

# International law and armed non-state actors in Afghanistan

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## **Abstract**

*An effective legal regime governing the actions of armed non-state actors in Afghanistan should encompass not only international humanitarian law but also international human rights law. While the applicability of Common Article 3 of the 1949 Geneva Conventions to the conflict is not controversial, how and to what extent Additional Protocol II applies is more difficult to assess, in particular in relation to the various armed actors operating in the country. The applicability of international human rights law to armed non-state actors – considered by the authors as important, particularly in Afghanistan – remains highly controversial. Nevertheless, its applicability to such actors exercising control over a population is slowly becoming more accepted. In addition, violations of peremptory norms of international law can also directly engage the legal responsibility of such groups.*



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

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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<sup>1</sup> and a number of other non-state armed groups pitted against Afghan government forces and an international coalition of some 150,000 military personnel<sup>2</sup> serving in the International Security Assistance Force (ISAF)<sup>3</sup> and Operation Enduring Freedom.

This article looks at the application and implementation of international law by armed non-state actors (ANSAs) in Afghanistan.<sup>4</sup> 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. 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. 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.<sup>5</sup>

- 1 For a summary of the defeat of the Taliban and their subsequent resurgence as a major fighting force, see, e.g., Ahmed Rashid, *Taliban*, I. B. Tauris, London/New York, 2010, especially Chapter 17, 'The Taliban resurgent, 2000–2009', pp. 217–246.
- 2 See, e.g., Jonathon Burch, 'Foreign troop deaths in Afghanistan near 600 for 2010', in *Reuters*, 24 October 2010, available at: <http://www.reuters.com/article/idUSTRE69N0ZN20101024> (last visited 18 January 2011).
- 3 Since 2003, the ISAF has been a North Atlantic Treaty Organization (NATO) operation, whose mission today is, 'in support of the Government of the Islamic Republic of Afghanistan, [to] conduct ... operations in Afghanistan to reduce the capability and will of the insurgency'. ISAF, 'Mission', available at: <http://www.isaf.nato.int/mission.html> (last visited 18 January 2011).
- 4 For the purpose of this article we use the following working definition of an armed non-state actor: *any armed group, distinct from and not operating under the control of, the state or states in which it carries out military operations, and which has political, religious, and/or military objectives*. Thus, it does not ordinarily cover private military companies or criminal gangs, although a controversial study by the US Senate Armed Services Committee 'uncovered evidence of private security contractors funneling U.S. taxpayers dollars to Afghan warlords and strongmen linked to murder, kidnapping, bribery as well as Taliban and other anti-Coalition activities'. See Committee on Armed Services, 'Inquiry into the role and oversight of private security contractors in Afghanistan', Report together with additional views, US Senate, 28 September 2010, p. i, available at: <http://armed-services.senate.gov/Publications/SASC%20PSC%20Report%2010-07-10.pdf> (last visited 18 January 2011).
- 5 According to Ahmed Rashid, a Pakistani journalist and author, 'A *talib* is an Islamic student, one who seeks knowledge compared to the mullah who is one who gives knowledge. By choosing such a name the Taliban (plural of *Talib*) distanced themselves from the party politics of the Mujaheddin and signalled that they were a movement for cleansing society rather than a party trying to grab power'. A. Rashid, above note 1, pp. 22–23.

## Armed non-state actors 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.<sup>6</sup> From their initial sphere of influence in south-western Afghanistan, they quickly extended their control over the rest of the country. In September 1996, they captured the Afghan capital, Kabul;<sup>7</sup> 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.<sup>8</sup>

Since that defeat, an insurgency has emerged against the government elected in 2002, which has grown in intensity each year.<sup>9</sup> 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,<sup>10</sup> Hezb-e-Islami<sup>11</sup> and

6 See, e.g., James Fergusson, *Taliban: The True Story of the World's Most Feared Fighting Force*, Bantam Press, London, 2010, p. 15.

7 See, e.g., BBC, 'Who are the Taliban?', 1 October 2010, available at: <http://www.bbc.co.uk/news/world-south-asia-11451718> (last visited 18 January 2011).

8 International Crisis Group, 'Taliban propaganda: winning the war of words?', available at: <http://www.crisisgroup.org/en/regions/asia/south-asia/afghanistan/158-taliban-propaganda-winning-the-war-of-words.aspx> (last visited 18 January 2011).

9 This growing intensity can be seen both on a military and a civilian level. The non-governmental 'icasualty' website has recorded military casualties among the international coalition rising from 12 in 2001, to 191 in 2006, to 521 in 2009, and 711 in 2010, available at: <http://icasualties.org/OEF/Index.aspx> (last visited 18 January 2011).

