This Article explores the role of rule of law in redressing crimes and human rights abuses committed against the women of Afghanistan. Mainstream discourse approaches the situation binarily, obliging women to choose between international and often distant human rights, on the one hand, or proximate cultural/religious norms, on the other, in order to adjudicate gender crimes. This can lead either to externalized justice or, in the case of the implementation of Afghan local law, to renewed victimization of women in the name of redressing abuses suffered by other women. Local law in Afghanistan is reflected in codes such as the Pashtunwali. The Pashtunwali consists of a blend of custom and practice that emerges from a context of embedded conflict and is filtered through an Islamist lens. The Pashtunwali propounds a restorative approach to human rights abuse in which the abuse is rectified when the family of the abuser transfers money, goods, animals or, preferentially, young girls or women to the family of the abused. Drawing from recent literature on law and culture, this Article posits that custom and culture in Afghanistan as operationalized through the Pashtunwali are politically contingent (and at the moment defined by patriarchal elites) instead of statically or immutably oppressive to women. If thoughtfully constructed, transitional justice institutions can play an important collective role that transcends the adjudication of individual guilt or innocence. They can pluralize the number of domestic actors that contribute to the definition of customary and cultural norms. This implies that transitional criminal interventions could play a democratizing role insofar as they could advance claims by all members of local communities to a right to involve themselves in the formulation of customary law. In the end, this Article links transitional criminal justice to the innovative conception of freedom within culture, instead of freedom from culture.
I. Introduction

The Taliban governed Afghanistan from 1996 until its ouster by international armed intervention in November 2001. [FN1] The Taliban was infamous for its brutality, extremism, and misogyny. Although many Afghan governments have instilled fear among the Afghan population, the Taliban did so in a particularly poignant fashion.

The optimism that immediately followed the demise of the Taliban has dissipated over time. Afghanistan remains an extremely violent and dangerous place. [FN2] The fact that a climate of impunity reigns throughout Afghanistan regarding the violence of the past encourages violence in the present. In this vein, scant progress has been made in holding individual perpetrators of war crimes and crimes against humanity, including gender crimes, accountable for their actions. [FN3] Nor have there been effective challenges to many of the structural and systemic factors that conspired to create a framework of collective gender apartheid. The reality of life for Afghan women remains one of segregation and struggle within a climate of fear. [FN4]

*352 This Article challenges this stasis and its resultant impunity. There is, after all, a role for rule of law in redressing the longstanding abuses suffered by the women of Afghanistan. However, as I have argued elsewhere, the justice emanating from foreign or international legal interventions often becomes externalized from the societies that this justice is intended to assist. [FN5] One way to mitigate this externalization is to embed international norms within local contexts, perhaps through the use of ordinary local justice mechanisms. In the case of Afghanistan, however, the invocation of ordinary local law--whether substantive or procedural--to punish perpetrators of gender crimes may prompt troubling outcomes. In Afghanistan, local justice involves a fusion of Islamic and customary law that responds to and reflects endemic cultures of war. In the majority Pashtun community of Afghanistan, this customary law is called the Pashtunwali. The Pashtunwali resonates among certain local constituencies as legitimate local law. However, the punishments and reparations it imposes on systematic human rights abusers themselves amount to human rights abuses, particularly against women. For example, conveying women as chattel among clans constitutes a preferred form of reparation under the Pashtunwali for a broad array of human rights violations. For those women who are so conveyed, the Pashtunwali creates a situation of sexual terror in the name of pursuing accountability for prior wrongs.

Part II of this Article discusses gender crimes in Afghanistan and the steps that have been taken under the new regime led by President Hamid Karzai to provide a legal framework to redress these crimes and prospectively empower Afghanistan's women. For the most part, these steps have been timid. Moreover, the weak authority of the Karzai regime over most of Afghanistan undermines those steps that actually have been taken.

*353 Part III examines the role that international criminal law can play in the pursuit of justice. Here, I argue that it is when international legal intercessions resonate with lives lived locally that their potential to actualize social change is maximized.

Part IV suggests that the integration of international criminal law with the local is particularly important in the Afghan context. This is so for a number of reasons. These include the understandable skepticism with which Afghans perceive international interventions and, collaterally, the reality that Islamic and customary modalities for justice provided important sources for continuity and predictability among Afghans, or at least certain groups of Afghans, all of whom have been successively subject to the failed nature of the Afghan state. An integrated approach, at least in theory, can allow deterritorialized international law to meet Islamic law and local custom and encourage all three to commingle.

Part V documents the Pashtunwali, its provisions regarding accountability for human rights abuses as ordinary crimes, and the extent to which its content embeds the subjugation of women. This gives rise to an impasse: At the present point in time,
the incorporation of the local [FN6] in the adjudication of mass violence in Afghanistan is itself a form of mass violence.

By way of conclusion, this Article suggests ways to reframe the dialog to circumvent this impasse. A helpful starting point is to recognize that religion and culture in Afghanistan are neither static nor immutable but, in fact, are politically contingent, and, as such, are informed by power structures. Present power structures are patriarchal, exclusionary, and totalitarian. One way to reframe the dialog is to generate change within local communities toward representative procedural access, including what Madhavi Sunder calls a right to culturally dissent. [FN7] Norms cascading from this generated change, in turn, could facilitate the input of all members of local communities in the construction of local law. International interventions that encourage such procedural openness could permit interested local constituencies to claim international norms within the *354 framework of customary and religious communities.

Afghanistan starkly presents dilemmas triggered by invoking the local in the adjudication of international crimes. Although the local may have more meaning among certain constituencies (in the case of Afghanistan, empowered patriarchal constituencies), it may further disempower and victimize other, more marginalized, constituencies. For these marginalized constituencies, such as the women of Afghanistan, the local may have limited meaning as a mechanism of justice and may in fact serve as a conduit for further violence. In the case of these constituencies, the international may well be a more meaningful mechanism for justice, notwithstanding--or perhaps because of--its distance from lives lived locally.

Ultimately, though, the choice should not be reduced to one of either the local or the international. International lawyers should not force choices on disempowered local constituencies in which they must elect between local culture or international rights. This leads to essentialist identity politics. Rather, international legal interventions could expand, and thereby pluralize, the number of community members with access to the process by which cultural norms are elaborated. These international legal interventions might thereby encourage cultural dissent and self-expression within normative communities such that human rights abusers could face modalities of justice that are meaningful to as many members of that community as possible. By presenting rights as part of culture, instead of alien to culture, transitional justice efforts could stimulate an innovative conception of freedom within culture, as opposed to freedom from culture.

II. Violence Against Afghan Women

Under the Taliban's regime of sexual apartheid, women were subject to gender crimes and sexual violence. [FN8] Examples include: abduction and sexual enslavement, [FN9] forced marriage to Taliban soldiers and foreign fighters, [FN10] selling and trafficking of girls and young women, [FN11] rape and murder during internal armed conflict, [FN12] *355 death by stoning for women convicted of adultery, [FN13] hanging of convicted female prostitutes, [FN14] and public lashing of unwed couples convicted of having sexual relations. [FN15] Women were obliged to travel with a male relative and to wear the burqa (chadari). [FN16] Violations of these obligations resulted in public beatings by militiamen. [FN17] Women were not allowed to work outside the home, except in strictly limited circumstances in the health care field and on humanitarian projects. Schools for girls older than eight years of age were closed. [FN18] Access to the dilapidated Afghan health care system was limited for women, resulting in an average life expectancy of forty-five years and extremely high rates of maternal mortality. [FN19] These examples are not discrete; in fact, they weave together cumulatively to define the lives of women in Afghanistan and to create an all-encompassing insecurity and fear of participating in public life.

To be sure, the Taliban institutionalized gender apartheid. That said, pervasive gender violence (and systemic gender discrimination) existed prior to the rise of the Taliban. Moreover, rape, forcible deportation, and abduction of women have been used as weapons of war by all parties to Afghanistan's internecine conflicts and as methods to persecute various minority ethnic or religious groups. [FN20] The international community chose not to intercede in Afghanistan while many of these tragic events, including the most extreme practices of sexual apartheid, took place under the Taliban, [FN21] *356

although it did intervene after Western interests were threatened by the Taliban's support of al-Qaeda. This leads Ratna Kapur to view as ironic the political use for Western audiences of the putative liberation of the Afghan woman as a justification for the armed intervention in Afghanistan. \[FN22\] In fact, some progressive women's groups in Afghanistan opposed the use of force on the grounds that attacking Afghanistan would jeopardize the well-being of Afghan women. \[FN23\] These groups continue to point out that U.S. failure meaningfully to support pluralistic political transition in Afghanistan has blighted opportunities for women's human rights and has in fact reinstated patriarchy. \[FN24\]

Moreover, the plight of Afghan women is indissoluble from the general plight of the Afghan population and the pervasiveness of human rights abuses throughout Afghanistan. To varying extents, almost every political, ethnic, or religious group in Afghanistan has been implicated in violence, both as victim and perpetrator. As such, women were and remain subject to abuse not only because of gender but also because of ethnicity, politics, social class, and religion. Justice for the women of Afghanistan involves redressing the criminality to which they were subject as women as well as the criminality to which they were subject owing to other manifestations of their identity. To this end, accountability for gender crimes is a crucial component of the process of overall accountability for human rights abuses in Afghanistan.

General abuses attributed to the Taliban include: \[FN25\] forced deportation; massacres; torture; extrajudicial executions; support of international terrorism; disappearances of prisoners; religious and ethnic persecution of the Hazara group (who are Shiite Muslims as \*357 opposed to the majority Sunni Muslims); \[FN26\] politicide; and destruction of cultural property. \[FN27\] Many of these actions constitute gross human rights offenses, namely serious violations of international humanitarian law and international human rights law that, in turn, may qualify as crimes under international law and for which there may be a duty to investigate, prosecute, and punish.

