

## CRIME AND WAR IN AFGHANISTAN

*Part I: The Hobbesian Solution*

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*This article views Afghanistan less as a war, and more as a contest of criminalized justice systems. The Taliban came to power because they were able to restore order to spaces terrorized by armed gangs and Mujahideen factions. After the Taliban's 'defeat' in 2001, their resurgence was invited by the failure of state justice and security institutions. The Taliban returned with a parallel court system that most Afghans viewed as more effective and fair than the state system. Polls suggest judges were perceived as among the most corrupt elements of a corrupt state. Police were widely perceived as thieves of ordinary people's property, not protectors of it. While the US diagnosis of anomie in Afghanistan up to 2009 was aptly Hobbesian, its remedy of supporting President Hamid Karzai as a Leviathan was hardly apt. The West failed to ask in 2001 'What is working around here to provide people security?'. One answer to that question was jirga/shura. A more Jeffersonian rural republicanism that learnt from local traditions of dispute resolution defines a path not taken.*

Keywords: peace, Afghanistan, Hobbes

*Introduction*

Thomas Hobbes lived through the terror and security dilemmas of the English Civil War. His conclusion was that life is nasty, brutish and short until a Leviathan (Hobbes 1651) emerges who can be granted legitimacy to pacify a space by dominating all other armed factions inside it. The Leviathan could be a monarch or some other authority that takes central control of a state. Afghanistan has since 1978 suffered much worse violence from various warring factions (including those who formed states) than England endured during Hobbes's lifetime. After 2001, a Leviathan, President Hamid Karzai, backed by the NATO-led International Security Assistance Force (ISAF), increased security at first in the way predicted by Hobbes.

In recent years, however, life has become nastier and more brutish for the people of Afghanistan—again because of an even older insight of the Roman historian Tacitus: 'Formerly we suffered from crimes, now we suffer from laws.' We will argue that the insight by Tacitus also applied when the Taliban became the Leviathan in 1996, providing Afghans with greatly enhanced security against marauding criminal gangs and armed militia groups. The Taliban also secured the people from widespread infighting among various Mujahideen factions, which they referred to as forces of *shar-aw-fasad* (wickedness and corruption). But the Taliban themselves terrified citizens, especially female ones, with tyrannical rules. A second problem of the Karzai–NATO Leviathan is

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discussed in this essay. Like the Taliban, the Mujahideen and the Communist Leviathans that preceded it, the Karzai–NATO state killed off ‘*Order Without Law*’ (Ellickson 1991). It is possible to have a state that both disarms competing armed factions and enables the order without law of traditional justice and other non-state forms of regulation. Sadly, the NATO intervention did not seek to bequeath that to Afghanistan until the second year of the Obama administration. We argue that the American policy shift was wise. Was it also a decade too late?

Part I is limited to the Hobbesian part of our analysis, Part II to a Jeffersonian analysis, which gives priority to empowering and reforming traditional rural justice. In Part I, we first provide a Hobbesian analysis of the rise of Islamist and other forms of tyranny. Then we connect this to the history of many other sources of fragmentation of the Afghan state. We connect this to the criminalization of the state, the criminalization of the justice system and the criminalization of war, all of which in Part I are seen as Hobbesian maladies. Part II discusses possible Jeffersonian paths to escape those maladies.

#### *Pacification as a Modern Path to Islamist Tyranny*

In 1998, terrible Christian–Muslim violence broke out in two hotspots of religious political competition in Indonesia: Ambon and Poso (Braithwaite et al. 2010). It subsequently spread more widely across the provinces of Maluku and Central Sulawesi at a cost of more than 10,000 lives. At both hotspots, the conflict took two disastrous turns that escalated the conflict. One was that, in response to rallies organized by radical Islamists in Jakarta, thousands of young men joined Islamist militias such as Laskar Jihad and sailed to Ambon and Poso, armed to the teeth, sweeping into villages, burning them to the ground, killing Christians who had not managed to flee. The second disaster was that elements of the security forces took sides. For example, large sections of the local police in Ambon sided with the Christian community; large sections of the military sided with the Muslim cause. Some professional military snipers sold their assassination services to both sides.

A Hobbesian war of all against all prevailed in these two provinces for a time, allowing the most radical Islamic groups to establish terrorist training camps there, assisting Indonesia to become the country with the highest frequency of terrorist bombings in the world until 2002, after which Iraq, Afghanistan and Pakistan took over this mantle. At these terrorist training camps in Maluku and Central Sulawesi, the Bali bombers, who took 200 lives, were trained. These camps are now closed. Christian–Muslim violence still exists, but has returned to the low levels that prevailed prior to 1998. There were three main factors in this accomplishment. One was that religious leaders pleaded with the fighters to return home peacefully. These included leaders in Saudi Arabia, who issued a Fatwa for the cessation of fighting, and local Muslim leaders in Javanese and Sulawesi villages from whence the young militiamen had come, and from the villages they had gone to defend in Ambon and Poso. Second, Muslim leaders joined with Christian leaders in inter-faith reconciliations that connected to bottom-up village-level traditions of reconciliation that were pre-Christian, pre-Muslim. Third, the security sector stopped taking sides and started enforcing the peace against spoilers from all sides. In the course of the 2000s, an imperfect but fairly firm peace consolidated in both provinces.