10 'Named after its leader Jalaluddin Haqqani, the Haqqani Network is a group within the insurgency in Afghanistan that is based out of North Waziristan in the Pakistani Federally Administered Tribal Areas (FATA). The group has been active mainly in the east of Afghanistan – in Paktia, Paktika, Khost, Ghazni Wardak and even Kabul provinces'. Institute for the Study of War, 'Haqqani network', available at: <http://www.understandingwar.org/themenode/haqqani-network>; and see also GlobalSecurity.org, 'Haqqani Network', available at: <http://www.globalsecurity.org/military/world/para/haqqani.htm> (both last visited 18 January 2011). Haqqani was the former Taliban Minister of Tribal Affairs. See A. Rashid, above note 1, p. 224. James Fergusson suggests that Haqqani was always much closer ideologically to Al Qaeda than the Taliban. He cites a report in the *New York Times* that suggests that the Haqqani Network forces numbered 'perhaps 12,000 in late 2009'. J. Fergusson, above note 6, p. 130, citing Jane Perlez, 'Rebuffing US, Pakistan balks at crackdown', in *New York Times*, 14 December 2009, available at: <http://www.nytimes.com/2009/12/15/world/asia/15haqqani.html> (last visited 25 January 2011).

11 According to GlobalSecurity.org, 'Hizb-I Islami Gulbuddin often operates like both a crime family and an apostle of al Qaeda ... In the early 1990s, Gulbuddin Hekmatyar served as prime minister of Afghanistan. He was the man most responsible for the fighting that left Kabul in ruins. Hekmatyar's Hizb-e-Islami was a key ally and favorite of Pakistan's Inter Service Intelligence (ISI). Hekmatyar's faction was abandoned by its Pakistani backers as the Omar faction grew in power in the late 1990s. Since the events of September 11, 2001 Hekmatyar, an ethnic Pashtun, formed an anti-coalition alliance with Taliban leader Muhammad Omar and the remnants of the al Qaeda group in the country. Hekmatyar's base of support was always in the Khyber Pass Jalalabad area, east of Kabul, but he still has supporters throughout Afghanistan'. GlobalSecurity.org, 'Hizb-I Islami', available

others'.<sup>12</sup> The precise nature of the relationships between the different armed groups within Afghanistan and in neighbouring Pakistan is not known.<sup>13</sup> 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.<sup>14</sup> 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'.<sup>15</sup> 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.<sup>16</sup> Reports suggest that Al Qaeda was weak in numbers in Afghanistan, perhaps with as few as fifty men in late 2010.<sup>17</sup> The nature of the relationship between Al Qaeda and the Taliban in Afghanistan today is also unclear.<sup>18</sup>

A high price is being paid by the civilian population for the ongoing conflict in Afghanistan.<sup>19</sup> The forces said to be the main cause of their suffering are

at: <http://www.globalsecurity.org/military/world/para/hizbi-islami.htm> (last visited 18 January 2011). See also J. Fergusson, above note 6, Chapter 12.

