



THE INEVITABLE CONSEQUENCES OF THE UN - US MILITARY CAMPAIGNS TO THE PUBLIC POLICY IN AFGHANISTAN

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Article history:	Abstract:
Received: 10 th January 2023 Accepted: 10 th February 2023 Published: 20 th March 2023	The conflict in Afghanistan is one of the longest contemporary conflicts involving an international coalition of military forces. In October 2001, the United States of America initiated air strikes on Afghanistan, followed by a ground offensive called Operation Enduring Freedom, to topple the Taliban government and drive out Al-Qaeda forces hosted in Afghanistan following the 11 September 2001 terrorist attacks on the United States. Since then, armed conflict has covered many parts of the country. The intensity of the conflict has been growing significantly, with a resurgent Taliban and a number of other non-state armed groups pitted against Afghan government forces and an international coalition of some 150,000 military personnel serving in the International Security Assistance Force (ISAF) and Operation Enduring Freedom.
Keywords: ISAF, Al-Qaeda, NATO, Taliban, 9/11, ANSA, IHL, Common Article 3 and Additional Protocol II, USSR troops, US-led invasion, ICTY, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.	

INTRODUCTION.

After gaining the central government in Afghanistan, the Taliban quickly lost international and domestic support as the group imposed strict adherence to its interpretation of Islam in areas it controlled and employed harsh punishments, including public executions, to enforce its decrees, including bans on television, Western music, and dancing. It prohibited women from attending school or working outside the home, except in health care, and publicly executed women for alleged adultery. In March 2001, the Taliban drew international condemnation by destroying monumental sixth-century Buddha statues carved into hills above Bamyán city, which the Taliban considered idolatrous and contrary to Islamic norms.¹ The United States had played a major role in supporting anti-Soviet mujahideen, but U.S. attention to Afghanistan declined with the withdrawal of Soviet troops after the 1988 Geneva Accords; the U.S. embassy in Kabul was evacuated for security reasons in January 1989 and remained closed until 2001.

This article looks at the application and implementation of international law by armed non-state actors (ANSAs) in Afghanistan. We approach these issues by investigating the application to these actors of both international humanitarian law (IHL) and international human rights law frameworks. In the first part of this article, the regimes under Common Article 3 and Additional Protocol II and their relevance for ANSAs operating in Afghanistan will be analysed in detail. A brief enquiry into customary IHL will also provide an insight into other applicable rules.² While the applicability of human rights law to the behaviour of ANSAs remains highly controversial, the practice of international organizations is pointing towards increased accountability of those actors for human rights violations, at least at the political level.³ From a legal point of view, such accountability seems to be more accepted when ANSAs exercise control over territory or a segment of the population, or when core human rights norms are at stake. Finally, the article assesses efforts to implement the applicable law in Afghanistan and considers what more could be done to improve respect by ANSAs, particularly the Taliban. Armed non-state actors in Afghanistan.

LAUNCHING A MILITARY CAMPAIGN IN AFGHANISTAN.

There is no consensus among commentators as to the size and structure of ANSAs in Afghanistan, or as to the nature of the relationships between them. The Taliban emerged in the early 1990s in northern Pakistan amid the violence that followed the withdrawal of Soviet troops from Afghanistan.¹ From their initial sphere of influence in south-western Afghanistan, they quickly extended their control over the rest of the country.² In September 1996, they captured the Afghan capital, Kabul; by 1998, they were in control of almost 90% of Afghanistan. Pakistan, Saudi Arabia, and the United Arab Emirates were the only three states that recognized the Taliban as the legitimate government in Afghanistan when they were in power until their military defeat by the US-led coalition in 2001.

Since that defeat, an insurgency has emerged against the government elected in 2002, which has grown in intensity each year. In describing the insurgency, the UN Assistance Mission in Afghanistan (UNAMA) uses the term 'anti-government elements', which 'encompass individuals and armed groups of diverse backgrounds, motivations and command structures, including those characterized as the Taliban, the Haqqani network, Hezb-e-Islami and others'. The precise nature of the relationships between the different armed groups within Afghanistan and in neighbouring