Although the Taliban was particularly zealous in its abusiveness, it certainly was not unique. Rights abuses have occurred throughout years of internecine conflict in Afghanistan. For example, "[t]he first communist regime of 1977-1979, the Khaqas led by Taraki and then Amin, killed 50,000 to 100,000 in purges of potential opponents." \[FN28\] Additionally, many Taliban became victims of human rights abuses and war crimes, in particular during the Taliban's ouster from power in the fall of 2001. \[FN29\]

Moreover, the criminalization of breaches of sharply circumscribed gender roles and widespread physical attacks on those who breach these roles persists in post-Taliban Afghanistan. So, too, do systematic crimes against women, such as sexual assault and rape, which were used as methods to exact reprisals against the Taliban and the majority Pashtun ethnic group during the 2001 armed conflict. \[FN30\] Human Rights Watch reported that Northern Alliance forces sexually assaulted, abducted, and forcibly married many women. \[FN31\] Many Northern Alliance leaders currently ensconced in political office and \*358 directly supported by U.S. forces in the interests of U.S. national security, such as Abdul Rashid Dostum and Ismail Khan, have orchestrated systematic rape and war crimes. \[FN32\] Reports of torture, arbitrary justice, persecuted minorities, and internal feuds abound. \[FN33\]

When "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack," \[FN34\] sexual violence could amount to crimes against humanity. To be sure, sexual violence is not exclusively directed against women. Men and boys can also be victims of sexual violence and sexual torture, as is the case in Afghanistan. \[FN35\] However, women are the primary victims of sexual violence. In Afghanistan, this violence enables misogyny to persist as official state policy. Ismail Khan, the Governor of Herat, has forced women to undergo "chastity checks" \[FN36\] and has forbidden them to shake the hands of foreign men. \[FN37\]

The general lawlessness and insecurity that today characterize life in Afghanistan make women all the more vulnerable to
sexual violence. Schools that were reopened for girls following the ouster of the Taliban have been bombed, students threatened, and teachers attacked. [FN38] Afghanistan's widespread poverty has increased the practice of the sale by parents of their young daughters, putatively as *359 brides but in practice as prostitutes, thereby contributing to global patterns of sex trafficking. [FN39] Although selling girls is prohibited by Islamic law, local custom is more ambiguous, so much so that one Afghan jurist opines that "nobody would ever be charged for selling a daughter." [FN40]

Many Afghans support bringing Taliban officials in particular, and human rights abusers in general, to justice for at least some of these atrocities. In fact, general discussion of retrospective trials formed part of the reconstruction compromise agreed to by all of Afghanistan's ethnic groups in negotiations held in Bonn, Germany that led to the transitional Bonn Agreement of December 5, 2001. This was followed by the formation of the Afghan Interim Administration, chaired by Hamid Karzai, who was subsequently elected President of Afghanistan by a tribal council (loya jirga) in June 2002. Free and fair elections are to be held no later than two years from the convening of this loya jirga. The Bonn Agreement also established an Afghan Human Rights Commission. However, this entity has received insufficient support and its staff is regularly threatened with violence which, in turn, inhibits its purely investigative and declaratory functions. [FN41]

In the case of gender crimes, the new Karzai government has provided a formal legal framework to protect victims and prospectively empower Afghanistan's women. The Bonn Agreement stated that parts of the 1964 Constitution of Afghanistan would apply on an interim basis until the adoption of a new constitution, including those parts prohibiting discrimination based on gender. [FN42] Pursuant to the Bonn Agreement, existing laws and regulations of Afghanistan remain in effect to the extent that they are not inconsistent with the provisions of the 1964 Afghan Constitution--subject to some limitations--and the international legal obligations, or treaties, to *360 which Afghanistan is a party. [FN43] The transition process authorized by the Bonn Agreement, including the rebuilding of the legal system, is to be "gender-sensitive." [FN44] In fact, the U.N. has called for full participation of women in political decision-making. [FN45]

On the ground, however, the reality is quite different. The formal legal system established under the provisions of the 1964 Constitution has never been the norm governing the lives of the majority of the population. Instead, the informal legal system, composed of an amalgam of Islamic law and customary law, provides order and administers punishment. In fact, "past experience would suggest that any attempt to implement and enforce secular statutory laws which depart from customary and/or particular interpretations of Islamic law is liable to be met with protests and perhaps even civil unrest." [FN46]

Tangible steps to address gender crimes and institutionalized gender discrimination have been timid overall. The Karzai regime has little authority over most of Afghanistan. Those who exercise authority, such as local warlords, tend to be ultra-conservative. Religious fundamentalism is on the rise. Many official gender restrictions have returned since the Bonn Agreement. Certain warlords who were (and remain) "allies of the U.S.-led coalition in the war against the Taliban . . . used their connections to the United States to seize power but then embraced some of the Taliban's most odious restrictions," including curtailing educational opportunities for women, forcing chastity examinations, imprisoning women for refusing to marry or for leaving a marriage, requiring women to wear the burqa, and blocking redress in cases of state-orchestrated sexual assault. [FN47] Lack of education and unavailability of employment remain *361 significant impediments for the reintegration of women into public life. [FN48] The Vice and Virtue Patrol, whose excesses made them infamous under the Taliban's most odious restrictions," including curtailing educational opportunities for women, forcing chastity examinations, imprisoning women for refusing to marry or for leaving a marriage, requiring women to wear the burqa, and blocking redress in cases of state-orchestrated sexual assault. [FN47] Lack of education and unavailability of employment remain *361 significant impediments for the reintegration of women into public life. [FN48] The Vice and Virtue Patrol, whose excesses made them infamous under the Taliban, effectively continue to operate under the new Ministry of Justice and under the aegis of the Department of Islamic Instruction. [FN49] Sexual policing reminiscent of the Taliban era continues in many areas of the country controlled by the Northern Alliance. [FN50] Afghan women have been intimidated from participating in public life, including at the ministerial level. [FN51] All in all, institutionalized misogyny still pervades Afghanistan.
III. Law, Values, and Transition

Prosecuting and punishing human rights abusers can promote retributive (deontological), deterrent (consequentialist), reconstructive, and expressive goals. According to the retributivist, certain systematic human rights abuses—including genocide, crimes against humanity, and war crimes—constitute radical evil. Perpetrators of radical evil will receive their just deserts when their wrongdoings are prosecuted as extraordinary crimes as opposed to ordinary crimes under ordinary municipal criminal statutes. Punishment is to be visited upon offenders regardless of the effects of that punishment. There also is an important deterrent component to punishment, insofar as accountability for the crimes of the past may deter the commission of crimes in the future. In principle, fear of punishment mitigates recidivism. Such deterrence may be specific to individual abusers and may also be general. Societies laced with accountability may move towards democratization, peace, and stability. These outcomes are key structural factors that encourage what Mark Osiel would call the "thinking citizen" to flourish. [FN52] Osiel *362 posits that the "thinking citizen" represents the best guard against future atrocity. [FN53] In addition, the process of justice may prompt cathartic vindication for survivors of human rights abuses, some sense of solace for the loved ones of those murdered, rehabilitation of certain offenders, and the possibility of individual forgiveness. In this sense, accountability can serve reconstructive goals. [FN54] Moreover, law sends a message, and expressive theories of law tell us that this signaling function is critical to the development of social norms. Expressive theories of law "look not so much at whether a law deters or whether a law punishes, but at the message we get from a law." [FN55] This expressive function also can help to develop an authenticated historical record of the violence.

Each of these goals is important to Afghanistan. Afghanistan's history of localized tribal and religious justice, its lack of centralized institutions, [FN56] and its understandable hostility to outsiders problematize the imposition of any state-imposed or internationally-driven judicial remedies. There is skepticism among many Afghans toward international organizations, foreign actors, [FN57] and national state institutions. In terms of national institutions, there is near complete distrust: "The Afghan state court system has never been seen as fair and impartial, but rather subject to concerns about the social status of the people involved, willing to take bribes, or simply ignoring the questions of legal process entirely." [FN58] Yet, paradoxically, attaining the conceptual goals connected to prosecuting and punishing offenders is pressing since Afghanistan's progress toward a post-conflict society is at best halting and may in fact be stagnant. Afghanistan is increasingly splintered into fiefdoms run by local strongmen. [FN59] "[I]nternal security has collapsed to the point where humanitarian aid no longer reaches many regions." [FN60] *363 Although, on the one hand, it may be too early for transitional justice efforts in Afghanistan insofar as the transition from war to peace has not yet occurred, on the other hand, justice initiatives might facilitate the politics of transition and unification. Moreover, at some point, saying it is too early for justice simply becomes an excuse for inertia. Initiating such efforts is also important to ensure that the focus of reconstruction efforts does not shift entirely to Iraq.

However, there is a need for modesty in assessing the transformative potential of law. Depending on the circumstances, law can only achieve fully some of these goals, only part of them, or none of them. Much depends on the legitimacy [FN61] with which rule of law intercessions are perceived by local populations. In many ways, legitimacy is locally assessed. Rama Mani puts it well: "If ideas and institutions about as fundamental and personal a value as justice are imposed from the outside without an internal resonance, they may flounder, notwithstanding their assertions of universality." [FN62]

Accordingly, sensitivity to the local contours the effectiveness of international justice initiatives. Attentiveness to local context can encourage deontological denunciation to be meaningful. This attentiveness also can facilitate deterrence, insofar as deterrence is maximized when undertaken in a manner that resonates in local cultures--the environments in which law matters most and in which the actual abuses take place. Furthermore, Diane Amann clearly explains the contingency of the expressive value with her observation that "[t]he message understood, rather than the message intended, is critical." [FN63] In this sense, I argue that taking local community standards into account pertains to each of the retributive, deterrent,
expressive, and reconstructive goals of punishment. When law is supported by community consensus, it will serve as a more effective conduit for the condemnation of that community as well as the expressiveness of the legal function. [FN64] As suggested by Dan Kahan, criminal law may play some role in the development of social norms. [FN65] But, in order to do so even modestly, it must be *364 communicated in language that resonates among local populations and in a manner that is familiar. Otherwise, its expressive meaning will be highly externalized.