- 12 UNAMA, 'Afghanistan: mid year report 2010: protection of civilians in armed conflict', August 2010, p. 6, available at: [http://unama.unmissions.org/Portals/UNAMA/Publication/August102010\\_MID-YEAR%20REPORT%202010\\_Protection%20of%20Civilians%20in%20Armed%20Conflict.pdf](http://unama.unmissions.org/Portals/UNAMA/Publication/August102010_MID-YEAR%20REPORT%202010_Protection%20of%20Civilians%20in%20Armed%20Conflict.pdf) (last visited 18 January 2011).
- 13 The Taliban has re-emerged in Afghanistan as the largest ANSA in the country, also becoming stronger as a distinct but related entity in neighbouring Pakistan. The Tehrik-i-Taliban Pakistan, the umbrella movement of the Pakistani Taliban, was founded in 2002: see J. Fergusson, above note 6, p. 35. There is said to be 'loose coordination' between different Taliban factions and militant groups: BBC, 'Who are the Taliban?', above note 9. Since 1 September 2010, 'Tehrik-e Taliban Pakistan' has been listed by the US Department of State as a 'foreign terrorist organization' but the Taliban in Afghanistan is not: Office of the Coordinator for Counterterrorism, US Department of State, 'Foreign terrorist organizations', 15 October 2010, available at: <http://www.state.gov/s/ct/rls/other/des/123085.htm> (last visited 18 January 2011).
- 14 See, e.g., Gilles Dorransoro, 'Who are the Taliban?', in *The Huffington Post*, 27 October 2009, available at: [http://www.huffingtonpost.com/gilles-dorransoro/who-are-the-taliban\\_b\\_335592.html](http://www.huffingtonpost.com/gilles-dorransoro/who-are-the-taliban_b_335592.html) (last visited 18 January 2011).
- 15 International Crisis Group, 'Afghanistan conflict history', updated January 2010, available at: <http://www.crisisgroup.org/en/key-issues/research-resources/conflict-histories/afghanistan.aspx> (last visited 18 January 2011).
- 16 Although the Taliban have not been listed as a foreign terrorist organization by the USA, Mullah Omar and other leading figures of the Taliban are part of 'the Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them', available at: <http://www.un.org/sc/committees/1267/consolist.shtml> (last visited 18 January 2011).
- 17 In June 2010, the head of the US Central Intelligence Agency claimed that the figure was between fifty and one hundred fighters. 'La lutte contre al-Qaïda en Afghanistan finira par porter ses fruits selon le patron de la CIA', in *RFI*, available at: <http://www.rfi.fr/ameriques/20100628-lutte-contre-al-qaïda-afghanistan-finira-porter-fruits-selon-le-patron-cia> (last visited 18 January 2011). According to James Fergusson, 'There has, of course, been no significant al-Qaïda presence in Afghanistan since 2002'. J. Fergusson, above note 6, p. 90.
- 18 According to claims reported by James Fergusson, Mullah Omar has not been in contact with Osama Bin Laden since the end of 2001. An email from Omar to a journalist in January 2007 had stated that: 'We have never felt the need for a permanent relationship in the present circumstances ... They have set jihad as their goal, whereas we have set the expulsion of American troops from Afghanistan as our target'. J. Fergusson, above note 6, pp. 92–93.
- 19 See, e.g., Afghanistan Independent Human Rights Commission, 'Civilian casualty figure; first seven months of 2010 (1st January–31st July)', Kabul, 8 August 2010, available at: <http://www.aihrc.org/af>

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)'.<sup>20</sup>

## 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.<sup>21</sup> 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.<sup>22</sup> The question of whether operations against Al Qaeda during that

2010\_eng/Eng\_pages/Reports/Thematic/Civilian\_Casualties\_Jan\_Jul31\_2010.pdf (last visited 18 January 2011); and UNAMA, above note 12.

- 20 Amnesty International, 'Afghanistan conference raises fears of sacrificing rights for short-term peace', 19 July 2010, available at: <http://www.amnesty.org/en/news-and-updates/afghanistan-conference-raises-fears-sacrificing-rights-short-term-peace-2010-07-19> (last visited 18 January 2011).
- 21 This point of view is widely shared. Thus, the UK regards the ongoing hostilities as a non-international armed conflict. See, e.g., David Turns, 'Jus ad pacem in bello? Afghanistan, stability operations and international law relating to armed conflict', in *Israel Yearbook on Human Rights*, Vol. 39, 2009, p. 236. Germany similarly qualifies the conflict as being non-international in character. See Christian Schaller, 'Military operations in Afghanistan and international humanitarian law', German Institute for International and Security Affairs, SWP Comments, No. 7, March 2010, p. 2. See also *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Philip Alston, Mission to Afghanistan, A/HRC/11/2/Add.4, para. 1: 'Afghanistan is experiencing armed conflict across a broad swath of its territory. In legal terms, this is a non-international armed conflict between the Government, supported by international military forces (IMF), and various armed groups'. This position does not, however, enjoy consensus among international lawyers. Yoram Dinstein argues that the continuing armed hostilities between international forces and the insurgency might be considered as a prolongation of the international armed conflict that started in October 2001 with the US-led military intervention against the former Taliban government. This conflict would remain international until the Taliban are defeated, alongside a separate armed conflict of a non-international character between the Taliban and the government that replaced them. See Yoram Dinstein, 'Concluding remarks on terrorism and Afghanistan', in *Israel Yearbook on Human Rights*, 2009, p. 325. For a similar position on that issue, see Eric David, *Principes de droit des conflits armés*, 4th edition, Bruylant, Brussels, 2008, p. 175.
- 22 According to Stéphane Ojeda, for example, the Taliban 'were controlling and ruling over about 95 percent of the Afghan territory in October 2001'. Stéphane Ojeda, 'US detention of Taliban fighters: some legal considerations', in Michael N. Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, International Law Studies, Vol. 85, US Naval War College International Studies, Naval War College Press, 2009, pp. 358–359. See also Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 29, para. 72. For a contrary assessment of the status of the conflict, see W. Hays Parks, 'Combatants', in Schmitt, *The War in Afghanistan*, p. 258: 'The facts on the ground and international law do not support a conclusion that the Taliban was the de facto, much less the de jure, government of Afghanistan ... . The civil war did not end

conflict could be considered as part of this international armed conflict or whether they represented a separate non-international armed conflict is moot.<sup>23</sup> 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). There is no consensus among legal authorities as to when exactly this occupation ended.<sup>24</sup>

