for having “collaborated” with the enemy.²⁷³

²⁶⁷ Afzal, *supra* note 107, at 3.

²⁶⁸ *See supra* notes 251–66.

²⁶⁹ *Supra* note 117.

²⁷⁰ *See* Crevasse, *supra* note 144; GC IV, *supra* note 156, at art. 27.

²⁷¹ *See* The Associated Press NPR, *supra* note 146.

²⁷² Masoud Popalzai et al., *Taliban Fighters Use Whips Against Women Protesting the All-Male Interim Government*, CNN WORLD (Sep. 9, 2021), <https://www.cnn.com/2021/09/08/asia/afghanistan-women-taliban-government-intl/index.html>.

²⁷³ *See* The Associated Press U.N., *supra* note 142.

Another example: the U.S. could have foreseen that exclusive negotiations with the Taliban would lead to the freezing of Afghanistan's funding from the international community²⁷⁴—funding which the country is heavily dependent on²⁷⁵—and likely trigger catastrophic issues such as the food insecurity currently experienced.²⁷⁶ In that respect, this greatly diminishes Article 89's warranty that legally protected persons must have access to “sufficient food [and] water”²⁷⁷

The list of indirectly flouted Articles is not exhaustive—but the great importance that IHL and the Fourth Geneva Convention in particular give to the protection of women, as per the last sentence of Article 27,²⁷⁸ or to children's access to an education as written in Article 50²⁷⁹—leads to reflect whether IHL should implement an additional, minimum threshold of responsibility when occupying powers have the upper hand in negotiating exits.

This Note is of the view that this responsibility should be greatly accentuated when occupations possess a nation-building purpose, for the simple reason that civilians are forced to rely on an entirely new status quo. Indeed, once the nation-building enterprise ends, (and in most cases, fails)—this not only means that internationally protected civilians lose the rights and conditions that occupiers have positively undertaken to set up for them, but that they will most likely be the first victims once the formally occupied state returns to its “original condition.” In the case of Afghanistan, this meant the foreseeably immediate return of an Anti-Western, retaliation-fueled Taliban group.

The philosophy of Clausewitz—that it is “imperative . . . not to take the first step without considering the last”²⁸⁰ remains incredibly insightful to support this argument. The potential logic on which IHL may rely to better address nation-building-driven occupations

²⁷⁴ See The Associated Press NPR, *supra* note 146.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ GC IV, at art. 89.

²⁷⁸ GC IV, at art. 27.

²⁷⁹ GC IV, at art. 50.

²⁸⁰ Robert Callum, *War Is a Continuation of Policy by Other Means: Clausewitzian Theory in the Persian Gulf War*, 17 DEF. & SEC. ANALYSIS 59, 59 (2001).

can be encapsulated by a conceptually useful analogy: one of surgical practice—or rather, malpractice. In a scenario where a surgical oncologist with years of experience and substantial resources is tasked with removing a tumor—it is safe to assume that before doing so, they will have at least thought about three important steps. First, how to cut the body open; second, how to address the tumor; and third, how to properly close the incision. From a policy perspective, a surgeon should not get away with abandoning an operation or leaving a patient open on the operating table without ensuring the proper closing of the wound.

This logic is one that American society has adhered to and embedded in its own laws.²⁸¹ The tort concept of “undertaking,” reflects these fundamental policy considerations.²⁸² When one undertakes to “provide services” designed to reduce the risk of harm to foreseeable plaintiffs, the law “burdens” them with the responsibility of behaving in a reasonable manner.²⁸³ In other words, if one undertakes an action, it *must* undertake it reasonably—or not undertake it at all.

The laws of war should work similarly. The Fourth Geneva Convention in particular, established a minimum standard of acceptable treatment that applies even when arguably no other law does, thereby “shining the light of law, however dim, into the darkness of war.”²⁸⁴ In that regard, “[t]he Conventions [put in place] a floor below which the treatment of individuals may not fall”²⁸⁵ By establishing duties that occupying powers have toward the population during occupation,²⁸⁶ the Convention sets up the “procedure” to follow. This is exemplified, in relevant parts, in Articles 27, 32, 50, 89, and succinctly summarized in Common Article 3. Therefore, if a High Contracting State to the Geneva Conventions undertakes to occupy a foreign country, encourages the modification of the country’s entire regime through nation-building, but abruptly ends such enter-

²⁸¹ See generally KENNEDY S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW (Robert C. Clark et al. eds., 5th ed. 2017).

²⁸² See *id.* at 266–67.

²⁸³ *Id.* at 71–72; e.g. *Farwell v. Keaton*, 215 N.W.2d 753 (1974).

²⁸⁴ *Jinks*, *supra* note 221, at 173.

²⁸⁵ *Id.* at 277.

²⁸⁶ See *id.*

prise without reasonably guaranteeing the protected civilians' minimum safety, such ending should not be considered a well-completed occupation. Under this rationale, the U.S.-led coalition left Afghanistan open on the operating table, unchecked by IHL.

B. *Imposing A Duty of Reasonable Care on Nation-Building Driven Occupations under IHL*

About fifteen years ago, author Adam Roberts discussed the legitimacy and validity of the nation-building enterprise under treaty-based international law relating to occupations.²⁸⁷ He concluded that “any expansion of the purposes of occupations beyond the narrow confines of existing occupation law could in principle be addressed by either of two legal approaches.”²⁸⁸

The first approach would consist of “secur[ing] a variation in the application of the law by obtaining resolution[s] from the UN Security Council (or other major international body) setting out the goals of the occupation.”²⁸⁹ Said authorization would perform an important function: mainly, it would “stress[] the application of human rights law as well as humanitarian law”²⁹⁰ all throughout the occupation. This, in turn, would give international law important elements of weight and flexibility, as it would timely address the often rapid and unique developments of occupations.²⁹¹

The second approach “would be to attempt to secure a formal modification of the Hague Regulations and the Fourth Geneva Convention to make allowance for transformative occupations”²⁹² Yet, Roberts argues, that “[t]he case for attempting to devise new

²⁸⁷ See Roberts 1, *supra* note 82, at 570 (“Within the existing framework of international law, is it legitimate for an occupying power, in the name of creating the conditions for a more democratic and peaceful state, to introduce fundamental changes in the constitutional, social, economic, and legal order within an occupied territory?”).