This leads to a broader concern regarding international criminal law, which runs the risk of offering a deterritorialized one-size-fits-all approach to the judicialization of mass atrocity. Instead, consideration ought to be given to contextual, humanistic, and individuated responses. This means that international legal standards, which often are perceived as derivative of Western rights-discourse, must be translated trans-culturally. This argument does not call for the nihilistic absence of cross-cultural notions of good and evil or right and wrong. Rather, it draws considerable inspiration from the work of Radhika Coomaraswamy, the United Nations Special Rapporteur on Violence Against Women, who concludes: [P]eople should recognize that internationally accepted standards and norms do exist, in defiance of post-modernist tendencies. Being sensitive to cultural relativism cannot imply putting hard-won battles on human rights up for grabs. . . . What must be seen as negotiable are the strategies of enforcement and implementation . . . . [FN66] This contextual approach is often a challenge for international lawyers, who may have a tendency to romanticize the process of law as detached from culture and society, and Western human rights activists, some of whom may view their work as akin to messianic salvation. Moreover, a critical perspective on criminal trials in the wake of mass violence recognizes that the individualization of guilt central to the criminal process may obfuscate the role of collective responsibility, complicity of foreign states, power politics, artful manipulation of religion, and patriarchy in the propagation of violence.

To be sure, defining the content of the local is by no means self-evident. In Afghanistan, the content of the local is determined and controlled by violence, force, and war. In order for invocations of the local to carry greater normative legitimacy, the process by which the local is defined needs to be opened up and internally pluralized. Victims of exclusionary practices within culture may prefer reforming culture rather than abandoning it. As a result, *365 transitional justice cannot be pursued in the absence of democratization as the two are mutually reinforcing. The point is not to wait until democracy arrives and then seek justice, but rather to pursue justice in order to induce democratic change and individual access to group cultural definitions.

IV. Islamic Legal Systems, Human Rights, and International Criminal Law

Coomaraswamy writes that "[i]dentity is often composite, made up of multiple selves, often contesting, contradicting, and transforming the other." [FN67] For the overwhelming majority of Afghans, Islam is a central component of identity. For many among this majority, Islamic laws [FN68] form central elements of this Islamic identity. [FN69] Of course, the content of "Islam" is disputed and diffuse. For example, many civil society organizations working within Afghanistan and under the rubric of Islam view Taliban policies undertaken in the name of Islam, such as those that pertain to the status of women, as unfounded mutations of Islamic law. [FN70]

The Chair of the newly created Judicial Commission of Afghanistan, Bahauddin Baha, has affirmed that Afghanistan's legal system will be based on traditional Islamic law (shari'a). [FN71] Baha *366 states that Afghanistan is "an Islamic country" that should "implement Islamic law." [FN72] There is reason to believe that the conception of shari'a envisioned by Baha and the Commission bears some parallels, at least in the area of the treatment of gender, with the version of shari'a in force under the Taliban. To be sure, Baha calls the Taliban's harsh interpretation of shari'a something "they made up themselves," [FN73] but it is unclear whether the Commission's understanding of Islamic law differs from that of the Taliban as a matter of degree or as a matter of kind. [FN74] The reality is that the Afghan justice system "is dominated by religious conservatives who have more in common with the Taliban than with Karzai." [FN75] The Commission is overwhelmingly composed of Islamic
clerics educated solely in religious schools (madrassas). Furthermore, among those members of the Afghanistan Supreme Court whose educational qualifications are publicly known there is not a single individual with a secular law degree.

Assuredly, the Taliban is largely a product of a culture of war and a legacy of violence and, as a result, its edicts emerged more proximately from this culture of war than the Islamic religion in which they were cloaked. "Taliban rule, in one sense, was the forced application of conservative Pashtun village life in Afghanistan's cities." Islamic law in post-Taliban Afghanistan may continue to be applied on the ground through these norms of village life, whether Pashtun or other, and, given the ongoing fighting prevalent throughout Afghanistan, through this prism of war. Many of these local norms are deeply misogynistic. In fact, the new Chief Justice of Afghanistan, Fazel Hadi Shinwari, has issued a number of rulings based upon a merger of shari'a with local and tribal law that are deeply troubling from a human rights perspective.

Shari'a laws are set forth in and formulaically originate from a number of important sources. These include primary sources such as the Qur'an (the divine revelation) and the hadith, also called the sunna, which consists of the utterances and actions of the Prophet Muhammed. The main secondary sources of Islamic law are Ijma' (consensus) and Qiyas (analogy), both of which derive from the ijtihad, a contested process of deductive reasoning by which Qur'an or sunna are applied to new concerns, and Istishab (legal presumption).

The substantive differences between the content and provenance of Islamic law and international human rights law are complex. Any limited discussion does a disservice to these complexities and runs the risk of essentialism which, as wisely pointed out by Professor El Fadl, opens the door to "deprecating [the] subject into a caricature." However, even cursory discussion can be of some guidance, although it is clear that this discussion constitutes the equivalent of painting with a broad brush and focuses on what religious leaders say, as opposed to how adherents to religion aspire to live their lives in faith. It is also important not to overstate the differences, but to rejoice in the fact that many tenets of international human rights and humanitarian law are central to Islamic law. As such, although there are important differences between the two, international human rights law and Islam are not incommensurable. Moreover, democracy, human rights, and Islam are not mutually exclusive. El Fadl observes that Islam is compatible with democracy, stating that many Muslims aspire for democracy and would do so much more affirmatively if they did not live under threat of persecution, imprisonment, and torture.

However, there are important differences pertaining to the treatment of gender. The difficult question is whether adhering to particular Islamic conceptions of the good can lead to prosecution and punishment through international criminal process for certain infringements of international human rights law. Although violence such as rape and sexual terror practiced by the Taliban fall outside the sphere of legitimization through Islamic law, certain aspects of the gender apartheid prevalent in Afghanistan necessitate more careful attention. Moreover, as shall be discussed in Part V, local practices of offering women into marriage and sexual slavery in order to repay blood debts and atone for human rights abuses could, based on the jurisprudence of international tribunals, be found to infringe international criminal law and hence trigger punishment.

"In the West, natural law doctrine eventually gave way to positivism, where law properly speaking is . . . determined by the legislature."

According to one observer, "Islam does not have a tradition of complex theorizing about the international system," largely because the international system formally consists of the umma (community of Islamic believers) and others. This is a somewhat essentialized view, insofar as certain traditional Islamic norms do in fact govern intercommunal relations. These norms stem from a conceptual world divided in two halves: dar al-Islam (the abode of Islam) and dar al-harb (the non-Islamic world, an abode of war). Rules and practices emerged to mediate the relationships between the dar al-Islam and coexisting civilizations in the dar al-harb. These rules, norms, and practices are called the siyar. In fact, "[s]iyar is the branch of the Shari'a . . . which best represents the international law of Islam." As the "international law of Islam merely anticipated the creation of a universal state bound by the Shari'a and governed by a single ruler," the siyar theoretically was designed to be a temporary, transitional institution. The siyar is fairly limited in scope and its main focus is the regulation of the use of force.

The enforcement and authority of the siyar derive from its divine origins. This is unlike public international law, whose enforcement and authority largely derive from the consent of states. The siyar accords little importance to individual rights. In fact, it "generated a scheme in which the value of human life was always subordinate to the common good of Muslim society." Whereas public international law is built around institutions--most notably the state and intergovernmental entities--Islamic international law focuses on the umma. To this end, public international law's focus on state sovereignty as a lynch-pin of international legal legitimacy stands outside the traditional conception of Islamic law.

To be sure, "[m]odern Muslim states have rarely pushed Islamic theory in the international system." Muslim nation-states insist on their sovereignty. For example, Pakistan treated fellow Muslims fleeing famine, war, and repression in neighboring Afghanistan as foreign aliens, with limited legal rights, and capable of being expelled on the basis of the territorial integrity of Pakistan notwithstanding the conceptual absence of such territorial integrity within the umma. Other Muslim states have welcomed public international law concepts of territorial boundaries and the resolution of related disputes through international legal institutions applying public international law.

Notwithstanding the acceptance of public international law among Muslim state elites, Sohail Hashemi observes that "the ideal of a united Muslim world remains--however inchoate--a central aspect of the normative framework of Islamic activism." These activists point out that many of the Muslim nation-states that exist today were initially created by European colonial powers or were once the "fiefdoms of local elites anxious to use the modern state for their own benefit." Although these states eventually achieved some legitimacy, this legitimacy is not unchallenged. In fact, it is under siege, not in the least by influential religious and fundamentalist movements that refuse to accept formal divisions within the umma.

The sanctity of state sovereignty also has been subject to parallel challenges by human rights activists. These challenges prompt the "relative normativity" of international norms, in which the value of national sovereignty--although still central to international order--erodes once that sovereignty conflicts with protecting persons from massive human rights abuses. However, according primacy to the rights of individuals is by no means a value-neutral exercise. It is in fact quite judgmental. This was one of Prosper Weil's initial fears--namely that a privileged group would create a hierarchy, throwing out the purported equality of states and undermining "the inherent pluralism of international society." While universal human rights carry with them the appearance of neutrality and aculturality, such a characterization may be misleading. Some scholars perceive a Eurocentric bias in international law and human rights enforcement. Shelley Wright, for example, comments that "[a] major gap in many analyses of human rights is the lack of any deep or complex awareness of }
the historical context in which they developed." [FN107] This context is one of Eurocentrism, whose dominance is taken as axiomatic and neutral. [FN108] The universality of international law is closely connected to the colonial experience. This is what Wright labels "diffusionism," namely "the process by which Europeans claim for themselves the capacity to spread civilisation and the benefits of European rationalism and enlightenment to the non-European world sharply separated from Europe and defined as non-rational, unenlightened, uncivilised, and backwards." [FN109]

Another critique posits that international human rights are not a cultural phenomenon narrowly tied to the West, but rather a derivative culture linked to a deterritorialized group of elites from both the developed and developing world that operate in United Nations fora, diplomatic meetings, and the NGO community. According to this critique, posited by Sally Merry, this deterritorialized epistemic community has developed its own cultural norms, its own modalities for rule-making, and its own sense of moral certainty. [FN110]