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).<sup>25</sup> Afghanistan ratified the four Geneva Conventions in 1956 and

with the Taliban as a clear victor occupying, much less controlling, Afghanistan. At the time of commencement of US and coalition operations on October 20, 2001, the civil war continued, and Taliban power had eroded significantly'. As noted above, only three states had recognized the Taliban as the legitimate government of Afghanistan; however, this would not necessarily *per se* preclude the conflict being an international one on the basis of Additional Protocol I, Art. 43, para. 1, which states that: 'The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party'. This begs the question, of course, as to whether this provision has become a customary rule, as neither Afghanistan nor the US was a party to Additional Protocol I at that time. Also relevant to the specific issue of prisoners of war (POWs) is Geneva Convention III, Article 4(3), which lays down the obligation to recognize as POWs 'Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power'.

- 23 The decision by the US Supreme Court in *Hamdan v. Rumsfeld* suggests that it could be the latter. US Supreme Court, *Hamdan v. Rumsfeld, Secretary of Defense et al.*, 29 June 2006, p. 6, esp. (d) (ii), available at: <http://www.supremecourt.gov/opinions/05pdf/05-184.pdf> (last visited 18 January 2011). For a criticism of the decision in *Hamdan*, see Y. Dinstein, above note 22, pp. 56–57, paras. 129–130. For a general review of the application of international humanitarian law to Al Qaeda, see Marco Sassòli, 'Transnational armed groups and international humanitarian law', Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, No. 6, Winter 2006.
- 24 There are at least five possible dates. The first of these is the establishment of an Interim Authority in December 2001 by the Bonn Agreement (Establishment of the Afghan Interim Authority on 22 December 2001 headed by Hamid Karzai. See the Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions (the Bonn Agreement), S/2001/1154, 5 December 2001, Art. 1(2)). The second possibility is the appointment of Karzai by the *Loya Jirga* (grand assembly) in June 2002 as President of the Transitional Authority. The third possibility is the adoption of the new constitution in January 2004. The fourth possibility is the presidential election of Karzai in October 2004. The fifth possibility is the parliamentary election in 2005. The International Committee of the Red Cross (ICRC), for example, implies that the appointment of Karzai in June 2002 as the President of the Transitional Authority changed the legal nature of the conflict into a non-international one. See ICRC, *International Humanitarian Law and Terrorism: Questions and Answers*, May 2004, available at: <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-faq-050504> (last visited 18 January 2011).
- 25 As discussed further below, there is a difference in the scope of application between Common Article 3, which has a relatively low threshold of application but which provides for limited protection, and Additional Protocol II, which has a more restrictive scope of application but which offers broader and more detailed protection. Both Common Article 3 and Additional Protocol II, however, only apply to an armed conflict and therefore not to situations of 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'. See Additional Protocol II, Art. 1(2). This threshold is also believed to be valid for situations covered by



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.

### Application of Common Article 3

The extent to which Common Article 3, whose rules are part of customary international law,<sup>26</sup> regulates the conduct of hostilities is debated. 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.<sup>27</sup> 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 example, the principle of civilian immunity can be inferred from paragraph 1, which prohibits violence to the life of persons taking no active part in hostilities.<sup>28</sup>

Common Article 3. See, e.g., Sylvain Vité, ‘Typology of armed conflicts in international humanitarian law: legal concepts and actual situations’, in *International Review of the Red Cross*, Vol. 91, No. 873, March 2009, p. 76; and UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2005, paras. 15.2 and 15.3.

- 26 See, International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, ICJ Reports 1986, para. 218. Similar remarks were made by the Court in the 1996 Nuclear Weapons Advisory Opinion of 8 July 1996, ICJ Reports 1996, para. 79. Statements on the customary nature of Common Article 3 have also been made by the ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda. See notably, International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 98; International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 608.
- 27 See, e.g., Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2002, p. 83; G. I. A. D. Draper, ‘Wars of national liberation and war criminality’, in Michael Howard (ed.), *Restraints on War: Studies in the Limitation of Armed Conflict*, Oxford University Press, Oxford, 1979, p. 183; Georges Abi-Saab, ‘Non-international armed conflicts’, in *International Dimensions of Humanitarian Law*, UNESCO and Martinus Nijhoff, Dordrecht, 1988, p. 235. The Rome Statute of the International Criminal Court also appears to distinguish between acts prohibited under Common Article 3 and other violations committed during the conduct of hostilities. See Rome Statute, Art. 8(2)(c) and Art. 8(2)(e).
- 28 A. P. V. Rogers, *Law on the Battlefield*, 2nd edition, Manchester University Press, Manchester, 2004, p. 221. See also Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, pp. 58–61.