Pakistan is not known. The size of Taliban forces in Afghanistan is estimated by the US to be around 25,000, although the reliability of this figure is contested.¹⁴ By 2010, the Taliban were said to be holding sway in the south and east of the country, as well as in pockets of the west and north, and 'in 2009 started launching increasingly brazen attacks in urban areas'.³ The Taliban in Afghanistan

are still believed to be led by Mullah Omar, a village clergyman who headed the group from the outset, including when they were in power. Reports suggest that Al Qaeda was weak in numbers in Afghanistan, perhaps with as few as fifty men in late 2010.¹ The nature of the relationship between Al Qaeda and the Taliban in Afghanistan today is also unclear. A high price is being paid by the civilian population for the ongoing conflict in Afghanistan. The forces said to be the main cause of their suffering are the non-state armed groups. According to Amnesty International, for example: 'The Taliban and related insurgent groups in Afghanistan show little regard for human rights and the laws of war and systematically and deliberately target civilians, aid workers, and civilian facilities like schools (particularly girls' schools)'.² Applicable international humanitarian law We believe that the armed conflict in Afghanistan is currently governed by the customary and treaty rules applicable to armed conflicts of a non-international character. Prior to the current armed conflict, the violence in Afghanistan has moved through at least three phases since 2001. The first of these phases covers the situation leading up to the US-led invasion of Afghanistan in October 2001; the violence between the Taliban government and the Northern Alliance forces at that time constituted an armed conflict of a non-international character. The second phase began with the US-led attacks against the Taliban on 6 October 2001, which constituted an international armed conflict governed by applicable customary and treaty rules. The question of whether operations against Al Qaeda during that conflict could be considered as part of this international armed conflict or whether they represented a separate non-international armed conflict is moot. The third phase is the occupation of Afghanistan by US and other foreign forces. This occupation is also considered an international armed conflict by Article 2 common to the four Geneva Conventions (Common Article 2).³ There is no consensus among legal authorities as to when exactly this occupation ended. Nonetheless, subsequently the armed violence in Afghanistan was certainly of a sufficient intensity to constitute an armed conflict of a non-international character. The two sets of treaty rules generally applicable to such conflicts are Article 3 common to the four Geneva Conventions (Common Article 3) and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II).¹ Afghanistan ratified the four Geneva Conventions in 1956 and adhered to the two Additional Protocols in June 2009, with Additional Protocol II coming into force for that country on 24 December 2009. This section assesses the application first of Common Article 3 and then of Additional Protocol II to the armed conflict in Afghanistan. A distinct but related issue is the direct application of each of these sets of legal obligations to all ANSAs involved as parties to that conflict.

The extent to which Common Article 3, whose rules are part of customary international law, regulates the conduct of hostilities is debated.² For some commentators, the provisions only afford protection to persons falling under the direct control of a party to the conflict and therefore the article has no direct relevance for the conduct of hostilities. For others, the reference to 'violence to life and person would cover acts committed in the course of military operations. Thus, for example, Rogers affirms that:

Common Article 3 does not deal directly with the conduct of hostilities. It seems, at first sight, only to protect the victims of such conflicts. However, a close reading of the text of the article leads to the conclusion that it does more than that. For Common Article 3 to apply, there must be an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'.³ Based on the case law of the International Criminal Tribunal for the Former Yugoslavia

(ICTY), this demands that two criteria be satisfied: there must be a state of 'protracted' armed violence, and any ANSA must possess a certain level of organization in order to be considered party to the conflict under international law.¹

Afghanistan, as noted above, is a state party to the Geneva Conventions, and for most of the last decade the violence between the Afghan government and international military forces and organized armed groups (particularly, but not only, the Taliban) has been of such intensity that an armed conflict has been taking place. It is further asserted that regarding the requisite level of organization of an ANSA to be considered a party to the conflict, the four main groups – the Taliban, the Haqqani network, Hezb-e-Islami, and Al Qaeda (in Afghanistan) – have each demonstrated sufficient organization to be bound directly by international humanitarian law.³¹ In the case of the Taliban, the issuance of what is in effect a military code of conduct is evidence of the existence of command structure and disciplinary rules and mechanisms within the group.² To what extent Common Article 3 directly addresses ANSAs has been debated. The article states that 'each Party to the conflict shall be bound to apply, as a minimum' its provisions. It has sometimes been claimed that the term 'each Party' does not apply to ANSAs, even though they may meet the criteria for being a party to the conflict, but only to government armed forces.³³ State practice, international case law, and scholarship, have, however, confirmed that Common Article 3 applies to such ANSAs directly. Despite this apparent certitude, the precise legal means by which such non-state actors are bound by international humanitarian law is more controversial. Several legal arguments have been advanced to explain why (or how) ANSAs are bound by certain international norms. The first – and, in the view of many commentators, the most persuasive – holds that ANSAs are bound by customary international humanitarian law. Thus, it is asserted that, at least in the case of Common Article 3, this provision is declaratory of customary international law and thereby applicable to each party to a conflict

without formal ratification.¹ A second approach, known as the doctrine of legislative jurisdiction, asserts that the rules of international humanitarian law bind any private individuals, including ANSAs, through domestic law, via implementation of these rules into national legislation or direct applicability of self-executing norms.² This theory is problematic, since what is at stake is not the fact that ANSAs are subjects of domestic law but the direct regulation of the acts of such groups under international law.³ A third approach is based on the general principles governing the binding nature of treaties on third parties under the 1969 Vienna Convention on the Law of Treaties.⁴ This would entail enquiry into the intention of the contracting states to impose duties on third parties and that the parties accept to be bound.