Bangladesh from 1998 saw a rather parallel story with the rise of a Salafist group, Jamaat-ul-Mujahideen Bangladesh (JMB), which organized hundreds of terrorist bombings across Bangladesh, peaking in 2004–05 (ICG 2010; South Asian Terrorism Portal 2012). JMB saw a state of sectarian violence, police failing to do their jobs, lawlessness, weak governance and a general condition of citizens feeling unsafe within certain rural hotspots of disorder, particularly in Rajshahi Division. It grasped this anomie as an opportunity to consolidate its movement. It enforced a rule of Shari'a law, allowing people to feel safer, and then used these rural areas as bases from which terrorist training and operations could be mounted across Bangladesh. As with the Indonesian militias of the late 1990s and early 2000s, in Bangladesh, a multidimensional state and civil society response from the mid-2000s has effectively eliminated JMB as a source of terrorism in recent years (Fink and El-Said 2011: 5–7), though it is a threat that could return. Indeed, Indonesia and Bangladesh—the largest Muslim-majority nations—are today not terrorist hotspots in the way that so many other Muslim-majority societies such as Afghanistan, Pakistan, Yemen and Somalia have become. Bangladesh security experts whom John Braithwaite interviewed said that the *modus operandi* of JMB was the same as that of the Taliban: to build a base from rural areas with a rule-of-law vacuum that are being terrorized by gangs.<sup>1</sup>

This observation led us to this paper's focus on a Hobbesian analysis of the rise of the Taliban. We conclude that the international community's response to the Taliban has also been Hobbesian: to install Hamid Karzai as a Leviathan. In 2001, the international community was still obsessed with the Yugoslavia break-up scenario, for which there was no historical precedent or basis for fear in Afghanistan. Nevertheless, international support for a highly centralized Leviathan was justified by 'the assertion that the country would break apart without firm control at the top' (Barfield 2010: 8). In Bob Woodward's (2011) *Obama's Wars*, he quotes US President Barack Obama as saying in meetings with his national security team that his objective is not to build 'a Jeffersonian democracy' in Afghanistan. The conclusion we develop in Part II of this paper is that the tragedy that is Afghanistan is a product of decades of policies that have been altogether too Hobbesian and insufficiently Jeffersonian. We must remember that Jefferson's republican vision was of rural, decentralized, deliberative checks and balances on challenges of domination and violence. The alternative we develop is of the kind of rural village republicanism supported by a democratic state—the Panchayat vision that we also see in the political thought of Mahatma Gandhi (see also Braithwaite et al. 2012). Village justice, according to this analysis, is more important than state justice, though state justice is also interdependently important to securing a world freed from terror and violence.

### *War, State and Society in Afghanistan*

Prior to a Communist coup in 1978, Afghanistan had many problems but remained generally peaceful for about five decades under King Mohammad Zahir Shah and

<sup>1</sup>Most of the 114 interviews typed up for this research were conducted together by both authors in July–August 2011. Other interviews were conducted with military and other personnel (who had served in Afghanistan) in other countries since the principal fieldwork finished, going back to 2006. Ali Wardak was born in Afghanistan and spent a large proportion of his life there, including three fieldwork trips on other research projects since August 2011. Our ethics protocols require that all interviews be anonymous unless informants specifically request that they be on the record.

President Mohammad Daoud Khan. During this period (especially between 1973 and 1978), Afghanistan was slowly beginning to consolidate state institutions. It was gradually becoming a freer society, especially for women. Compared with other developing nations at a similar level of development, there was promise in the education system. The tragedy of Afghanistan was partly born of the latter strength. Like many educationally free universities around the world in the late 1960s and early 1970s, Kabul University was vibrant with student radicalism (Barfield 2010: 213). What distinguished the radicals of Kabul University from those at the Sorbonne or Berkeley was that its radical factions of the left came to be backed by the full might of the Soviet empire (or of Mao's China) and its Islamic radicals came to be backed by radical circles in Pakistan, Iran and other parts of the Muslim world. After the Soviet invasion, the latter were also backed by Pakistan's Inter-Services Intelligence Directorate (ISI), the US Central Intelligence Agency (CIA) and money, men and munitions from Saudi Arabia and some other Arab nations.

With this backing, the Communists and then the Islamists were able to take over the Afghan state. Between them, they managed to destroy the fragile promise of Afghanistan. In a succession of wars in which the Communists and the Mujahideen were the main protagonists, more than 1.2 million Afghans are estimated to have lost their lives. In the course of these wars, Afghanistan's economic, political, educational and cultural infrastructure was decimated. Successive classes of warlords captured corrupted institutions, while smaller gangs and militia groups were allowed to carve up the countryside. Eventually, the destroyed promise of the state education system meant that the only way many young Afghans could get an education was in *madrassas* (Islamic seminary schools). Many *madrassas* were funded by the likes of Osama bin Laden in the border areas between Afghanistan and Pakistan and in some Pakistani cities.