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’. 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’<sup>29</sup> armed violence, and any ANSA must possess a certain level of organization in order to be considered party to the conflict under international law.<sup>30</sup>

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.<sup>31</sup> 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.<sup>32</sup>

- 29 ICTY, *Prosecutor v. Tadic*, above note 26, para. 70. By ‘protracted’ is meant particularly the intensity of the armed violence and not merely its duration, the ordinary meaning of the word notwithstanding. ICTY, *Prosecutor v. Haradinaj*, Case No. IT-04-84-84-T, Judgment (Trial Chamber), 3 April 2008, para. 49. See also, e.g., S. Vité, above note 25, pp. 76–77.
- 30 Regarding the level of organization of the ANSAs, international tribunals and legal scholars have developed a variety of indicative elements or ‘useful’ guidelines that may be taken into account to establish the necessary degree of organization of the group, none of which is, on its own, essential to establish whether the organizational requirement is fulfilled. See Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary: First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, pp. 49–50, available at: <http://www.icrc.org/ihl.nsf/COM/365-570006?OpenDocument> (last visited 19 January 2011); ICTY, *Prosecutor v. Tadic*, above note 26, para. 70; ICTY, *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, 16 November, 1998, para. 184; ICTY, *Prosecutor v. Haradinaj*, above note 29, para. 60; ICTY, *Prosecutor v. Boskoski*, Case No. IT-04-82, Judgment (Trial Chamber), 10 July 2008, paras. 199–203; and ICTR, *Prosecutor v. Akayesu*, above note 26, para. 619; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgment (Trial Chamber I), 6 December 1999, para 93. See also the International Commission of Inquiry on Darfur, ‘Report Pursuant to Security Council Resolution 1564 of 18 September 2004’, 25 January 2005, paras. 74–76; International Law Association, Use of Force Committee, ‘Final report on the meaning of armed conflict in international law’, 2010, pp. 28–33, available at: <http://www.ila-hq.org/en/committees/draft-committee-reports-the-hague-2010.cfm> (last visited 18 January 2011).
- 31 For instance, the US Department of State recognizes the existence of an ‘armed conflict with al-Qaeda, the Taliban and associated forces’. Harold Hongju Koh, *The Obama Administration and International Law*, paper delivered at the Annual Meeting of the American Society of International Law, Washington, DC, 25 March 2010, available at: <http://www.state.gov/s/l/releases/remarks/139119.htm> (last visited 18 January 2011).
- 32 On ‘The Islamic Emirate of Afghanistan rules for mujahideen’, see: ‘Taliban issues code of conduct’, in *al-Jazeera*, 28 July 2009, available at: <http://english.aljazeera.net/news/asia/2009/07/20097278348124813.html> (last visited 18 January 2011). More generally, see Program for Cultural and Conflict Studies, ‘Understanding Afghan culture: analyzing the Taliban code of conduct: reinventing the *Layeha*’, Department of National Security Affairs, Naval Postgraduate School, August 2010, p. 3, available at: <http://info.publicintelligence.net/Layeha.pdf> (last visited 18 January 2011).



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.<sup>33</sup> State practice, international case law, and scholarship, have, however, confirmed that Common Article 3 applies to such ANSAs directly.<sup>34</sup>

Despite this apparent certitude, the precise legal means by which such non-state actors are bound by international humanitarian law is more controversial.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> This theory is

33 One of the arguments put forward has been that ‘Party’ (with a capital ‘p’) meant ‘High Contracting Party’, i.e. states, and that it was used in a contracted form merely to avoid repetition. See, e.g., Svetlana Zašova, ‘L’applicabilité du droit international humanitaire aux groupes armés organisés’, in J. M. Sorel and Corneliu-Liviu Popescu (eds), *La protection des personnes vulnérables en temps de conflits armés*, Bruylant, Brussels, 2010, p. 58; and L. Zegveld, above note 27, p. 61.

