

THE RULE OF LAW IN AFGHANISTAN

Missing in Inaction

How, despite the enormous investment of blood and treasure, has the West's ten-year intervention left Afghanistan so lawless and insecure? The answer is more insidious than any conspiracy, for it begins with a profound lack of understanding of the rule of law, the very thing that most dramatically separates Western societies from the benighted ones in which they increasingly intervene.

This volume of essays argues that the rule of law is not a set of institutions that can be exported lock, stock and barrel to lawless lands, but a state of affairs under which ordinary people and officials of the state itself feel it makes sense to act within the law. Where such a state of affairs is absent, as in Afghanistan today, brute force, not law, will continue to rule.

WHIT MASON consults internationally on political development and directs the project on justice in peace-building and development in the Centre for Interdisciplinary Studies of Law, University of New South Wales, Sydney. He was a founding member of the UN's justice coordination office in Kandahar and works as an adviser to the United States Institute of Peace's dispute resolution program in Afghanistan.

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Edited by
WHIT MASON



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CONTRIBUTORS

SHAFIULLAH AFGHAN was formerly the top aide to Kabul's slain chief of police, Akrem Khakrezwal, governance adviser in the Canadian Provincial Reconstruction Team, and program associate in UNAMA's justice office coordination office for southern Afghanistan. He currently heads an independent consulting firm in Kandahar.

COLIN DESCHAMPS is now working on the national solidarity program in the World Bank's Kabul office. At the time of writing, he was the Natural Resource Management Research Officer at AREU.

JOEL HAFVENSTEIN was formerly head of operations for USAID's alternative livelihoods program in Helmand; author of *Opium Season: A Year on the Afghan Frontier* (2009); then director of Tearfund, Afghanistan. He and his wife are now walking the length of Britain.

MICHAEL E. HARTMANN is senior adviser and manager, Criminal Justice Program, UN Office on Drugs and Crime, Afghanistan (2008–10). He was formerly acting chief of UNAMA's rule of law unit (2007–08), US State/INL-JSSP adviser to the Attorney-General of Afghanistan (2005–07), and UNMIK international prosecutor appointed to the Supreme Court of Kosovo (2000–05). He worked on justice reform in Bosnia and Herzegovina for the UN and ABA-CEELI from 1997 to 2000, and was a senior Fulbright Scholar (criminal law) in Lahore, Pakistan (University of Punjab Law College) in 1996. In the US, he served as a San Francisco assistant district attorney from 1983 until he joined the UN in Bosnia. Hartmann was a senior fellow for the US Institute of Peace in 2003, and adjunct faculty at the law schools of the University of California at Berkeley, UC Hastings and USF.

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DAVID J. KILCULLEN is an author and a consultant on counter-insurgency and counter-terrorism. A former Australian army officer, he left that army as a lieutenant-colonel in 2005 and is now a principal of the Crumpton Group. During 2007, he served in Iraq as senior counter-insurgency adviser, Multinational Force, Iraq – a civilian position on the personal staff of US Army General David Petraeus responsible for planning and executing the 2007–08 joint campaign plan which drove the Iraq War troop surge of 2007. He has a PhD in political anthropology from the University of New South Wales. He has written extensively about counter-insurgency and complex interventions, including the critically acclaimed *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One* (2009).

AGNIESZKA KLONOWIECKA-MILART is on leave as a judge in her native Poland. For twelve years she served with the UN, first as a legal monitor in the UN Mission in Bosnia, then as a judge appointed to the Supreme Court of Kosovo (2000–08.) From 2008 to 2010, she was engaged with UNODC helping the Afghan Ministry of Justice redraft Afghanistan's criminal procedure code. From 2006 to the present, she has served as an international judge on the UNAKART ECCC, the Supreme Court Chamber of the Khmer Rouge tribunal in Cambodia. She is a judge with the EULEX mission in Kosovo.

MARTIN KRYGIER, Gordon Samuels Professor of Law and Social Theory and Co-Director, Centre for Interdisciplinary Studies of Law, is one of the world's leading authorities on the rule of law in countries in transition. In 1997 he delivered the Australian Broadcasting Corporation's Boyer Lectures. His work spans several fields, including legal, political and social philosophy, communist and post-communist studies, and the history of ideas. He is the author, co-author or editor of many books.

WILLIAM MALEY, AM, is professor and, from 1 July 2003, Foundation director of the Asia-Pacific College of Diplomacy, Australian National University. He taught for many years in the School of Politics, University College, University of New South Wales and the Australian Defence Force Academy, and has served as a visiting professor at the Russian Diplomatic Academy, a visiting fellow at the Centre for the Study of Public Policy at the University of Strathclyde, and a visiting research fellow in the Refugee Studies Programme at Oxford University. He is also a barrister of the High Court of Australia, a member of the executive committee of the Refugee

Council of Australia, and a member of the Australian committee of the Council for Security Cooperation in the Asia Pacific (CSCAP). In 2002, he was appointed a Member of the Order of Australia (AM). He is the author of many books on Afghanistan and international relations, and regularly contributes to media around the world.