Regardless of their source, human rights are often presented through meta-narratives of universality. [FN111] Yet, upon closer examination, this universality may mask what is essentially a cultural phenomenon. [FN112] After all, universal connotes something quite different than global. [FN113] Leti Volpp notes that "[t]hose with power appear to have no culture; those without power are culturally endowed." [FN114] Shelley Wright adds:

Thus, 'culture' is never a problem from a Euro-American perspective for itself as 'difference' always resides elsewhere. Euro-American perspectives do not see themselves as having any 'culture' in the sense of the local or particular. Rather they represent the universal through the repetition of the familiar, allowable through the dominating institutions set up under colonialism, and perpetuated through continuing inequalities of power. [FN115]

Wright perceptively observes that presumptions form part of the problem. She notes that many Euro-American commentators tend to dismiss "cultural relativism" or "difference" as annoyances and examine how they may be "contained or dealt with." [FN116] This tendency ensconces universal human rights as the rule and culture as derogating therefrom, instead of seeing rights themselves as the product of culture. "For human rights as they are currently defined in universalist terms cultural or other differences must always be a problem and will always result in discomfort and denial." [FN117] Differences that arise are perceived as infringements from the *373 universal. What then becomes impossible is "alterity," namely a relationship of equality and mutual respect between different "others." [FN118] In order for the international legal order to be perceived with legitimacy or credibility, some efforts toward alterity must be made. After all, "cultural diversity is not a problem but rather a necessary prerequisite for the survival of human beings as human." [FN119] One of the reasons such a diverse integration has been lacking is that, according to Rama Mani, there "is a troubling imbalance or 'injustice' in the study of justice" that derives from "the predominance of Western-generated theories and the absence of non-Western philosophical discourse." [FN120]

Hilary Charlesworth suggests an explanation for this absence of dissident discourse, stating that "[a]nalyses of the foundations and scope of international human rights law frequently lapse into heroic or mystical language: it is almost as if this branch of international law were both too valuable and too fragile to sustain critique." [FN121] In the end, though, immunizing this branch of law from critique may lead to a reification feared even by supporters of universalism. Karima Bennoune, for example, suggests that universalist approaches are "not inherently dogmatic, though they can be if . . . insensitive, un-self-conscious or triumphalist, and this is a distinction we must not lose sight of." [FN122]

Although it is impossible to generalize unassailably about what the Muslim world thinks about international human rights norms and the criminal punishment of those who defy those norms, it is possible to conclude that important and in many cases growing constituencies within the Muslim world do experience some dissonance between their lives and these norms. This dissonance emerges in part from tangible conceptual differences between Islamic and international legal norms, which, as discussed previously, can represent different ontologies for living, functioning, and conceptualizing the world. [FN123] These constituencies may balk at the *374 universalization of Western norms through the vehicle of international law.
Regardless of the precise etymology of that which presently constitutes international human rights law, the corpus of this law is perceived by many in the Muslim world as decidedly Western in flavor, yet brazenly imposed on all. Furthermore, even among Muslims observers who do not challenge the concept of the nation-state itself, dissonance is prompted by geopolitical tensions. In the past, Muslim states have criticized the "West for the way it used its universal human rights to judge and condemn others." [FN126] The imposition of universal and purportedly neutral human rights standards may be perceived as the political manifestation of Western hegemony. This imposition is layered upon the fact that Muslim nations historically have been excluded and currently are marginalized from the formulation of international law and institutions, although they remain the objects of this law and these institutions. This sense of exclusion is particularly poignant given that there are over one billion Muslims worldwide and that Muslims constitute a majority in over forty states. [FN127] Murden notes that, by the middle of the twenty-first century, Muslims will likely constitute over one-third of the world's population. [FN128] The end result is civilizational exclusion from the collective of humanity. In turn, this civilizational exclusion constitutes a human rights issue: Within the established array of human rights, is there not a right to participate meaningfully in the structures that create world order? [FN129]

In the end, the use of what might be perceived as "outsider" rights to vindicate oppression may not be the most effective manner to build social norms within afflicted states. This is so for four principal reasons, each related to the tension between outsider rights and insider lives. First, as pointed out by numerous scholars, *375 including Richard Falk, [FN130] Leti Volpp, [FN131] Upendra Baxi, [FN132] and others, [FN133] the "outsider" has committed abuses in the name of promoting rights. Second, the "outsider" may exhort rights for others, but not always for itself. [FN134] A third concern is that the "outsider" *376 generally favors civil and political rights over economic rights. [FN135] Although more recent international human rights treaties aim at integrating civil, political, economic, social and cultural rights, international crimes do not include serious breaches of economic and social rights. [FN136] Western concern with the oppressiveness of the burqa illustrates the gap between Western "rights-speak" and the realities of life in many developing nations. "The West has almost obsessively focused on the veil as a symbol of the Taliban's discriminatory treatment of women. To 'Westerners' the burqa is a 'kind of body bag for the living.'" [FN137] On the other hand, for most *377 Afghan women, "what they wear is the least of their worries." [FN138] Instead, they are primarily concerned with earning a living; access to food, housing, employment and education; the removal of landmines; the availability of health care; and surviving child-birth. [FN139] Yet, how many of these worries are conceived of affirmatively by the West in general-- and the United States in particular--as rights? Constructive change for women in Afghanistan "requires the reduction of poverty, increased opportunities for education and work, and, above all, recognition of the value of the work that these women already do." [FN140]

Moreover, Western understandings of the content of civil rights may not translate effectively elsewhere. Again, the burqa provides an insightful example. Immediately following the abdication of the Taliban, some of the warlords who took control of Afghanistan passed edicts that made the wearing of the burqa optional. But women certainly have not thrown it off en masse. [FN141] This suggests that what "to the outside world . . . was the most obvious and chilling symbol of the Taliban rule" has, within Afghanistan, a "meaning" that "is more complicated." [FN142] More disquieting is the fact that one major reason why women still wear the burqa is because it is simply too dangerous to go out in public without it. [FN143] Large groups of men, often with the support of local officials, roam the streets to terrorize and attack women not clad in the burqa. To a large extent, this climate of fear derives from the lack of public security which, in turn, can be traced to inadequate peace-keeping on the part of the United *378 States and NATO and their official support of abusive warlords. [FN144]

Last, "outsider" rights-speak may carry colonial connotations. [FN145] Assuredly, this proposition is hotly contested. For
example, Mary Ann Glendon argues that the 1948 Universal Declaration of Human Rights attracted the support of a wide range of cultures and beliefs, of large countries and small countries on all continents, and of broad elements of civil society. [FN146] Indeed, there was considerable support, but at that time most of Africa and much of Asia and the Pacific were under colonial rule. [FN147] There are other contrarian and nuanced responses to the empirical reality that many developing nations have signed onto human rights treaties. One response is that many states sign onto international human rights treaties because this is a good way for illegitimate governments to appear legitimate or ensure the continued receipt of foreign aid. After all, there is a tangible difference between treaty ratification and treaty compliance. [FN148] Scholars voice broader and less cynical responses as well. In this vein, Falk argues that these treaties "evolved out of Western initiatives and priorities, with only nominal non-Western participation." [FN149] Bahar comments that "while stripped of a voice in the making of allegedly universal international law, Asian states unwillingly remained its objects." [FN150] Simon Murden points out that the response of Muslim states was one of "limited accommodation" to the Universal Declaration, which "was accepted only in part by many Muslim states." [FN151] "Muslim states had trouble signing up [to] these liberal rights because Islamic rights were not based on the natural rights of the individual, but on those outlined in Islamic law and the *379 sharia." [FN152] In the end, Muslims who write on international law do so with an awareness that public international law, a product of Western culture, is universally entrenched as the normative standard and will be used to judge Islamic legal doctrines, which will be deemed defective if they violate the international norms. . . . [I]nternational law is perceived as something outside (traditional) Islam, which Islam needs to account for, respond to, explain, or make useless. For the Islamic scholar, public international law is foreign. As a consequence, the authority of public international law over Muslims, its legal quality, is inherently problematic. [FN153]

On the other hand, there is nothing to gain from entirely dismissing the normative force of international human rights law and the institutions that implement that law. Such a rejection may undermine the rule of law and may also lead to impunity for aggressors, frustration for victims, and dissolve accountability for unspeakably egregious crimes against humanity. Entirely dismissing this apparatus assumes that oppression is part of the cultural software of those communities where oppression occurs. Stuart Hampshire sagely advises that "[t]here is nothing . . . culture-bound in the great evils of human experience." [FN154] Although there may be plural conceptions of the good, there is a much more singular or monist conception of these great evils. "These great evils, universally recognized, form the basis of moral argument in every culture and every epoch, regardless of how much the culture's positive ideal and conceptions of the good vary." [FN155] To this David Luban pointedly adds: "There is no society . . . in which gratuitous infliction of the great evils is tolerable." [FN156] Entirely dismissing the normative force of international human rights law also assumes there can be no room for overlap between the international and the local, between the secular and the religious, and between the West and the rest. It is doubtful *380 that there is no overlap, nor opportunity for transcultural consensus. Perry [FN157] and Drinan [FN158] offer the example of the 1993 Vienna Declaration on Human Rights, adopted by consensus of 172 states, to repudiate the argument that it is a lost cause to endeavor to bridge gaps between international human rights, local lives, and religious pluralism. To be sure, this does not deny that there may be particularized disagreement whether a particular practice violates a human right and, if so, how accountability for that is to be determined, whether such accountability should take the form of criminalization, and what form of punishment or restitution is proper.