34 In *Nicaragua v. United States of America*, for example, the ICJ confirmed that Common Article 3 was applicable to the Contras, the non-state armed group fighting the government: ‘The conflict between the contras’ forces and those of the Government of Nicaragua is an armed conflict which is “not of an international character”. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character’. ICJ, *Nicaragua v. United States of America*, above note 26, para. 219. See also Marco Sassòli, ‘Taking armed groups seriously: ways to improve their compliance with international humanitarian law’, in *Journal of International Humanitarian Legal Studies*, Vol. 1, 2010, p. 12.

35 For example, in 2004, rather dodging the issue, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) simply held that ‘it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties’. SCSL, *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E)), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Decision of 31 May 2004, para. 22.

36 See, e.g., Daniel Bethlehem, ‘The methodological framework of the study’, in Elizabeth Wilmshurst and Susan Breua (ed.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, p. 8.

37 Thus, e.g., it has been asserted that: ‘[T]here is now no doubt that this article [Common Article 3] is binding on states and insurgents alike, and that insurgents are subject to international humanitarian law ... [a] convincing theory is that [insurgents] are bound as a matter of customary international law to observe the obligations declared by Common Article 3 which is aimed at the protection of humanity’. SCSL, *Prosecutor v. Morris Kallon and Brima Buzzy Kamara*, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 March 2004, paras. 45–47. See also L. Moir, above note 28, pp. 56–58.

38 Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (hereafter *ICRC Commentary*),

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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> However, this approach can easily be challenged on the ground that the 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.<sup>42</sup> 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.<sup>43</sup>

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',<sup>44</sup> that ANSAs are bound by international humanitarian law.

## Application of Additional Protocol II

The entry into force of Additional Protocol II to the Geneva Conventions for Afghanistan in December 2009 raises the question of its applicability to the ongoing armed conflict. According to Article 1, paragraph 1, the Protocol applies

to all armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise

ICRC, Geneva/Martinus Nijhoff Publishers, Dordrecht, 1987, p. 1345; Sandesh Sivakumaran, 'Binding armed opposition groups', in *International and Comparative Law Quarterly*, Vol. 55, 2006, p. 381.

39 See, in this regard, Antonio Cassese, 'The status of rebels under the 1977 Geneva Protocol on Non-international Armed Conflicts', in *International and Comparative Law Quarterly*, Vol. 30, No. 2, April 1981, p. 429.

40 1969 Vienna Convention on the Law of Treaties, Art. 35; see A. Cassese, above note 39, pp. 424–429.

41 Some argue that this theory results in an application of IHL norms on ANSAs only on a case-by-case basis, depending on each armed group's willingness to apply the law. This represents a significant drawback to such an approach. In addition, as Zegveld observes, requiring the consent of an ANSA would put the group 'on an equal footing with the state. This consequence has clearly been unacceptable for states and international bodies'. L. Zegveld, above note 27, p. 18.

42 According to the ICRC, 'The obligation resting on the Party to the conflict which represents established authority is not open to question. ... [I]f the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country'. Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, ICRC, 1958, p. 37; see also M. Sassòli, above note 34, pp. 5–51.

43 L. Moir, above note 28, pp. 55–56.

44 Andrew Clapham, *The Rights and Responsibilities of Armed Non-state Actors: The Legal Landscape & Issues Surrounding Engagement*, 1 February 2010, p. 6, available at: [ssrn.com/abstract=1569636](http://ssrn.com/abstract=1569636) (last visited 18 January 2011).

such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.<sup>45</sup>

Additional Protocol II introduces a higher threshold of application than Common Article 3. In addition to the existence of an armed conflict between the insurgency and the government taking place in the territory of a High Contracting Party,<sup>46</sup> there are three cumulative material conditions under Article 1, paragraph 1: the organized armed group(s) must be under responsible command; they must exercise such control over a part of the national territory as to enable them to carry out sustained and concerted military operations, and the territorial control must be such as to enable them to be able to implement the Protocol. Where these cumulative criteria for application of Additional Protocol II are objectively met, the Protocol becomes ‘immediately and automatically applicable’, irrespective of the views of the parties to that conflict.<sup>47</sup>

### *Responsible command*

What is required is that the group possesses organs and has ‘a system for allocating authority and responsibility’.<sup>48</sup> The Taliban’s ‘Code of Conduct’ is evidence of such a system and it can be asserted that the Taliban meets this organizational criterion, although at least one commentator has questioned this.<sup>49</sup>

### *Control over a part of the territory*

There are differing accounts about the Taliban’s actual territorial control of Afghanistan. For instance, in December 2008 the Taliban was said to have expanded its sphere of influence to 72% of the country, ‘confident in their expansion beyond the rural south’, and it was claimed that ‘the Taliban is at the gates of the capital and infiltrating the city at will’.<sup>50</sup> It has also been claimed that the Taliban are not in control of a single large section of territory, but rather of areas intermingled with those under government control.<sup>51</sup>

45 Thus, as Moir has noted, the conditions set by Article 1 of the Protocol imply that it governs only ‘the most intense and large scale conflicts’. L. Moir, above note 28, p. 101.