WHIT MASON has lived and worked outside his native US since 1989. He edited newspapers in Siberia and the Russian Far East, was a staff writer at *Asiaweek* magazine in Hong Kong, and reported for CBS News from Bosnia and South Korea. As a fellow of the Institute of Current World Affairs, Whit lived in Istanbul and wrote about the nexus between religion and politics in Turkey, Iran and the southern Balkans for three years. He worked in Kosovo first for the International Crisis Group and then as a speechwriter and adviser to the head of the UN mission, about which he co-authored a critically acclaimed book, *Peace at Any Price: How the World Failed Kosovo* (2006). He led a large media development project in Azerbaijan, and was communications and outreach director for USAID in Pakistan. In 2008 he opened the UN's justice coordination office for southern Afghanistan. He is a non-resident fellow of the West Asia program of the Lowy Institute for International Policy, Sydney, for which he co-authored Lowy Institute Paper 25, *Zealous Democrats: Islamism and democracy in Egypt, Indonesia and Turkey* (2008). Whit is a founding member of the Centre for Interdisciplinary Studies of Law of the UNSW Faculty of Law. He has spoken on international relations at many prestigious institutions, including NATO, the UN's Division of Peacekeeping Operations, the Folke Bernadotte Academy in Sweden, the Wilson Centre for Scholars, and Harvard University. He is a regular contributor to media in Australia and internationally. Whit is the Research and Lessons Learned Program Manager, Asia Pacific Civil–Military Centre of Excellence, Australia.

SHAHMAHMOOD MIAKHEL was formerly Deputy Minister of the Interior, Government of the Islamic Republic of Afghanistan; a senior governance adviser, UNAMA; and currently Chief of Party, Kabul, US Institute of Peace.

GRETCHEN PETERS is a journalist and author of *Seeds of Terror: How Terror is Bankrolling the Taliban and al Qaeda* (2009).

ALAN ROE is an adjunct research fellow at the School for Environmental Research, Charles Darwin University, Northern Territory, and did his

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PhD in geography at Durham University, UK. At the time of writing, he was senior research manager for Natural Resources Management at the Afghanistan Research and Evaluation Unit in Kabul.

SUSANNE SCHMEIDL is a sociologist and Afghanistan specialist. She was formerly project director of the Global Warning and Response Net (Global WARN) at Swisspeace. She worked for nearly four years until the end of 2005 as the country representative for Swisspeace in Afghanistan, working mainly with two Afghan organisations – the Afghan Civil Society Forum and the Tribal Liaison Office – that she helped set up. She also advised and supported other civil society organisations and served on the Board of Rights and Democracy, an organisation funding women's projects in Afghanistan. Previously she worked as senior research analyst for the FAST early warning unit at Swisspeace, where she was responsible for South Asia and special projects such as developing conflict early warning and response mechanisms for the Inter-Governmental Authority on Development in the Horn of Africa. She received her MA and PhD in sociology from Ohio State University (1989 and 1995), and worked at the Centre for Refugee Studies (York University, Canada) as a postdoctoral researcher (1995–96), coordinator of the prevention/early warning unit (1996–97), coordinator of the interim secretariat of the Forum on Early Warning and Early Response (1996–97), and technical consultant for the food and statistics unit of the UN High Commissioner for Refugees (1997). She has published in the areas of Afghanistan, civil society, refugee migration, conflict early warning and peace-building, and human security, including edited volumes with Howard Adelman, *Early Warning and Early Response* (1998), and Cirú Mwaûra, *Early Warning and Conflict Management in the Horn of Africa* (2002).

GRAEME SMITH is the former Kandahar-based correspondent for *The Globe and Mail*, Canada's national newspaper. He was stationed in Afghanistan from 2006 to 2009. Previously he was based in Moscow. His many awards include three National Newspaper Awards, Canada's highest prize for print journalism, and the annual Michener Award for public service given by the Governor-General of Canada. His multimedia series, *Talking to the Taliban*, gave viewers the opportunity to watch forty-two insurgents discuss why they fight, and made public the raw video of each interview along with accompanying articles and short documentaries. The project won several prizes, including an Emmy for new approaches to news and documentary.

BARBARA J. STAPLETON is a political adviser to the Office of the EU Special Representative for Afghanistan. She studied Middle East history and politics at the School of Oriental and African Studies at London University, and completed her LLM in the international law of human rights at the University of Essex in 1991. She spent the 1980s working in Eritrea, Iranian Kurdistan, Pakistan, Burma and the Thai-Cambodian border. From 1992 to 1997 she was a consultant to the BBC series *Human Rights, Human Wrongs*. She moved to Afghanistan in October 2002, joining ACBAR, the main NGO coordination body based in Kabul, as advocacy and policy coordinator. In May 2006, she joined the office of the Special Representative of the EU for Afghanistan in Kabul as a senior political adviser.