In this vein, it is important to contemplate a communitarian vision of justice, in which the societal and cultural characteristics of a locality inform and articulate the implementation of justice. This approach entails uncovering a basis for commonality by understanding local difference. Moreover, as Wright points out, this process "may also mean applying standards for human behavior that actively work against European dominance, something which will make many proponents of 'universal' human rights very uncomfortable." [FN159] Although difficult, this may well be a necessary task, given Wright's exhortation that
"[w]e do not abandon human rights by embedding them in culture. We in fact increase accountability and responsibility for human rights abuses and the genuinely revolutionary potential that they promise." [FN160]

The integration of international criminal law with the local is particularly important in the Afghan context. This is so for a number of reasons, including the understandable skepticism with which international interventions are perceived and, collaterally, the reality that Islamic modalities for justice provided important sources for continuity and predictability among Afghans successively subjected to the failed nature of the Afghan state. There is space within Islam for such a sedimentary process of integration, particularly regarding the censure of what Hampshire and Luban would call "great evils." However, locating this space within local customary law--through which much of Islamic law is filtered in daily life--is, as discussed below, considerably more complex.

*381 V. Customary Laws in Afghanistan

Local customs that do not contravene a clear Islamic precept become part of Islamic law. [FN161] This contributes to the deeply heterogenous nature of the Muslim world. [FN162] As Professor El Fadl observes, Islamic law is far more flexible and malleable than is commonly assumed . . . [it] is similar in some important respects to the common law system. . . . Far from being a rigid and nonresponsive system, [Islamic law] engages the cultural paradigms of its adherents in an active and dynamic fashion. [FN163]

Identity in Afghanistan is multi-faceted. Afghans share strong attachments both to Islam and ethnicity. For the majority Pashtuns, ethnicity brings with it detailed customary laws, the Pashtunwali, that inform much of daily life and filter many Islamic norms, particularly in rural areas. Other ethnic groups in Afghanistan also have local customs that animate local law-in-practice.

The International Legal Foundation ("ILF"), a nongovernmental organization, has undertaken a compilation of the Pashtunwali, specifically as currently applied in southern and eastern Afghanistan. [FN164] The Pashtunwali, which has been called a "form of common law," [FN165] "de facto . . . govern[s] the lives of a majority of the population." [FN166] The Pashtunwali, along with other customary legal systems in other regions of Afghanistan, continued to function "reasonably well" even during the "past quarter century of war." [FN167] This may not be surprising given that the Pashtunwali emerges from a culture of war. Since war officially is waged only among men, the Pashtunwali reflects a patriarchal world view. Moreover, Roy Gutman observes that the Pashtunwali, as a system of common law, *382 changed over the 1990's in response to ongoing warfare and the migration to Afghanistan of Osama bin Laden and Arab fighters. [FN168] Gutman observes that some practices of this group, including those that involve the status of women, became integrated into the Pashtunwali by virtue of fatwa (religious edict), governmental directive, or other public pronouncements related to dispute resolution. [FN169] The contingency of these practices is evident in Shaheed's observation that it is easy to promote radical, and purportedly "Islamic," reform when the costs of reform are visited upon disempowered groups such as women. [FN170]

In principle, the Pashtunwali provides that the right to seek justice lies with the victim or the family of the victim. Justice for a wrong can be pursued through a blood feud, which can be averted by payment of blood money, more formally presented in Western legal systems as restitution or reparation. "If you killed my relatives, you owe me a blood debt. And this is not a blood debt that can be paid at The Hague." [FN171] The matter is to be settled by Afghans, not by foreigners for Afghans, and "the mere fact that the state throws somebody in jail is not necessarily considered justice." [FN172] The Pashtunwali is ordinary law that can apply to human rights abusers and perpetrators of gender crimes.

A. Procedure

Legal process takes the form of the jirga. "Afghans regard Jirga decisions as the law and condemn those who refuse to accept
these decisions.” [FN173] Jirga members, who are called marakchi, are men who are well-known in their communities and have distinguished themselves owing to their wisdom and knowledge of social issues. [FN174] Marakchi are not elected nor appointed, but come forward as volunteers.

Jirga proceedings do not take place in a formalized setting. *383 They can occur in a private chamber, a common gathering place, or the local mosque. [FN175] The proceedings begin with each marakchi “sharing short stories, narratives, examples and proverbs before addressing the issues.” [FN176] This is followed by open discussion and an evaluation of those issues in dispute. “While Jirgas are not closed to the public . . . women and children [are] not . . . included.” [FN177]

The number of marakchi presiding over any given dispute is not pre-determined. Ordinarily, half of the marakchi will be drawn from the village or tribe of each disputant. The Pashtunwali, however, explicitly states that marakchi are expected to be impartial. As the ILF reports, “if a party suspects undue favoritism by a member, he may object. If these suspicions prove to be well-founded, the offending member may be replaced.” [FN178]

The length of the jirga proceeding also is indeterminate, ranging from days to weeks. [FN179] This depends on the nature and importance of the disputed issues.

At the beginning of the session, cash or property is collected as a surety or guarantee and given to a third-party for safe keeping. This practice is known as machilgha or baramta. [FN180] Disputants can plead their own cases or avail themselves of a representative. Jirga decisions are rendered orally. They may set forth general rules and have precedential value (tselay). [FN181] Marakchi rely on prior decisions and tselay to resolve the conflicts before them. [FN182] There also is an appellate structure. A disputant dissatisfied with the decision of a jirga may request that another jirga review the case. If the disputant remains dissatisfied, he may ask a member of that second jirga to request a third review (takhm). [FN183] All disputants must accept the final decision of the takhm. Punishments for failing to abide by the outcome of the takhm range from cash fines to the burning of the house of the guilty or unsuccessful disputant. [FN184]

Those responsible for the enforcement and implementation of *384 jirga decisions are known as arbakai. [FN185] In ancient Aryan tribes, the Arbakai led groups of warriors in wartime and maintained law and order in peacetime. Today, they . . . are given considerable immunity in their communities and cannot be harmed or disobeyed. Those who do so are subject to the punishments set by the Arbakai organization. [FN186]

B. Substantive Law and Remedies

The Pashtunwali covers a broad swath of issues, including inheritance, transactions, obligations, and property ownership. For the purpose of this analysis, only those portions of the Pashtunwali related to justice for criminal harms to the person, specifically harms to women, shall be considered.

With the exception of certain sex crimes, the Pashtunwali is based upon what Westerners might call restorative justice. The point is not to exact retribution by punishing the offender or the offender's family, but rather to make the victim, victim's family, or clan whole in light of the injustice suffered. Therefore, rather than being incarcerated to repent for a wrong committed, the offender or his family is asked to pay poar (blood money). [FN187] The amount of poar is determined by the jirga in accordance with the nerkhs, namely recognized amounts of damages for different wrongs. [FN188] These damages are somewhat standardized among the Pashtun tribes and include cash, services, animals, and also the transfer of women. For example, the poar for intentional murder without abuse or torture in the largest Pashtun tribe (the Ahmed Zai tribe) “requires the perpetrator's family to give two fair and virgin girls or pighlas (also known as speen paita, got laka, and ronee) to be wedded to a member of the victim's family following special ceremonies.” [FN189] Poar generally is doubled in cases of
intentional murder with abuse or torture. [FN190] The nerkhs of the Wazir tribe specify that a murder be punished by death, giving blood money to the victim's family, or *385 giving a girl to the victim's family. [FN191] However, "generally, girls are preferred to money, because when the girls are wedded to the victim's family, kinship and blood sharing will transform the severe enmity into friendship." [FN192] In fact, every Pashtun tribe permits restitution to be effected through the offering of girls or young women. Although it is unclear whether providing a girl from one family to the other as a means of settling a blood debt accords with Islamic law in theory, this manifestation of poar is accepted among local disputants as legitimate in terms of Islamic law in practice.

Furthermore, the offender or his family is required to perform nanawati-- essentially, asking for forgiveness. [FN193] The purpose of nanawati is to eliminate enmity through apology. Nanawati can take different forms. It can involve carrying the victim's body to the gravesite. [FN194] It can involve transferring goods or services. In these forms, nanawati can overlap with the poar. Just as with the poar, the nanawati depends on the offense. The ILF reports that the nanawati for the murder and abduction of a married woman requires the giving of four copies of the Holy Koran, four women, and a fat sheep. [FN195]

Poars for assault are determined mathematically, with the poar for murder set as a baseline. These poars depend on the nature of the injury and the weapon used. The nerkhs provide poar for the following injuries: an eye for half a murder; two eyes for one murder; one ear for half a murder; two ears for one murder; the tongue for one murder; two legs for one murder; two lips for one murder; a front tooth for one murder; other teeth for 1/12th or 1/13th of a murder; cutting genitals for two murders. [FN196] The poars may increase if the wounds are caused by a gun, knife, or sword. [FN197]

Crimes against women and sexual offenses are treated separately. These crimes are accounted for by poars and, in certain exceptional cases, by more severe retributive punishment. The kidnapping of a married woman entails a poar equivalent to seven murders. [FN198] If a woman enters a stranger's house seeking asylum and *386 the owner of the house gives her shelter, he is considered a kidnapper and punished accordingly. [FN199] Adultery leads to the execution of both the woman and man--no poar is required. [FN200] If a man kidnaps a woman and takes her to his house by force, he will be required to pay poar for one murder to save his own life and an additional half a murder to the relatives of the girl. [FN201]

With regard to sexual assault, if the victim "does not struggle against, or otherwise resist" the perpetrator, she is deemed to be a willing participant and both she and the perpetrator will be killed. [FN202] If the victim "screams and struggles," the nerkhs require that the aggressor's ear be cut off, that he pay a large poar, or that he be "sexually insulted;" a person who kills the aggressor is only required to pay a poar equivalent to half a murder. [FN203] The ILF reported a jirga decision in which the rape of a married woman entitled the woman's family "to receive two women . . . from the members of the [offending] man's household. [His] uncle had two wives and was forced to give up one of his wives to the family of the aggrieved woman . . . as fair compensation for the crime." [FN204]

Other crimes also are accounted for by poars. In terms of domestic violence, a husband who beats his wife and thereby "breaks a bone, injures a body part or kills her," creates an entitlement for the wife's father to claim poar. [FN205] Property crimes usually involve a poar amounting to cash payments, including restitution in cases of stolen goods. [FN206]

In conclusion, the Pashtunwali's provisions regarding accountability for criminal acts and human rights abuses embed the subjugation of women. This gives rise to an impasse. At present, the incorporation of the local in the adjudication of mass violence in Afghanistan is itself a form of mass violence. Some Afghan leaders endeavor to immunize the Pashtunwali from international scrutiny based on the importance of local autonomy and so-called cultural difference. [FN207] Unfortunately, this rationale obscures the reality that only certain elements of the local, i.e., empowered males, ever were *387 involved in
the imposition of the Pashtunwali as local law. As such, until the local truly is derived from an inclusive process in which cultural dissent is accepted, if not welcomed, these sorts of arguments should be viewed with caution.