When the Soviet Union decided that sending guns and advisers was no longer enough to prop up its chaotic Communist client, it invaded Afghanistan, in December 1979. The Mujahideen were then able to draw in countervailing support from the United States, Western Europe, Pakistan, Saudi Arabia and Osama bin Laden. This was enough for them to defeat the Soviet Union and contribute greatly to the collapse of global communism. The last ruler of the former Communist regime of Afghanistan, Dr Mohammad Najibullah, renounced communism in the same way that Russia did, declaring instead support for Islam, and democracy. The regime remained a Russian client and managed to hang on with Russian military aid. Though Gorbachev's and then Yeltsin's Russia was no longer its Cold War adversary, the United States did not seize the opportunity to work with Russia to support the transition from communism to democracy in Afghanistan. Instead, the United States wallowed in satisfaction at its expensive Cold War triumph there, refused to take responsibility for cleaning up the mess Cold War rivalry had created and jumped at the fiscal opportunity to sever the flow of funds to Afghanistan. The United States outsourced regional security for Afghanistan to Pakistan. The vacuum where great powers had once competed opened up a world in which Afghanistan could become a key site of a dangerous rivalry between regional powers—especially India and Pakistan. This cocktail of instability was further compounded by the state on its western border, Iran, arming Afghan Shi'ite militias inside Afghanistan.

Not only has the United States suffered terrorism as a result of its decision to abandon Afghanistan after the Soviet withdrawal (Wardak 2002). Pakistan and India have

also suffered ravages of terror as a result, while Russia now loses 14,000 young people a year to heroin sourced from Afghanistan—a number close to that of the young soldiers it lost throughout its Afghan war. Iran likewise bleeds from heroin trafficking out of Afghanistan, typically accounting for more than one-quarter of the world's opiate seizures (Paoli et al. 2009: 238). Between the Soviet withdrawal from Afghanistan and the early 2000s, it had already lost no fewer than 3,700 police killed in fights with drug traffickers (Ashouri and Rahmdel 2003; Paoli et al. 2009: 238). At the end of the war with the Soviets, the Afghan state was much more salvageable than it was in 2001, when the West finally re-engaged with Afghanistan.

This is the Hobbesian lesson from Afghanistan. If the short-term interests of neighbouring states allow a war of all against all within a lawless state, all manner of sinister forces might incubate inside that space. This poses longer-term threats, even nuclear ones around the Pashtun belt that straddles Afghanistan and Pakistan, where the risk of Pakistan's nuclear weapons falling into the hands of terrorists is one of the greatest threats the world faces. This is no less than the lesson of Somalia, of Yemen and of other parts of Pakistan. While the Hobbesian diagnosis of disorder is perceptive, we seek to explain why the Hobbesian remedy of a Leviathan with a strong police and military made things worse in Afghanistan, just as it has in Pakistan.

#### *Fragmentation of the State*

There were many competing Mujahideen groups, which between them won the war against the Soviets and finally in 1992 against Dr Najibullah's successor Russian-backed regime. Sadly, when the United States outsourced regional security to Pakistan, the latter saw itself as having an interest in backing one Mujahideen group after another that it hoped would be its client. In the process of moving support from one religious party to another, it prevented the emergence of a more independent Afghan national leadership (Rubin 2002: x). Pakistan saw Afghanistan as a sphere of its influence and a potential ally to project a policy of 'forward defence' or 'strategic depth' against India. More importantly, it aspires to use Afghanistan as a conduit for marketing its goods in Central Asia and importing badly needed gas and oil from there. Pakistan probably did not see some instability inside Afghanistan, which it believed it could manage, as such a bad thing. And it especially did not want a stable Afghanistan that was a close friend of its enemy, India, which has been steadily making huge economic and political investments in Afghanistan. Pakistan is highly suspicious of the recent signing of a 'strategic agreement' between Afghanistan and India, and India's offer to train Afghan security forces.

Until Pakistan switched its support to the Taliban from 1994, Pakistan's efforts to dominate Afghanistan through a client Mujahideen group failed because competing regional powers—India, Iran, Russia and some Central Asian former Soviet republics—responded by backing their own Mujahideen clients. While the wars among Mujahideen groups for control of Kabul were not quite as destructive of lives as the war against the Communists, they were much more destructive of the state and of infrastructure in the capital, Kabul. Large swathes of the city were turned to rubble, including precincts that represented strengths of Afghan state-building, such as some key educational institutions including Kabul's well-known engineering college (Takhneek-e-Sanawai) and crucially important facilities at the University of Kabul.

The descent into anarchy was worst in the Kandahar region. Armed gangs carved up control of the countryside. Abduction of teenaged boys and women was widespread. Internecine fighting put citizens at risk of a stray bullet or of accusations of harbouring an enemy. Farmers could not get their produce to markets. Travellers could not visit friends without paying tribute to gangs at multiple checkpoints. One spontaneous response was *madrassa* teachers and students self-organizing under the leadership of Mullah Mohammad Omar to close the checkpoints and control the armed gangs under a banner that became known as the Taliban. In November 1994, they seized control of Kandahar province, asserting order through implementation of Shari'a law. At first, they expanded under a 'law and order' platform, implementing their Deobandi ideology in full only when they were well established (Barfield 2010: 257).

Their quick success attracted sponsorship from Pakistan, which desperately needed a stable and friendly Afghanistan for establishing closer and deeper economic ties with Central Asian countries, especially Turkmenistan and Uzbekistan. Pakistan's ISI (or circles within it) later played matchmaker between the Taliban and al-Qaeda. With popular support throughout much of Afghanistan, and money (as well as a few hundred fighters) from al-Qaeda, the Taliban were able to expand their sway across nearly all of Afghanistan by August 1998. As in Ambon, Poso and Bangladesh, in Kandahar, Hobbesian anarchy created the opportunity for Islamic extremists. The difference between Kandahar and these other cases is that foreign funding was not cut off as soon as their military power began to spread and consolidate. Even the United States initially saw the Taliban as a kind of Leviathan that might restore an order that would allow American companies (especially UNOCAL) to pipe gas and oil from Central Asia (Rubin 2002: xiv).