46 In contrast to Additional Protocol II, Common Article 3 also regulates armed conflict that takes place only between ANSAs, for example in a failed state.

47 ICRC Commentary, above note 38, p. 1353; ICTR, *Prosecutor v. Akayesu*, above note 26, para. 624.

48 Michael Bothe, Karl J. Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 1982, p. 626. See generally ICRC Commentary, above note 38, p. 1352. See also ICTR, *Prosecutor v. Akayesu*, above note 26, para. 626.

49 D. Turns, above note 21, p. 230.

50 International Council on Security and Development, *Struggle For Kabul: The Taliban Advance*, December 2008, available at: [http://www.icosgroup.net/modules/reports/struggle\\_for\\_kabul](http://www.icosgroup.net/modules/reports/struggle_for_kabul) (last visited 18 January 2011).

51 Yaroslav Trofimov, ‘U.S. rebuilds power plant, Taliban reap a windfall’, in *Wall Street Journal*, 13 July 2010, available at: <http://online.wsj.com/article/SB10001424052748704545004575352994242747012.html> (last visited 18 January 2011).

The requirement of territorial control is, however, purely functional. It must be sufficient to enable the Taliban to conduct sustained and concerted military operations and to implement the Protocol, both of which are discussed below. For this reason, the criterion is not based on the number or duration of the presence of members of the armed group.<sup>52</sup>

### *Sustained and concerted military operations against governmental armed forces*

‘Sustained’ military operations against governmental armed forces refers to continuous operations, while ‘concerted’ indicates operations that are ‘agreed upon, planned and contrived, done in agreement according to a plan’.<sup>53</sup> Given the intensity of combat in Afghanistan and the level of casualties suffered by the forces ranged against the Taliban (see introduction above), this criterion has clearly been met.

### *Implementation of the Protocol*

The ability to implement the Protocol is considered as the ‘fundamental criterion’ that justifies the other elements of the definition of Article 1 of Additional Protocol II.<sup>54</sup> It has even been said that the condition that ANSAs have the capacity to apply the substantive obligations of the Protocol is the basis for their ‘obligation to do so’.<sup>55</sup> It thus appears sufficient to establish that the Taliban could realistically apply the provisions of the Protocol should they be so minded, not that they actually do so. If it were otherwise, the level of requisite respect would thus become an issue and it could even be argued that the Protocol would only apply to armed groups that were already respecting its provisions in full.<sup>56</sup>

This inquiry leads us to conclude that Additional Protocol II is indeed applicable to the conflict in Afghanistan, at the very least to the hostilities between the armed forces of the Government of Afghanistan and the Taliban, given that all the requisite criteria appeared to be met as of early 2011.

52 See M. Bothe, K. J. Partsch, and W. A. Solf, above note 48, p. 627.

53 *ICRC Commentary*, above note 38, p. 1353.

54 *Ibid.*

55 Frits Kalshoven, *Constraints on the Waging of War*, ICRC, Geneva/Martinus Nijhoff, Dordrecht, 1987, p. 139.

56 See, e.g., L. Moir, above note 28, pp. 97–98. But, for less certainty as to this position, see, e.g., UK Ministry of Defence, above note 25, p. 32; Françoise Hampson, ‘Winning by the rules: law and warfare in the 1980s’, in *Third World Quarterly*, 1989, p. 44; and Adam Roberts and Richard Guelff, *Documents on the Laws of War*, Oxford University Press, 3rd edition, 2000, p. 482. According to Cassese, determining whether a group is capable of implementing IHL rules might require a certain level of willingness. A. Cassese, above note 39, p. 428.