VI. Conclusion

The judicialization of systemic human rights abuses in Afghanistan, in particular gender crimes, involves much more than a straightforward legal or administrative exercise. The effectiveness of judicialization is not preordained. Instead, effectiveness is precariously contingent on achieving a consensual balance between international human rights norms, criminal punishment, religious conviction, and the pluralism of lives lived locally. It is not axiomatic that just because an intervention is international in provenance that it is necessarily better than something local. Nor is the obverse self-evident: A local intervention is not guaranteed to be more effective just because of its locality. To be sure, both local and international interventions may form part of the bureaucracy of punishment, a phenomenon of institutionalization suggested by Michel Foucault. [FN208] That said, although the power to punish may augment the authoritativeness of an intervening institution, it is not clear that a bureaucratized and authoritative punishment necessarily leads to legitimacy in victim or aggressor communities.

Afghanistan starkly presents the dilemmas created from involving the local in the adjudication of international crimes against women. Although the local may have more meaning among certain constituencies (in the case of Afghanistan, patriarchal local constituencies), it may further disempower and victimize other generally marginalized constituencies. For these marginalized constituencies, the local may simply serve as a conduit for further violence. In the case of these constituencies, the international might be a more meaningful mechanism for justice, notwithstanding or perhaps because of its distance from lives lived locally.

In any event, punishing those who abuse human rights will not create new social norms when local populations are coerced into adjudicating through either international or local proceedings. For the women of Afghanistan, such coercion "entails either leaving one's community . . . or else praying that one's culture becomes *388 'extinct.'" [FN209] From the perspective of the international lawyer, while it is important to demonstrate sensitivity to local context, it also is important to recognize that local values in certain spaces may only reflect the values of empowered segments of society. This is the case in Afghanistan. Religion and culture in Afghanistan are neither static nor immutable. They are politically contingent and, as such, influenced by power structures.

Accountability for serious human rights abusers should be pursued jointly with the right for all members of a local community to define the laws, practices, and values of their community. [FN210] This approach gives voice to members of religious and cultural communities, not just to the leaders of those communities. Failing to do so means that reformers can make rights arguments only in distant secular terms, thereby "completely relinquishing the terms of cultural and religious identity to patriarchs." [FN211]

For Afghanistan, an immediate need is to investigate and document crimes against women and preserve any evidence that is uncovered. The more difficult issue whose contours this Article has sought to demarcate involves what to do with the information that investigations discover. Questions would arise whether indictments should be issued and, if so, as to which individuals should be indicted. This, in turn, prompts an additional series of inquiries. Careful consideration ought to be given to the law that applies and the forum best suited to enforce the law deemed to be applicable. In this latter regard, a number of choices arise. Accountability can be pursued through extraordinary proceedings entirely at the international level (ad hoc tribunals [FN212] or the ICC). [FN213] An alternate process involves *389 ordinary proceedings at the entirely local level (Afghan national courts, jirgas, or military tribunals). Another option involves the exercise of universal jurisdiction by national courts of other countries (either in criminal or civil cases) or proceedings in foreign military commissions. Inclusive
approaches that combine some or all of these three options also are possible. These might involve hybrid courts in Afghanistan, [FN214] internationally assisted jirgas, or special chambers of national courts. Moreover, broader approaches such as truth commissions might complement whatever judicial remedies are adopted. [FN215]

There is no one-size-fits-all approach. In the case of Afghanistan, both ends of the spectrum—exclusively international approaches involving international criminal law or exclusively local approaches involving Islamic and, especially, customary law—suffer from serious shortcomings. Exclusively international approaches are plagued by the externalization of justice from certain constituencies, particularly aggressor constituencies, while local approaches are hampered by the internalization of harm by other constituencies, particularly victim constituencies.

International donors and advisors would like the new Afghanistan to embody international standards of human rights, including the rights of women. Many of those who are in positions of authority on the ground in Afghanistan incline toward shari’a as applied through local custom. It is unclear whether any generalization can be made as to what is preferred by those currently disempowered—i.e., the group of persons victimized by the conduct that this Article suggests ought to be subject to some sort of legal process. In the end, neither the global nor the local offers magical solutions. Consequently, Afghanistan may be a fertile ground for serious consideration of hybrid mechanisms [FN216] that borrow from the *390 international and invoke the local while pluralizing the types of groups that contribute to the content of the local.

Constructing hybrid approaches could open an important discursive space for extralegal conversations. There is a role for the rule of law in political transition. Legal process creates a constructive forum in which clashes between various social groups, along with many individual grievances, can be aired and mediated. This can facilitate discourse among Afghan religious conservatives and secular modernists [FN217] and, simultaneously, among members of cultural groups and the elites of those same groups. This process also recognizes the embrace by women of a complex identity that demands security, emphasizes rights, and welcomes religion and culture.

[FNa1]. Assistant Professor and Ethan Allen Faculty Fellow, School of Law, Washington & Lee University. E-mail: drumblm@wlu.edu. Earlier versions of this Article were presented in a number of venues, including the Annual Meeting of the Association for the Study of Law, Culture and the Humanities (University of Pennsylvania Law School, March 8-10, 2002); the Annual Meeting of the International Studies Association (New Orleans, March 23-26, 2002); a panel discussion on the "Taliban’s ‘Other’ Crimes" at the International Law Association, International Law Weekend (New York City, October 2002); the Conference on International Crimes Against Women (Case Western Reserve University School of Law, October 10, 2003); and a faculty workshop at Washington & Lee University, School of Law. Each of these presentations triggered helpful commentary and feedback for which I remain grateful. Special thanks to Karima Bennoune for thoughtful comments on an earlier draft. I would like to acknowledge the generous support of the Frances Lewis Law Center at the Washington & Lee University School of Law, of its Director Blake Morant, and of Dean David Partlett. Matt Earle provided outstanding research assistance.


[FN2]. The Hamid Karzai regime, which assumed power following the ouster of the Taliban by a U.S.-led 23-nation coalition, effectively controls only the Kabul area, where there is tremendous political instability and violence. SeeHarold Koh, On American Exceptionalism, 55 Stan. L. Rev. 1479, 1482, 1489 (2003); April Witt, Karzai Powerless as Warlords Battle, Wash. Post, May 18, 2003, at A14. This violence includes the assassinations of various ministers and the vice-president, an assassination attempt on Karzai’s own life, ongoing warlord control, and attacks on U.S. and coalition

[FN3] Attempts to bring human rights abusers to justice have met with similar results. "The legal reality is marked by impunity: not only do past grave violations of human rights remain unpunished but such abuses are continuing without any immediate prospect for a legal system capable of bringing the perpetrators to justice." Martin Lau, International Commission of Jurists, Afghanistan's Legal System and its Compatibility with International Human Rights Standards, para. 2 (2002).

[FN4] Human Rights Watch, "We Want to Live As Humans" 4 (2002) [hereinafter We Want to Live] ("[W]omen and girls in Afghanistan still face severe restrictions and violations of their human rights, for in many areas Taliban officials have been replaced by warlords, police officers, and local officials with similar attitudes toward women.").

[FN5] Mark A. Drumbl, Punishment Postgenocide: From Guilt to Shame to Civis in Rwanda, 75 N.Y.U. L. Rev. 1221 (2000); Mark A. Drumbl, Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order, 81 N.C. L. Rev. 1 (2002) [hereinafter Drumbl, Asymmetries]. Foreign national tribunals may most externalize justice, followed by international tribunals. Distanced trials in international institutions may favor ethnic neutrality over local engagement of judges, impose one-size-fits-all international norms over local traditions and sentiments, and bypass the need to reconstruct local judicial systems through locally-engaged trials. That said, although judgments issued by local tribunals may be the least susceptible to externalization, in many cases local tribunals may be destroyed in the aftermath of conflict, there may be little domestic capacity or infrastructure, and local officials may lack legitimacy. However, international lawyers should recognize that just because something is international in provenance does not necessarily mean that it is more legitimate than something local in provenance.

[FN6] The focus of this Article is on the Pashtunwali. An analysis of other customary legal systems particular to other regions of Afghanistan lies outside the scope of this Article. That said, these other local legal systems do not diverge much from the Pashtunwali in their treatment of gender or in their approaches to restoration. See Part V infra.

[FN7] Madhavi Sunder, Piercing the Veil, 112 Yale L.J. 1399, 1456, 1467 (2003) (positing that a woman should have a right to exit a normative community and choose another one if she wants to, but should also have a right to stay within her community and reform it through the articulation of dissenting interpretations of the norms of that community).


Id.

Id.


Taliban Hang Convicted Prostitutes, supra note 14.

U.S. Dep't of State, supra note 12.

Taliban Hang Convicted Prostitutes, supra note 14.

U.S. Dep't of State, supra note 12.


Indeed, the West did not recognize the Taliban government. Only Pakistan, Saudi Arabia and the United Arab Emirates recognized the Taliban as the official government of Afghanistan. The U.N. General Assembly Credentials Committee refused to take action on the Taliban's submission of governmental representatives for the U.N. General Assembly. Although this demonstrates some ostracism, it did not lead to affirmative attempts to improve the life of Afghan women.

Ratna Kapur, Unveiling Women's Rights in the 'War on Terrorism', 9 Duke J. Gender L. & Pol'y 211, 213 (2002); see also Farida Shaheed, The "War on Terror" and Women's Rights: A Pakistan-Afghan Perspective, in Lost Liberties: Ashcroft and the Assault on Personal Freedom 222, 222 (Cynthia Brown ed., 2003) ("[U]sing the rallying cry of women's oppression in Afghanistan in the opening chapter of the 'war on terror' hijacked the women's rights discourse and conscripted it in the service of military actions, making a mockery of genuine women's rights activism.").