While fighting among Mujahideen groups backed by different neighbours and regional powers delivered the most decisive blows in recent history to the Afghan state, it built on a longer history of state fragmentation as a result of civil war, clientalism of external powers, the geopolitical reality that Afghanistan was a buffer between competing empires (Russian, British) and competing alliance systems (Soviet, American) (Rubin 2002), unstable succession from polygamous rulers (Saikal 2004) and other causes. Some past military decimations were even more fragmenting than recent ones; for example, Genghis Khan destroyed many towns and most irrigation infrastructure in the thirteenth century, turning most of the surviving population back to nomadism (Rubin 2002: 22). Propping up Hamid Karzai's government with the Northern Alliance warlords/leaders as a Leviathan without an effective separation of powers served to further erode state legitimacy. This led to a weak-state–strong-society pattern of Afghan development (Migdal 1988). The renowned hospitality of Afghan civil society flourished by ordinary people learning to depend on their village and clan for security, justice and economic opportunities. They learnt not to depend on the state. Among the most critical of the supportive non-state civil society institutions were *jirgas*.

#### *Taliban State Crime against Women and Rule Breakers*

In power, the Taliban, supported by al-Qaeda fighters, committed heinous war crimes and crimes against humanity, especially in Mazar-i-Sharif, Yakawlang and Shomali (Afghanistan Justice Project 2005; Grossman 2006). When the Taliban fully implemented their radical Islamic justice policies, they allowed criminalized state excess.

On one level, many respondents said they felt safe on the streets under Taliban rule. ‘So long as you did not break their religious rules, you could walk safely anywhere. You could not do that before they took over and you cannot do that today’ (2011 interview, Kabul civil servant). The trouble was that, if you did break their religious rules, state terror struck. Benign artistic crimes like creating or watching a film or listening to a female singer were severely punished. The Taliban state also perpetrated crimes against cultural heritage in the name of state enforcement of religious orthodoxy—the best-known example being the demolition of the ancient Buddhist statue of Bamiyan.

Order was partly maintained by the Taliban’s own selective interpretation of Shari’a such as death of murderers and cutting off the hands of thieves in public displays in a football stadium. Men without a beard were at risk of victimization, but women suffered the most terrible state tyranny. The religious police of the Directorate for the Promotion of Virtue and Prevention of Vice were the most important agents of this tyranny, although all Talibs were potentially roaming agents of state tyranny against those who broke religious rules. Women were punished for entering public space without the approval of their husband. If found outside their home, they at least had to be completely covered with a *burka*.

### *State-Building after 2001*

The collapse of the Taliban at the hands of the US military campaign supported by the Northern Alliance warlords did not at first deliver a massive injection of Western support for state-building. Once the initial rout of the Taliban was accomplished in 2001, the attention of Western powers was focused mostly on what was seen as the more difficult challenge of Iraq. The Bush administration had come to power with a platform averse to state-building, so the priority in Afghanistan was killing or capturing remnants of al-Qaeda and the Taliban. As senior UN official Frances Vendrell (2011) put it:

Some of us forcefully argued for a heavy footprint on the model of Cambodia, East Timor, Bosnia or Kosovo, convinced that, after years of conflict and misrule, the Afghan people were ready for a strong international role that would do away with both warlord and Taliban rule, reconstruct their country, and assist in building up rule of law institutions. But we were overruled by those favouring a ‘light footprint’, in which the Afghans would be ‘in the lead’, a politically correct slogan that in practice ensured that the process would be led not by genuine representatives of the Afghan people, but by a group of mostly rapacious individuals. Afghans saw the international community’s support for transferring power to the worst villains in their country and drew the natural conclusions. (Vendrell 2011: 54–5)

In the years after 2001, the realization began to dawn that former Northern Alliance warlords/leaders and relatives and friends of President Karzai were pillaging the state. The authority of that state to monopolize the use of force did not extend much beyond Kabul and, even within Kabul, its legitimacy was plummeting. What one United Nations Development Programme (UNDP) informant described to us as a ‘bribery for peace’ philosophy was at first countenanced by NATO to ‘keep the warlords happy’:

Those who defend bribery for peace in Afghanistan say they will build systems for things like corruption over time, but in the short term we must create security first. Brahimi, Kofi Annan’s man in Afghanistan, said another day without conflict is another day closer to permanent peace .... This subsidizes a culture where violence pays .... In Afghanistan, corruption control was a nice thing to do, put in the ‘good governance’ box that they would come to later. Then it was too little, too late. (2007 interview, UNDP)

Progressively, Western support for state-building poured in more voluminously. It poured into a bucket with holes controlled by a Leviathan who captured the leaks. It was a Leviathan unchecked by an effective separation of powers. The fatal mistakes were made early of putting criminals<sup>2</sup> in charge, bedding down a culture of impunity, and creating an electoral system that was winner-take-all and stunted the development of political parties. Worst of all, the constitution and the occupation concentrated power in the hands of one person: the president. That president then doled out positions with discretionary power to buy support from corrupt powerbrokers. The Bonn agreement in 2001 did not usher in an effective ‘constitutional moment’ (Afsah 2011: 157) because it enabled a personalized division of spoils rather than an institutionalized division of powers. Key ministries and other important positions in the first two crucial post-Taliban administrations were given to those anti-Taliban warlords who were involved in the destruction of Kabul, the killing of hundreds of its innocent residents, rapes and widespread looting (Afghanistan Justice Project 2005; Grossman 2006; Nordland 2012). These ministries—especially Interior, Defence, Foreign Affairs and the National Directorate of Security—were then staffed by the warlords’ factional followers and have become major networks of institutionalized abuse of power, corruption and nepotism (Grossman 2009). More importantly, all these have had negative implications for the legitimacy of the post-Taliban Leviathan and its international backers who promised to promote human rights and democracy in the new Afghanistan.