²⁸⁸ *Id.* at 622.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

law in this way is weak. The heart of occupation law remains a “sensible and essentially conservationist set of rules to cover a type of emergency situation that frequently arises in war.”²⁹³

Imposing a duty of reasonable care on nation-building driven occupations, however, will most likely require a mixing of these two approaches. In line with author Kennedy’s view: “[j]ust because ‘it can be troubling to imagine politicians and military professionals thinking strategically about the laws [of] war,’”²⁹⁴ does not mean that a shift to a strategic legal vernacular should not occur. In other words, IHL has a strong interest in treating strategy, with strategy.

This “additional duty” would mainly be ad hoc in nature, and contingent upon four, rather narrow conditions. The first condition would necessitate occupation law to apply to the “victorious” belligerent actively and positively. The second condition would identify nation-building as the political motivation behind the belligerent’s actions. The third condition would formally recognize that the victorious belligerent has a *de facto* upper hand in negotiating the ending of the war. Finally, the last consideration would require an objectively high degree of certainty that an abrupt withdrawal would cause an imminent threat to the legally protected civilians.

Under this ad hoc, condition-dependent mechanism, the way in which an occupier would initiate and negotiate the ending of its occupation would become an integral part of the occupation process, and therefore fall under the umbrella of the Geneva Conventions’ obligations. Precisely, just because the legally protected person of a formally occupied territory gets disproportionately harmed *after* the occupation is over, does not mean that the former occupying power did not have a duty to ensure minimal protection of civilians *before* it left. In fact, the manner in which a state withdraws from another state would be considered an action that occurs, *de facto*, during occupation. Because the ultimate decision to withdraw takes place while the occupant is still “in,” it logically follows that withdrawal negotiations will be just as much subject to IHL as any other kind of more direct or wanton military behavior during occupation.

In the same manner that medical malpractice covers the reasonable completions of surgical procedures, IHL would apply to the

²⁹³ *Id.*

²⁹⁴ See KENNEDY, *supra* note 168, at 108.

reasonable endings of occupations. Hypothetically, therefore, this mechanism would have forced the U.S.-led coalition to push for the explicit inclusion of minimum rights into the Doha Agreement, or for greater negotiations that the departure be conditional upon the support and acknowledgment of the Afghan government.

The establishment of such mechanism will be an incredibly complex calculation, one that Roberts himself would be wary of.²⁹⁵ After all, “[m]ilitary occupation remains a contentious issue on which differences in perspective and opinion, including on the extent to which transformative goals are legitimate, will inevitably emerge.”²⁹⁶ Even with major international bodies, such as the UN Security Council, potentially at the center of peace negotiations, the questions of morality and political strategy will remain heavily present.

Yet, this proves the point that IHL must “get better at operating in a complex world of legal pluralism, of multiple perspectives on the validity, persuasiveness, and strategic usefulness of legal norms and institutional competence.”²⁹⁷ The international legal world of warfare should not be scared away by underlying political strategies and ambitions, for it is the very tool that enables them.²⁹⁸

CONCLUSION

In the forbidding mountains and dry deserts of Afghanistan, IHL may be perceived as a mirage; a utopian means to address civilian protection during armed conflicts. While turning to the Fourth Geneva Convention to find solutions may seem hopeless at first, one must not forget that IHL has helped saved countless lives since its creation.²⁹⁹ The plethora of legal lacunas and vacuums that this incredibly stimulating field of law possesses does not mean the international legal community should stop scrutinizing what drafters may

²⁹⁵ See Roberts 1, *supra* note 82, at 570.

²⁹⁶ *Id.*

²⁹⁷ KENNEDY, *supra* note 168, at 75.

²⁹⁸ *Id.* at 172.

²⁹⁹ Vincent Bernard & Anne Quintin, *Governing Armed Conflicts, The ICRC between Hierarchy and Networks*, in GLOBAL GOVERNANCE IN A WORLD OF CHANGE 273 (Michael N. Barbett et al. eds., 2021).

have potentially envisioned on the matter or finding windows of opportunity to make it better.

In order to do so, international law must not be divorced from reality. If states are to engage in nation-building, whether overtly or under the cover of puppet governments, they should do so responsibly and ensure that minimum regional stability will prevail following their departure to avoid the unnecessary suffering of internationally protected civilians. This is not to say that occupiers should be able to predict the future, or that nations be incentivized to occupy, quite the contrary. Instead, reasonable ending duties should burden them with the responsibility of considering the last step even before undertaking the first, and ultimately act as a deterrent. Accordingly, the Doha Agreement should not have embodied this minimum standard of responsibility.

The critical issue moving forward, as author Curtis puts it, “is the way in which the [United States] engages with a Taliban-controlled Afghanistan.”³⁰⁰ Such “engagement should be based on a commitment to the principles of human dignity” because this is what IHL tries to incarnate. To recognize the need for better flexibility and adaptability is, in a way, a step toward ameliorating the laws of armed conflicts, and reducing the velocity of humanitarian illegality. Perhaps one day, it may even prevent desperate civilians from plunging to their death after feeling compelled to hang onto the parts of a military plane that symbolized the expectation of a better future.

³⁰⁰ See Curtis, *supra* note 113, at 1.