See Kapur, supra note 22, at 220-21; Shaheed, supra note 22, at 225.


[FN27]. Well-known examples include the willful demolition of the ancient Bamiyan Buddhas and objets d'art in the National Museum in Kabul and the Herat Museum. See Christopher de Bellaigue, The Lost City, New Yorker, Jan. 21, 2002, at 28; Murray Campbell, A Nation's Holy War on History, Globe & Mail, Mar. 1, 2001, at A1. International law does notriminalize the destruction of cultural property outside of armed conflict (i.e., as a war crime), although there may be some room to classify such destruction as a crime against humanity. Steven Ratner & Jason Abrams, Accountability for Human Rights Atrocities in International Law--Beyond the Nuremberg Legacy 109-10 (2001).

[FN28]. E-mail from Aziz Huq to Mark A. Drumbl (Dec. 16, 2002) (on file with author) [hereinafter Huq].

[FN29]. See, e.g., Babak Dehghanpisheh et al., The Death Convoy of Afghanistan, Newsweek, Aug. 26, 2002, at 20 (discussing the alleged murder of approximately one thousand Taliban prisoners by the Northern Alliance, specifically by warlord Abdul Rashid Dostrum, through suffocation in sealed containers following their surrender).


[FN41]. We Want to Live, supra note 4, at 8. Afghan women are endeavoring to insert a bill of rights into the Afghan constitutional framework. See Roy Gutman, Sexual Assaults of International Consequence, Keynote Address at the Case Western Reserve University School of Law Symposium on the Suppression of International Crimes Against Women (Oct. 10, 2003) (notes on file with author).


[FN45]. Id. para. 44.

[FN46]. Lau, supra note 3, para. 10.


[FN48]. U.S. Dep't of State, supra note 12, at 2362.


[FN50]. See Whitaker, supra note 24.
Sima Samar, the interim minister for women's affairs following the Bonn Agreement and Chair of the Afghan Human Rights Commission, was not appointed during the loya jirga to a ministerial post in the transitional government after she had subtly criticized the fundamentalist view. See Laurie Goering, Afghans' Islamic Law Calls for Compassion; But Amputations and Stonings Still Included in Code, Chi. Trib., July 1, 2002, at 1.


Id.


Diane Marie Amann, Message as Medium in Sierra Leone, 7 ILSA J. Int'l & Comp. L. 237, 238 (2001).


See, e.g., Peter Slevin, U.S. Pledges to Avoid Torture, Wash. Post, June 27, 2003, at A11 (reporting the deaths of two Afghan prisoners in U.S. custody in Afghanistan that are being investigated as homicides). Skepticism arose from the experience of foreign interventions, such as the Soviet invasion, and the recruitment of Arab fighters as mujeheddin to repel that invasion.

Barfield, supra note 56, at 440.

Huq, supra note 28.


A useful working definition casts legitimacy as the condition that arises when authority is exercised in a manner seen as justified.

Rama Mani, Beyond Retribution: Seeking Justice in the Shadows of War 49 (2002).

Amann, supra note 55, at 238.


Id. at 483.

I use the term Islamic laws and legal systems in the plural because that is a more accurate way to think of the
implementation of Islamic law, as such implementation occurs through a variety of cultural, national, and institutional filters. After all, "Islamic law has never been applied as a uniform code of law. In fact Islamic law does not aim at uniformity." A.A. Oba, Islamic Law as Customary Law: The Changing Perspective in Nigeria, 51 Int'l & Comp. L.Q. 817, 821 (2002) (footnote omitted). In this sense, I draw inspiration from Professor El Fadl who, in the different context of "Arab law," observes that "while... there are common doctrines and institutions that unify the legal systems of most Arabic speaking countries, one must also be cognizant of the fact that there are many differences as well." Khaled Abou El Fadl, Islamic Law and Ambivalent Scholarship, 100 Mich. L. Rev. 1421, 1431 n.8 (2002) (reviewing Lawrence Rosen, The Justice of Islam: Comparative Perspectives on Islamic Law and Society (2000)).

[FN69]. This analysis does not overlook the fact that many practicing Muslims do not see the continued use of religious law as central to their faith or self-conception.


[FN71]. Shari'a to be New Afghan Legal System, Pakistan News Service, Nov. 30, 2002, [hereinafter Shari'a], at http://www.paknews.com/specialNews.php?id=1669&date1=2002-11-30. "The word Shari'ah literally means 'the way to the watering place'". See Oba, supra note 68, at 819. The Commission is composed of Afghan experts on jurisprudence and is to develop a blueprint for the revival and reform of the Afghan justice system. That said, there is an important distinction between a country populated by Muslims, on the one hand, and a formal Islamic state, on the other.


[FN73]. Shari'a, supra note 71.

[FN74]. As Professor Ruti Teitel warns, there is no guarantee that the shari'a of post-Taliban Afghanistan will involve standards more moderate or liberal than the shari'a of Taliban Afghanistan. There may be cause to be optimistic, but there is no guarantee. See Ruti Teitel, The Taliban's Other Crimes, Remarks at the American Branch of the International Law Association International Law Weekend (October 2002) (notes on file with author).


[FN76]. Whitaker, supra note 24.


[FN78]. Rohde, supra note 38.

[FN79]. See Human Rights Press Release, supra note 51. Shinwari "publicly upbraided" Sima Samar, a former women's affairs minister, when she subtly criticized the fundamentalist view. See Whitaker, supra note 24. Shinwari has issued an order that women's voices cannot be played on the radio. Landsberg, supra note 38. Shinwari, who is in his 80s, does not have formal training in secular sources of law and is viewed as an Islamic hard-liner. See Asia Report, supra note 77, at ii.
[FN80]. Oba, supra note 68, at 819.

[FN81]. Id. at 820.

[FN82]. El Fadl, supra note 68, at 1421-22.


[FN85]. El Fadl, supra note 68, at 1442 n.33, 1443.

[FN86]. Oba, supra note 68, at 822.

[FN87]. Id. The Muslim world is assuredly heterogenous. Accordingly, this conceptual monism is contested also from within the Islamic community.


[FN91]. Id. at 187 (stating that “[t]he division between believers and nonbelievers remained the definitive understanding of international relations”).


[FN93]. Id. at 164-65.

[FN94]. Id. at 165.

[FN95]. Id. at 166 (specifically referencing Islamic political ideology in Iran).


[FN97]. Id. at 883.

[FN98]. Murden, supra note 90, at 18.

[FN100]. See, e.g., Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), 2001 I.C.J. (Mar. 16), available at http://www.icj-cij.org/icjwww/idocket/iqb/iqbframe.htm (ruling and demarcating the land and maritime boundaries between the two countries to their express satisfaction).


[FN102]. Murden, supra note 90, at 188.


[FN104]. See, e.g., U.N. Charter art. 2, para. 7 (denying authority to intervene in matters essentially within the domestic jurisdiction of states).


[FN106]. Id. at 441.

[FN107]. Shelley Wright, International Human Rights, Decolonisation and Globalisation 2 (2001). See generally Makau Mutua, Human Rights: A Political and Cultural Critique (2002) (arguing that a culture of human rights cannot take hold if imposed paternalistically from the outside, and that human rights will not become operational on the ground if non-Western societies must implement them immediately and uncritically, especially if these rights are bound up with liberal democracy and market fundamentalism).

[FN108]. See Wright, supra note 107, at 2-3.

[FN109]. Id. at 36.

[FN110]. Sally Merry, Remarks at the Association for the Studies of Law, Culture, and the Humanities Annual Meeting, Cardozo Law School and New York University School of Law (Mar. 9, 2003) (notes on file with the author).

[FN111]. See, e.g., Ignatieff, supra note 88, at 102 ("Human rights doctrine is now so powerful, but also so unthinkingly imperialist in its claim to universality."). That international human rights law has a universalist agenda represents a traditional viewpoint in the academic literature. There are contrary perspectives. See, e.g., Sunder, supra note 7, at 1407, 1413, 1418 (positing that international human rights law is marked by cultural relativism insofar as it readily permits cultural or religious derogations, demarcating in a sense between the public and the private).

[FN112]. There are well-argued contrary perspectives. Thomas Franck suggests that human rights do not represent Western cultural imperialism; instead "they are the consequence of modernizing forces that are not culturally specific." Thomas Franck, Are Human Rights Universal?, Foreign Aff., Jan-Feb. 2001, at 191, 202. Even if that is so, the point is that these rights often are perceived as culturally specific, even imperialist.

[FN113]. Upendra Baxi, The Future of Human Rights 78, 95-97 (2002). Baxi writes, Globalization of human rights consists in those practices of governance by the dominant states that selectively target the enforcement of certain sets of rights or sets of interpretation of rights upon the 'subaltern' state members of the world system. Such practices need no ethic of 'universality' of human rights; these constitute an amoral exercise of dominant hegemonic
power because the hegemon does not accept as a universal norm that its sovereign sphere, rife with human and human rights violations, ought to be equally liable to similarly based intrusion.

Id.


[FN115] Wright, supra note 107, at 131.

[FN116] Id. at 37.

[FN117] Id. at 130.

[FN118] Id. (citing generally Seyla Benhabib, *Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics* (1992)).

[FN119] Id. at 213.


[FN124] Ignatieff, supra note 88, at 103.

[FN125] Murden, supra note 90, at 17; see also Barfield, supra note 56, at 441 (“[O]ne great fear I have is with international NGOs coming in, they will want to see the government make public political statements about controversial issues to please their own audiences in the West. They want to see all international norms recognized and implemented without delay.”).

[FN126] Murden, supra note 90, at 156.

[FN127] Id. at 185.

[FN128] Id. at 205.


[FN130] Id. at 38-39.

[The United States] has generally viewed human rights standards as important for the countries of the South, but superfluous for the countries of the North, and certainly unnecessary with respect to the internal political life of the United States. The confusingly one-sided message that has been sent by the most powerful state in the world is that human rights are conceived as almost exclusively an instrument of foreign policy.
[FN131]. See Volpp, supra note 114, at 1206-07 (footnotes omitted).