The Afghan state failed to secure inclusiveness, to deliver security and justice, to prevent corruption, address the issues of war crimes and crimes against humanity and to control the drug trade. Taliban fighters who had fled or surrendered in 2001 mostly sought to reconcile and submit to the Karzai government, right up to the level of Taliban military commander and minister of defence (Afghan 2011: 308–9; ICG 2011: 6; Ruttig 2011: 6). While Karzai himself wished to reciprocate reconciliation overtures from Taliban leaders in 2001 and 2002, his American overloads were at best indifferent to this as a priority. At worst, the United States was sympathetic to dominant Northern Alliance elements in the government who killed, imprisoned and persecuted Talibs with whom President Karzai or provincial leaders had reached reconciliation agreements (ICG 2011: 11). As Michael Semple (2011: 2) put it, in 2002, many ‘senior Taliban figures attempted to pledge loyalty to the new order, but were hunted down. The US sent to Guantanamo Bay many people who could have been far more useful if they had been given a chance to participate’. Talibs learnt from the bitter experience of 2002 that reconciliation would be punished rather than supported and many rejoined those remnants who sought to rebuild an insurgency against the foreigners and the Karzai government (Strick van Linschoten and Kuehn 2012).

### *Criminalization of the Justice System after 2001*

The Afghan government is a savage criminal enterprise that a few people run. (Former member of parliament quoted in Nixon 2011: 11)

Prisons are full of people who have committed no crime but are too poor to bribe their way out of trouble, while serious criminals can pay enough to avoid ever serving their sentences. Just over half

<sup>2</sup>So, many of them were criminals not only in the sense of being widely suspected as war criminals, but also as expert practitioners of corruption, extortion, embezzlement, tax evasion and living off the profits of the opium trade.



of Afghans fear for their safety in the local area (Asia Foundation 2009), and many feel more secure and are more optimistic about justice prevailing in areas controlled by the Taliban. (Mason 2011: 1)

The book *The Rule of Law in Afghanistan: Missing in Inaction* from which this Mason quote is taken documents the ways the Afghan state has failed to compete with the Taliban in offering rule-of-law services. David Kilcullen, at the launch of the book in Canberra, described the Taliban as an ‘armed rule of law movement’. His chapter (Kilcullen 2011) describes the greater appeal of Taliban Shari’a courts in comparison with corrupt state courts for resolving disputes that matter locally, such as land conflicts, and for making the resolution of agreements stick, albeit brutally at times. These Shari’a courts consist of one *qazi* and two *ulema* and are part of the Taliban’s administrative structure (Ruttig 2010: 17). Kilcullen describes how the Taliban have an ombudsman (see also Peters 2011: 108–9) to whom citizens can complain about the shadow state services offered by the Taliban, including its courts. Peters (2011: 108–9) found a sudden increase in wealth by a Taliban member can result in an investigation, and demotion or physical punishment if illicit bribes or kidnapping are the reason. A recent field study of the Taliban justice system—*Shadow Justice: How Taliban Run Their Judiciary*—further confirms these observations (Giustozzi et al. 2012). The 6 January 2012 ISAF State of the Taliban Report, based partly on interrogations of 4,000 arrested Taliban, leaked to *The New York Times* ([www.nytimes.com/interactive/world/asia/23atwar-taliban-report-docviewer.html?emc=etal](http://www.nytimes.com/interactive/world/asia/23atwar-taliban-report-docviewer.html?emc=etal)), concludes that there is independence in the administration of this ombudsman function and in its enforcement of the Taliban Code of Conduct, the integrity of which ordinary Afghans have come to respect (at pp. 3–6).

Kilcullen (2011) contrasts the Taliban’s justice services with the vicious and procedurally unfair Islamic justice meted out by al-Qaeda in Iraq, which the people of Iraq could not wait to turn on and evict. At the opposite extreme, Kilcullen finds the rather reintegrative justice and welfare services of Hezbollah in Lebanon, which support people in solving problems of injustice more holistically than the services provided by the Taliban. Finally, Kilcullen takes us on a journey across time and space to show from the writings of the ancient Greek Herodotus (1954) how military commanders with a small local base could expand that base during periods of Hobbesian anarchy by providing quality justice and security services to ever-widening circles of frightened citizens.

The point of all this empirical work is to show not that the Taliban courts and ombudsmen are models of exemplary justice, but that their justice services are a bit more satisfactory to citizens than the justice supplied by the Afghan state. In Part II of this paper, we will move on to show that the real competitor to both Taliban and state justice was *jirga/shura* justice and that both the Taliban and the state justice bureaucracies (and the United States at first) found common cause in seeking to crush it. But we jump ahead.