Convention only addresses treaties between states creating obligations for other (third) states. Fourth, one can consider that, when ANSAs exercise any effective power over persons or territory of a state, they are bound by that state's obligations. This claim is unpersuasive, though, as Common Article 3 – in contrast to Additional Protocol II – does not require territorial control for applicability and, as Moir points out, not every group seeks to replace the state. Further discussion on the relative validity of the different theories is beyond the scope of this article. Suffice to acknowledge that, although the legal reasoning to sustain this conclusion remains unsettled, it has now become uncontroversial, even 'commonplace', that ANSAs are bound by international humanitarian law.⁵

IMPLEMENTATION OF APPLICABLE NORMS IN AFGHANISTAN BY ARMED NON-STATE ACTORS

There is a huge and pressing challenge to effectively implement applicable norms by the various ANSAs in Afghanistan.¹²⁵ Indeed, in its 2010 mid-year report on the protection of civilians in armed conflict, UNAMA stated that: The human cost of the armed conflict in Afghanistan is escalating in 2010. Nine years into the conflict, measures to protect Afghan civilians effectively and to minimize the impact of the conflict on basic human rights are more urgent than ever. Given these tragic realities, in the remainder of this article we propose a set of general and specific measures that we believe would contribute to improving respect for applicable norms by ANSAs.¹ These measures are legal, political, and programmatic in nature and concern a wide range of actors including, but going beyond, the ANSAs themselves. First, it is clear that international humanitarian law offers a relatively broad framework of protection to those caught up in armed conflict through both customary and treaty law.² Uncertainties remain, however, as to precisely which rules of international humanitarian law apply in an armed conflict not of an international character, both in general and specifically with respect to the situation and actors in Afghanistan. This is not conducive to effective protection efforts and demands clarification.³ For instance, as we have seen, the extent to which Additional Protocol II is applicable to the various parties to the conflict in Afghanistan is far from settled.

As a first major step, the Government of Afghanistan and all foreign forces Schier, belonging to ISAF should commit publicly to respecting all of the provisions of the Protocol – and then call on the Taliban to do the same.¹²⁷ This could be combined with other applicable customary rules into 'special agreements'¹²⁸ between the Government of Afghanistan, ISAF, and the Taliban, which could then be subject to internal and external monitoring. In August 2010, in what appears to have been a response to the UN's latest report on civilians in armed conflict, the Taliban proposed, through a statement posted on its website, to set up a joint commission to investigate allegations of civilians being killed and wounded in the conflict in Afghanistan. The statement called for the establishment of a body including members from the Organisation of the Islamic Conference, UN human rights investigators, NATO, and the Taliban.¹ A positive response to this proposal would either advance the cause of promotion of civilian protection or call the Taliban's bluff, depending on the reader's view of the seriousness of their proposal.

Second, lines of communication with the Taliban and other ANSAs that are currently focusing on a possible route to a peace agreement¹³⁰ need to encompass civilian protection and other humanitarian concerns.² This should include, among other things, a detailed discussion – and where possible agreement – on who is a civilian and thus how the Protocol and other applicable law should be implemented by the parties to the conflict.

We have attempted to demonstrate the importance of not only international humanitarian law but also international human rights law in seeking to promote essential compliance with international norms by armed non-state actors in Afghanistan.³ It is clear, however, that, whatever standards are applicable or agreed upon, monitoring will be an essential element in supporting their implementation.

Such monitoring should build on the work of the UN and human rights and humanitarian non-governmental organizations, and through initiatives that actively engage the Taliban. During his visits to Afghanistan, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions regretted that he did not speak with any formal representatives of the Taliban. Recognizing the political and security obstacles to engaging directly with the Taliban¹, Alston emphasized that 'there is no reason to assume that the Taliban could never be persuaded to modify its conduct in ways that would improve its respect for Human rights'.² The international community thus faces diverse challenges when dealing with ANSAs. Some of these have a legal dimension, but other aspects of a broad approach to reducing the impact of conflict on civilian's demand programs, advocacy, and, especially, direct engagement with ANSAs.³ All of these elements need to be pursued if we are truly to make the law anything approaching a reality.

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