[Amid] the concern about gender apartheid under the Taliban, there has been little focus on the relationship between the intensification of religious fundamentalism and geopolitical economics. The United States gave aid to various mujahideen forces in Afghanistan to fight the Soviets. From these mujahideen groups, the Taliban emerged. The United States aided General Zia of Pakistan—whose government adopted the notorious hudood ordinances that among other provisions criminalized extramarital sex, so that women who accuse men of rape or become pregnant risk punishment for adultery—for the same reason. Feminists in the United States need to think critically about the relationship of this aid to states with policies inimical to women’s concerns, instead of abstractly condemning Islam as the font of patriarchal oppression.

[FN132]. See Baxi, supra note 113, at 112 (“[T]he West seeks to impose standards of right and justice which it has all along violated in its conduct towards Islamic societies and states.”).

[FN133]. Ciaran Cronin & Pablo De Grieff, Introduction, in Global Justice and Transnational Politics 4 (Pablo De Greiff & Ciaran Cronin eds., 2002) ("Critiques of universalist models of reason gain considerable credibility from the fact that Western countries have committed gross injustices against non-Western peoples in the name of allegedly universal ideals of reason and progress.").

[FN134]. For a compelling example involving the United States, see Volpp, supranote 114, at 1212-13.

[The obsessive focus on Muslim countries’ ‘Islamic’ reservations to the Convention on the Elimination of All Forms of Discrimination Against Women obscures the fact that the U.S. government has made reservations in the same manner. Both Muslim countries and the United States have entered sweeping reservations based on domestic law to the principle of equality—Muslim countries on the basis of Islamic law, and the United States on the basis of the U.S. Constitution. The United States has specifically interpreted broader treaty obligations that would require establishing the doctrine of comparable worth, introducing paid maternity leave, and promoting the full development of women and prohibiting discrimination, as enforceable only to the extent required by the U.S. Constitution. The United States has eschewed, criticized, or issued reservations to a number of other important international human rights instruments and international criminal law institutions such as the International Criminal Court. This has given rise to claims of U.S. exemptionalism or exceptionalism. See Koh, supra note 2, at 1482. Specific international legal instruments include: the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, Ottawa Convention on Landmines, Comprehensive Test Ban Treaty (designed to stop nuclear testing), and a protocol to enhance compliance concluded under a 1972 treaty banning germ warfare. The United States left the Racism Conference in Durban in September 2001 while the conference still was in session; U.S. motivations included concerns over the stigmatization of Israel and the frank discussion of reparations for slavery and the slave trade, which was declared now and always to be a crime against humanity. Moreover, in July 2002, the United States failed in its attempt to water down a United Nations plan to reinforce the Convention Against Torture that might have led to universal application of external monitors’ reviewing internal practices. See Barbara Crossette, U.S. Fails in Effort to Block Vote on U.N. Convention on Torture, N.Y. Times, July 25, 2002, at A7. U.S. reluctance is motivated by concern of foreign review of U.S. practices regarding the detainees at Guantanamo Bay, Cuba. Id. I have argued elsewhere that prosecutorial strategies for the September 11 attacks represent an important asymmetry in the application of international criminal law and, as such, perpetuate this discussion. See Druml, Asymmetries, supra note 5. Whereas detainees in the war on terror (whether held at Guantanamo Bay or under U.S. control elsewhere, including in Afghanistan) are given only minimal human rights protection in order to ensure justice and security, detainees in U.S. supported international institutions—such as the ICTR and ICTY—are to be given maximum human rights protections in order to ensure justice and security. See Neil A. Lewis, Detainees From the Afghan War Remain in a Legal Limbo in Cuba, N.Y. Times, Apr. 24, 2003, at A1 (citing experts who opine that indefinite detention at Guantanamo infringes international law and may have influenced 25 suicide attempts among detainees); Slevin, supra note 57 (reporting on
allegations of human rights abuses, including torture, by the United States during the interrogation of suspects in the war on terror). This exemplifies what Karima Bennoune calls the dynamic between lawfulness and lawlessness: whereas we require prosecutorial responses to other tragedies to proceed with great lawfulness, our prosecutorial response to 'our own' tragedy has proceeded through lawlessness. See Karima Evan Bennoune, Terrorism and Human Rights: In the Wake of September 11, 10 Mich. St. U.-Det. CL J. Int’l L. 572, 574 (2001). For a discussion of U.S. exceptionalism generally, see Robert F. Drinan, The Mobilization of Shame (2001). “[T]he United States can be criticized by nations abroad because of its apparently adamant refusal to accept any obligations from an international entity which are not already binding on the United States.” Id. at 79. “It seems clear that the record of the United States on international human rights has been uneven, uncertain, and unpredictable.” Id. at 84.

[FN135]. Koh, supra note 2, at 1482; see also Falk, supra note 129, at 49-50 (commenting on Western reticence for the International Covenant on Economic, Social, and Cultural Rights). The fact that individual rights have little meaning in the Islamic vision intensifies the realpolitik of the international legal order, in which certain breaches of individual human rights should be punished, but little attention is given in discourse or practice to collective rights. Rights to development are weak in international law; so too are rights to environmental well-being or intra- or inter-generational equity, as exemplified by the inability of the developed nations effectively to curb their greenhouse gas emissions. This inability derives in large part from concerns that curbing greenhouse gas emissions will have negative effects on the wealthier economies of the developed world.

[FN136]. Wright, supra note 107, at 188.


[FN138]. Amy Waldman, Behind the Burk: Women Subtly Fought Taliban, N.Y. Times, Nov. 19, 2001, at A1. Wright makes effective use of "freedom of expression" to advance this point. She notes that, "often held up as a pre-eminent civil and political right," freedom of expression must be contextualized. Wright, supra note 107, at 133. How can these freedoms operate within a society where education is sorely lacking?

What is frequently forgotten is that most people do not have the electricity necessary to run a computer or to access any form of modern technology, nor are they literate in a 'computer friendly' language such as English.... The majority of people on this planet today have never used a telephone, let alone 'surfing the Web'.... To talk about freedom of expression in this context is something fundamentally different from the debates we are used to in the developed world.

Id.


[FN140]. Wright, supra note 107, at 91.

[FN141]. Waldman, supra note 138; see also Kapur, supra note 22, at 213.

[FN142]. Waldman, supra note 138.

[FN143]. See Huber, supra note 33; Landsberg, supra note 38.

[FN144]. See discussion supra note 2.
See, e.g., Makau Mutua, *Savages, Victims, and Saviors*, 42 Harv. Int'l L. J. 201, 204 (2001) ("The human rights corpus, though well-meaning, is fundamentally Eurocentric, and suffers from several basic and independent flaws.... [T]he corpus falls within the historical continuum of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions.").


Wright, supra note 107, at 15.


Falk, supra note 129, at 8; see also Johan Galtung, *Human Rights in Another Key* 1 (1994) ("The West is so powerful that such ideas as 'Western history = universal history' and 'Western culture = universal culture' are found not only among Westerners.").

Bahar, supra note 92, at 181.

Murden, supra note 90, at 156.

Id. at 160.

Westbrook, supra note 96, at 833-34.

Stuart Hampshire, *Innocence and Experience* 90 (1989). Hampshire describes these "great evils" as: "murder and the destruction of life, imprisonment, enslavement, starvation, poverty, physical pain and torture, homelessness, friendlessness."
[FN164]. Int'l Legal Found., The Customary Laws of Afghanistan (2003), http://www.theilf.org/customarylaws.htm [hereinafter ILF Report]. This compilation from primary sources was undertaken by Professor Karim Khurram in Kabul and Natalie Rea, Esq. in New York. The findings are based on the research of Afghan jurists and judges in the Pashtun areas of southern and eastern Afghanistan.

[FN165]. Barfield, supra note 56, at 439.

[FN166]. ILF Report, supra note 164, at 1.


[FN169]. Id.

[FN170]. Shaheed, supra note 22, at 231.

[FN171]. Barfield, supra note 56, at 441.

[FN172]. Id. at 439-40.


[FN174]. Id.

[FN175]. Id.

[FN176]. Id.

[FN177]. Id.

[FN178]. Id.

[FN179]. Id.

[FN180]. Id. at 7.

[FN181]. Id.

[FN182]. Id.

[FN183]. Id. at 7-8.

[FN184]. Id. at 8.

[FN185]. Id.

[FN186]. Id.
Assaults with these weapons may be treated more seriously than assaults with sticks. The conjunctive or disjunctive nature of these remedies will depend on the discretion of the jirga.

See We Want to Live, supra note 4, at 5.


Sunder, supra note 7, at 1411.

See We Want to Live, supra note 4, at 5 ("Many women and girls in Herat [Afghanistan] expressed to Human Rights Watch a strong desire to participate in the country's civil and political life, to be able to speak freely, both publicly and
privately. They want to participate in the political discourse and have a voice in governmental decisions--especially those that affect them.

[FN211] Sunder, supra note 7, at 1444.


[FN213] Afghanistan acceded to the International Criminal Court on January 13, 2003. That means that, in principle, the jurisdiction of the ICC is valid in Afghanistan only for crimes committed after January 13, 2003. However, by virtue of art. 11(2) of the Rome Statute, a state can become a party and declare that the jurisdiction of the ICC cover acts committed following the entry into force of the Rome Statute on July 1, 2002. Rome Statute, supra note 34, arts. 11, 125. Thus, although ICC jurisdiction could capture some of the litany of criminality, most of that criminality will not be within the purview of the ICC. In any event, owing to concerns regarding the risk that the ICC will externalize justice from those communities it is intended to serve, that the ICC may not capture much of the Afghan violence may not be cause for disappointment.

[FN214] UN-assisted local initiatives have been employed with considerable success in Kosovo and East Timor and differ from the ad hoc tribunals for Rwanda and the Former Yugoslavia (which have been located away from the situs of the violence and are not staffed by representatives of either the victim or aggressor groups).


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