During our interviews, many Afghans complained of the police stealing from ordinary people: ‘Forget about the Taliban. Our biggest problems are with the police’ (truck driver quoted by Wilder 2007: 1). The same sentiment is frequently expressed by foreign security advisers, such as Canadian Brigadier Gary O’Brien, who said the Afghan police ‘are part of the problem. They do not provide security for the people—they are robbers of the people’ (Cotter 2007). Few areas more than policing show the folly of very little support from American aid in the foundational years of 2002 and 2003, though, by 2007, this increased more than a hundredfold (Wilder 2007: 20). Because the foundations were so corrupted, with capturing a local police commander’s position seen

as the spoils of victory by leaders fighting on the winning side, there was no surprise when masses of money did flow; it lined the pockets of police executives who sought to control and exploit ordinary people rather than serve them:

Mid to high-level officials pay tens, sometimes hundreds of thousands of dollars to obtain a senior position in the security services and then extract bribes or collaborate with criminal and insurgent networks in smuggling and other illegal activities, including kidnapping for ransom. (ICG 2011: 23)

While it would be wrong to say there are no pockets of good policing practice, the consensus among commentators has been that the billions in American and European aid have built a tyrannical policing culture with weak community policing capabilities (Bayley and Perito 2010; ICG 2007; 2008; Murray 2007; Wilder 2007).

Community policing has been the casualty of a policing culture corrupted and militia-ized by its leaders. In 2006, the Ministry of the Interior launched the Afghanistan National Auxiliary Police (ANAP) with international funding, which was intended to build community policing capability. Rather than realizing this intent, 'the program was used to regularize existing militias' (Lefèvre 2010: 1). Another reason it did not work as a community policing initiative was that recruits overwhelmingly came from outside the areas they were assigned to police (Lefèvre 2010: 6). ANAP was closed in 2008, only to see similar initiatives launched with the same weaknesses: the Afghan Public Protection Program and Local Defence Initiatives. These programmes may in reality discourage recruitment by the Afghanistan National Police, becoming their rivals rather than their auxiliaries. The training is less arduous than joining the police. ANAP recruits received the same pay and uniform as regular police after ten days' training (ICG 2007: 13). The successors to ANAP have been led by the US military and have drawn their inspiration from the 'Sons of Iraq' arming of 100,000 local irregulars in the fight against al-Qaeda in Iraq starting in 2006. They also harnessed the tradition of the *arbaki*. The *arbaki* were unpaid militias formed by the tribal *jirga*, which have operated in specific cultural tribal settings for centuries. The auxiliary militias formed by the US military since 2006 differ from the *arbaki* in not being under the regulatory influence of the *jirga* and being paid, meaning that they are 'uncontrollable when payments stop' (Ruttig 2010: 10). They are harnessed to the military objectives of one side in a war as opposed to having community policing objectives. Therefore, the auxiliaries neglected 'the *jirga*'s inherent principle of mitigating conflicting interests and rather tend to deepen conflicts' (Ruttig 2010: 10).

Another problem is that peaceful areas where militias have handed in their weapons to support democratic policing do not benefit from these aid programmes. Leaders from these peaceful areas complain that the American funding for auxiliaries goes to the most criminal gang leaders who have dragged their feet on handing in weapons. This is a direct contribution to the criminalization of the state:

[T]he government ends up rewarding criminal jihadi commanders instead of peaceful members of the community. To some, this may form an incentive to take up arms in the hope of accessing government funding and employment. (Lefèvre 2010: 22)

Accessing government funding and employment illegitimately is closely connected to institutionalized corruption in the Afghan justice 'system' and in other state organs. Corruption is not a new problem. During the Najibullah regime that fell to the Mujahideen in 1992, '[c]orruption was so rampant that the government bureaucracy

absorbed 85 to 90 percent of the Soviet aid intended for the population as a whole' (Barfield 2010: 248). Afghanistan has managed a rapid fall down the Transparency International Corruption Perceptions Index, from 117th in 2005 to 180th in 2011, with only North Korea and Somalia falling below it in the 2011 perceptions index (see also Hartmann 2011: 175). All analysts see it as a massive problem (Gardizi et al. 2010; Maley 2010: 14–15), with one UN survey concluding Afghans paid an equivalent of 23 per cent of their gross domestic product in bribes during 2009 (UNODC 2010: 25). One reason for the greater appeal of Taliban courts is that 'unlike the state courts, their decisions are not dependent on the ability to pay bribes' (Ledwidge 2009: 7)—a conclusion Claude (2010) also reached after consideration of survey evidence. Ledwidge tells the story of an open and shut case of murder where a man was convicted but sentenced to only six months after bribing a state judge. When he was released, the Taliban used this despicable crime to build popular support by arresting him and trying him before a Taliban court that ordered his handover to the mercy of the victim's family, who chose to kill him. In property cases, ordinary people feel they can get greater security of their property rights from a Taliban court, which will enforce the decision if they win against a man more powerful than themselves. Ladbury and CPAU (2009) found that:

The general perception was that the Taleban had indeed captured the justice market and were perceived to be reasonably efficient and fair—at least when compared to the formal system which was neither. There was no mention of unreasonable or unjust punishments. When women respondents in Qandahar mentioned the Taleban and justice it was to endorse the general message: that ordinary people support the Taleban because they provided justice in contrast to the formal justice system and the courts. (Ladbury and CPAU 2009: 24)

A problem is the patrimonial form of rule Hamid Karzai put in place. It is not that Karzai is personally one of the more corrupt individuals in Afghanistan. His style is genteel, and he seems to aspire to an Afghanistan that is an independent, democratic and prosperous society. It is not that he is a corrupt or brutal tyrant, more that he is a weak leader enjoying enormous control over a highly centralized presidential system. He uses that control in a patrimonial fashion to buy personal support from any powerbroker who threatens him or demands booty; his government is referred to by many Afghans as *hokomat-e-maslahati*—a government formed on the basis of a 'marriage of convenience' among rival individuals and groups each serving their personal and/or factional interests. President Karzai seems to allow a small circle of corrupt individuals at the political centre to build their wealth and power by expanding factional patronage systems. Ironically, this small circle also includes some smartly dressed, secular, Western-educated 'advisers' who advocate democracy and human rights, but are deeply involved in patronage, nepotism and corruption.