ASTRI SUHRKE is a senior researcher, Christian Michelsen Institute, Bergen, Norway. Before moving to the institute in 1992, she was a professor of international relations at the American University in Washington DC, and has been an associate at the Carnegie Endowment for International Peace. She has written widely on peace-building, forced migration and the politics of humanitarian action. She is currently working on a book on international assistance to Afghanistan entitled *The Limits of State-building*. Her most recent publications are *Roads to Reconciliation* (2005) (co-editor with Elin Skaar and Siri Gloppen); *Conflictual Peacebuilding: Afghanistan Two Years After Bonn* (2004) (with Arne Strand and Kristian Berg Harpviken); and *Eroding Local Capacity: International Humanitarian Action in Africa* (2003) (with Monica Kathina Juma).

FRANCESC VENDRELL, CMG, is a Spanish diplomat with vast experience working in societies in conflict, including as Special Representative of the UN Secretary-General from 2000 to 2001 and the EU's Special Representative to Afghanistan from 2002–08. He graduated in law at the University of Barcelona, continued studying at King's College London, and graduated in modern history at the University of Cambridge. He was director of the International Law Academy of The Hague in 1979. In 1968 he joined the diplomatic corps in the UN, and was appointed head of the documentation services of the general secretariat in Europe and America from 1987 to 1992. Among other positions in the upper body, he was the personal representative of the Secretary-General in the peace processes in El Salvador and Nicaragua (1989–91), Guatemala (1990–92) and East Timor (1999). He has participated in diplomatic missions in

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the Caucasus (1992) and Haiti (1993), and was director of the political affairs division for East Asia and the Pacific (1993–97) and the combined Asia-Pacific division (1998–99). In 1999 he became responsible for the attendance office at the UN Secretary-General for Political Affairs in the Asia-Pacific, Americas and Europe. In 2002 he received the Cross of St George.

PREFACE AND ACKNOWLEDGEMENTS

This book has its origins in a brief conversation in the Kabul headquarters of the United Nations Assistance Mission in Afghanistan (UNAMA) two days before Christmas in 2008. I was rushing to Seattle to see my father, David Mason, who was reaching the end of a 14-month struggle with cancer. Not knowing how long I would be gone, I delayed my departure by a day in order to convey the most important things I had learned in the six months after establishing the UN's justice coordination office in Kandahar. I explained the urgency of devising a recruitment strategy to fill the 90 per cent of posts in the formal justice system that remained empty, of ending arbitrary detention, of engaging with the customary justice system, and several other recommendations widely shared by Afghans in the south. The person then presiding over UNAMA's rule of law department smiled and said: 'Whit, if anything could be done about any of these problems, don't you think that someone would have done it in the past seven years?' Thanks to my erstwhile colleague for providing such unforgettable inspiration.

In fact, many people have recognised profound mistakes as the intervention has stretched out, and many have suggested better ways of proceeding. The Project on Justice in Peace-building and Development in the Centre of Interdisciplinary Studies of Law (CISL), University of New South Wales, brought several of the brightest of these people together for a symposium, 'Catalysing the Rule of Law in Afghanistan: Challenges and Opportunities', on 3 and 4 September 2009 in Sydney. The symposium was co-sponsored by CISL and the Asia-Pacific Civil-Military Centre of Excellence. CISL co-director (and contributor) Martin Krygier deserves special thanks for his support to the symposium, and for proposing some years ago that we co-author a paper on violence and the rule of law, many elements of which have germinated and influenced this book. The symposium, and hence this book, never could have happened without the generous support of the University of New South Wales, its Law

Faculty and the faculty's dean, David Dixon. Mike Smith, executive director of the Asia-Pacific Civil-Military Centre of Excellence, and Christine Brooks, UNSW Law Faculty's very capable events coordinator, also lent indispensable support to the symposium.

The contributors came from Afghanistan, Europe, North America and other parts of Australia, and together produced an event remarkable for its sincerity, candour and passion. After the symposium, all the contributors generously agreed to revise and further develop their papers for a book. To those we have added two that were not originally presented in Sydney. Needless to say, this book would not have been possible without the contributors' thoughtfulness and generosity with their overtaxed energy and time. Nienke van Schaverbeke of Cambridge University Press and the anonymous readers also demonstrated impressive flexibility in embracing a rather unconventional proposal. The book has been improved by helpful comments from Kim Ross and David Brody and from the thoughts and support of my wife, Amanda Wilson.

My biggest thanks go to Jeremy Gilling, proofreader extraordinaire, whose fast, thoughtful and meticulous copy editing and unfailing good humour allowed this book to be published while its subject remained the focus of intense and consequential debate.

It goes without saying that this book is for the people of Afghanistan.