Corruption has been particularly acute in the judiciary. There is perhaps no place in the world outside Afghanistan where it is nearly impossible to buy urban land without bribing a judge. Afghanistan is one of the few places in the world, if not the only place, where you can find a national survey that shows citizens are more likely to experience having to pay a bribe in their dealings with the judiciary than in their dealings with the police, the military and customs officials (the 2008, 2009 and 2011 Asia Foundation surveys, though with more mixed results in 2006 and 2010; see Asia Foundation 2011: 102). Equally unusually, citizens are more likely to view the judicial branch as acting in 'their own interests' than members of the legislative or executive branches (Asia Foundation

2010: 101; 2011: 112). On the positive side, these same surveys do show a little improvement across time in citizen attitudes to the judiciary. Even more positively, Afghanistan after 2009 became the only country in the world about which one could say hundreds of judges have been punished or dismissed for corruption. This started in 2009 with a unilateral initiative of the Supreme Court administration itself:

Ninety-two judges were arrested [in 2009] after they were caught taking bribes on camera in sting operations conducted by the Judicial Inspectorate. The effort was undertaken without the support or knowledge of international actors working in the sector; indeed not all of them were happy with the legality of entrapment or the lack of an appeals process, even though the arrests, sackings and detentions appear to have had some effect on judges' behaviour. Ultimately, however, death threats have slowed and possibly even stopped the clean-up programme. (Carter and Clark 2010: 22)

Our 2011 interviews with US military officers responsible for ISAF anticorruption efforts gave an account broadly similar to Carter and Clark's of a huge spike in corruption convictions in 2009–10 based on integrity testing assisted by technical support from US Federal Bureau of Investigation (FBI) officers working with the Serious Crimes Task Force. After this early success, as one would do in the West, the Serious Crimes Task Force started to move up to hard cases as opposed to softer targets such as low-level judges. In the first case in which a fairly senior official was targeted, he got on the phone to President Karzai and the case was dropped. As a result, politically:

... the Major Crimes Task Force is something of a spent force, discredited and impotent ... there has not been one successful conviction for corruption against a senior person in a politically connected family. These cases do not successfully get through the Attorney-General's office. The Attorney-General and the Anticorruption Commissioner are close to President Karzai .... Anyone who did push on with corruption cases against really top officials would create risk to their family and their self. (August 2011 interview, US military, Kabul)

Indeed, according to Filkins and Rubin (2010), a former deputy Attorney General of Afghanistan, Fazel Ahmed Faqiryar, was sacked after repeatedly refusing to block corruption investigations against high-ranking government officials. According to Filkins and Rubin, the list included 25 senior officials in Karzai's government, including Mohammed Siddiq Chakari, the former Minister for Hajj and Islamic Affairs, and Rangin Spanta, who is now the national security adviser.

The sacked (or retired, according to the Afghan Government) former deputy attorney was then prosecuted, and a Kabul court found him guilty of falsely stating that he had been forced into early retirement and of falsely accusing Rangin Spanta of corruption (Rubin 2012). While protesting against the injustice of the Afghan justice system, according to, Faqiryar said that he would appeal against the verdict of this highly publicized court hearing; however, few expect that the powerless will win a court case against the powerful in the current Afghan court system. Indeed, in his BBC-Persian/Pashto 'Open Letter to the President of the Islamic Republic of Afghanistan' in December 2009, Dr Spanta himself described Afghanistan's justice system as 'anti-justice' and wrote that 'I did not intend to complain about this organ [the Afghan justice system], because every day hundreds of citizens of this country are put into darkness and depravity by this very organ' ([www.bbc.co.uk/pashto/news/story/2009/12/091219\\_spant-letter-2-karzai.shtml](http://www.bbc.co.uk/pashto/news/story/2009/12/091219_spant-letter-2-karzai.shtml)). Mr Faqiryar may well be a

victim of this justice system that serves interests of the politically and economically powerful in Afghanistan.

When there are an estimated 800–1,000 presidential pardons annually—a large proportion for people from well-connected families (Carter and Clark 2010: 33)—justice officials both fear for their safety and feel there is no point doing their job if a presidential pardon will be the ultimate result in any major corruption case. In this sense, impunity for corruption is of the same kind as impunity for crimes against humanity for powerful families connected to powerful warlords-turned-politicians. The former Communist head of the secret police, Assadullah Sarwari, can be sentenced to death by the courts, but not a member of the current elite (Hartmann 2011: 186). The ISAF officers in the above interview argued that the 2009–10 spike of enforcement on lower-level officials nevertheless had an impact. They said that their QSAR survey of 10,000 Afghans quarterly showed steady improvement in willingness to take cases to state judges among people who had previously preferred Taliban judges. The ISAF officers attempted to get permission to make these data available to the authors, but this was not granted.

#### *Drugs and Criminalization of Justice*

The production and smuggling of illicit drugs are closely connected with the criminalization of the justice ‘system’ in post-Taliban Afghanistan and are key drivers of corruption. This has also been one reason the Afghan National Army has not been winning the war. Some join the army because they are heroin addicts: being a member of the army is a good way to get free heroin. Afghanistan for some years has been producing around 90 per cent or more of the world’s illicit opium and more recently has become the world’s largest producer of cannabis resin (UNODC 2010: 7). Commercial production of opium started in the Mujahideen war economy against the Soviet Army, supported logistically by ISI and the CIA, including in the laundering of drug money and a ‘weapons–drugs pipeline’ (Maass 2011: 7). Some ISI elements also were likely directly involved in heroin trading themselves (Coll 1991; Rubin 2002: 196–9).

The Taliban accomplished a large reduction in production in 2000 followed by a further fall in 2001 of about 90 per cent in an attempt to reduce Western pressure on their regime. There was a more modest reduction in 2008–10, which was reversed in 2011, with production expected to rise again when complete 2012 statistics are released. These two were the only temporary reversals of three decades of continuous growth. Both sides in the current war—the Taliban on the one hand and some former Northern Alliance warlords and some Karzai cronies and family members on the other—continue to rely heavily on profits from the drug trade. It is a slight exaggeration to see the Taliban as a narco-insurgency because the percentage of funding of their insurgency that comes from taxing drug production—while large (Peters 2009; 2011: 101)—is contested (e.g. Hafvenstein 2011). It also exaggerates a little, but only a little, to see Afghanistan as a narco-state. Jonathan Goodhand (2009) concluded that ‘the Ministry of Interior in effect operates as a shadow “ministry of opium” by controlling key positions in drug producing and smuggling areas’ (Goodhand 2009: 20). The Ministry of Interior also directly controls the other key component of the Afghan justice system: the police. The Afghan justice system hardly operates as a ‘system’ (Johnson et al. 2003; Wardak 2004), ‘except when it comes to corruption’, as one of our interviewees put it.

In Afghanistan, as in so many conflicts in poor countries, war persists because ‘it’s a business’ (July 2011 interview, Provincial Peace Council leader). Drugs form one of the factors that make so many who are earning good money out of the business of war want to keep it going. This is true up to the level of ISI operatives who ‘cream off a nice percentage’ of monies that flow to them from sources as disparate as US military aid and funds to support *jihad* from wealthy Islamists in Saudi Arabia, the United Arab Emirates and the West. Of course, it would be impossible to smuggle Afghan drugs into Europe without the deep involvement of international organized criminals, whose share in this illicit trade is estimated to be around 80 per cent. These interests become more entrenched and harder to move towards peace once a war has been raging for a long time—an issue we develop in the next section.

### *The Criminalization of War*

When UK Prime Minister Tony Blair justified the 2001 intervention in Afghanistan, he gave great prominence to the need to control the narcotics trade out of the country. A decade later, NATO had surrendered not only to ‘bribery for peace’, but also to a ‘narcotics for peace’ philosophy that was accepting of Afghanistan continuing to supply most of the world’s heroin. NATO’s philosophy became much worse than tolerating impunity for the corruption, drug deals and war crimes of the warlords it supported. Led by the Bush administration, ‘torture for peace’ became part of the philosophy of the ‘war on terror’. The detention and torture of suspected insurgents at Guantanamo Bay and at the notorious Bagram prison, ‘extraordinary rendition’ of detainees and the repeated killing of civilians in night raids and in CIA’s drone attacks are well documented (BBC 2009; Centre for Constitutional Rights 2006; Human Rights Council 2011; *The Guardian* 2011; UNAMA 2011). In Afghanistan, extrajudicial execution by NATO forces increasingly displaced arrest and trial. One reason ISAF officers we interviewed gave for this was that judges were afraid to send captured Taliban down for long prison terms and were pleased to take bribes from defendants, so what was the point of putting Taliban before the courts?

The criminalization of NATO justified in the minds of the Taliban further criminalization of their *jihad*. The Taliban had never engaged in or approved suicide attacks on civilians until 2002; right up to the level of their foreign minister, whom we interviewed, and up to Mullah Omar, they strongly condemned the suicide attack on New York of 11 September 2001 (also see Strick van Linschoten and Kuehn 2012). From 2002, the Taliban took a leaf out of al-Qaeda’s book and, with technical support from them and from ISI-protected suicide bomb factories in Pakistan, the Taliban turned to terror. Armed gangs on all sides turned to funding their fighters partly through the heroin trade. This leads us to hypothesize that *the longer a war continues in stalemate, the more criminalized it becomes, especially if visible precedents of impunity abound early on*. This is hardly an original insight; it is a Hobbesian one. It is also Durkheimian, about anomic spaces where the rules of the game are no longer settled, where openings are created for all manner of sinister forces, not just those of the principal war makers and not only the brutishness of organized criminal groups. Hence, for example, personal revenge murders in Afghanistan are passed off as war killings or accommodations between armed factions (von Biljert 2009).

We further hypothesize that the remedy is not so much in shifting the balance back from the war model to a criminal law-enforcement model for fighting terrorism and insurgency, though that is also needed. Rather, the more fundamental solution we advance is grounded in a restorative justice approach to defeating impunity. It can be built peacefully from the fabric of surviving traditional community justice institutions—*jirga* and *shura*—that are deeply grounded in Afghan culture and society. These traditional local justice and decision-making institutions are examined in Part II of this article.

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