## Content of Additional Protocol II

As to the obligations set by Additional Protocol II, the instrument contains a set of eighteen substantive provisions that ‘supplements and develops’ the contents of Common Article 3.<sup>57</sup> It places more detailed obligations on states and ANSAs that are party to the conflict, extending the protection afforded to civilians, detainees and medical personnel, and adding important provisions on the conduct of hostilities, including by:

- strengthening the fundamental guarantees enjoyed by all persons not, or no longer, taking part in the hostilities, including care of children, such as their education;<sup>58</sup>
- laying down rights for persons deprived of their liberty and providing judicial guarantees for those prosecuted in connection with an armed conflict;<sup>59</sup>
- prohibiting attacks on the civilian population and individual civilians, objects indispensable to the survival of the civilian population, works and installations containing dangerous forces, and cultural objects and places of worship;<sup>60</sup>
- regulating the forced movement of civilians;<sup>61</sup> and
- protecting religious personnel and all medical personnel, units and means of transport, whether civilian or military.<sup>62</sup>

That being said, the law applicable in non-international armed conflict has comparatively few rules, as is clear from a comparison of the limited number of provisions of Additional Protocol II with the extensive set of rules enshrined in the four Geneva Conventions and Additional Protocol I applicable to international armed conflicts.<sup>63</sup>

## Application of the Protocol to armed actors in Afghanistan

A thornier issue than the application of Additional Protocol II to the conflict in Afghanistan, however, is that of determining exactly to which parties to the conflict

57 *ICRC Commentary*, above note 38, p. 1350.

58 Additional Protocol II, Art. 4.

59 *Ibid.*, Arts. 5–6.

60 *Ibid.*, Arts. 13–16.

61 *Ibid.*, Art. 17.

62 *Ibid.*, Arts. 9–11. Article 19 of the Protocol also requires that its provisions be disseminated ‘as widely as possible’.

63 Unlike Additional Protocol I, the following rules are not included in Additional Protocol II: definition of civilians and fighters, prohibition to attack civilian objects, definition of civilian objects and military objectives, prohibition of indiscriminate attacks, definition of indiscriminate attacks, prohibition of disproportionate attack, definition of disproportionate attacks, obligation to take precautionary measures in attack, obligation to take precautionary measures against the effects of attack. Jean-Marie Henckaerts, ‘Binding armed opposition groups through humanitarian treaty law and customary law’, in *Proceedings of the Bruges Colloquium, Relevance of International Humanitarian Law to Non-state Actors*, 25–26 October 2002, Vol. 27, Colloquium No. 123, Spring 2003, p. 131.

its provisions apply. It is clear that the Protocol applies to all of Afghanistan's armed and other security forces in their operations against the Taliban, but the extent to which ANSAs are also directly bound by the Protocol could be questioned. Indeed, contrary to Common Article 3, the Protocol does not expressly apply its provisions to any party (or 'Party') to the conflict. Nevertheless, the applicability of the Protocol to ANSAs should be inferred where they meet the criteria of 'organized armed groups' referred to in Article 1(1) of Additional Protocol II. This clearly includes the Taliban, based on our analysis.<sup>64</sup>

The second question is whether Additional Protocol II governs the conflict between the Taliban and the multinational forces. A narrow reading of Article 1 would apply the Protocol's provisions only to the Afghan government, as the scope of the Protocol is limited to any conflict 'which takes place *in the territory* of a High Contracting Party between *its* armed forces and dissident armed forces or other organized armed groups'.<sup>65</sup> On the basis of this wording, the foreign forces are not those of the territorial state (Afghanistan) in which the conflict is taking place, unless it can be proved that the intervening states are agents of the state of Afghanistan. This would imply that the foreign forces are 'placed at the disposal' of the host state, but this does not appear to be the case in Afghanistan.<sup>66</sup>

A broader interpretation – one that, in the view of the present authors, better fits with the language employed, as well as with basic logic – is that the Protocol applies to each and every party to any armed conflict that meets the criteria of Article 1(1).<sup>67</sup> Interpreting the material scope of application in line with the object and purpose of humanitarian law would brush away the purported territorial requirement referred to above. Thus, instead being read restrictively so as to apply only to the territorial state and its rebels, Article 1(1) should encompass the conduct of any contracting party to Additional Protocol II intervening in support of the territorial state by the mere fact of participating in a conflict that

64 Note the plural of dissident armed forces or other organized armed groups, suggesting that the Protocol could potentially be not merely applicable to the Taliban but also to other 'anti-government elements' that meet the three criteria discussed above.

65 Additional Protocol II, Art. 1(1) (emphasis added). See also D. Turns, above note 21, p. 239; and Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, p. 257.

66 Article 6 (Conduct of organs placed at the disposal of a state by another state), International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, in *Yearbook of the International Law Commission, 2001*, Vol. 2, Part Two. To establish attribution, the multinational forces would have to attain the status of state agents of Afghanistan for the purpose of international humanitarian law. One would have to assert that the foreign troops in Afghan territory are not only acting with the 'consent', 'under the authority of', and 'for the purpose of the receiving state', but more importantly 'under its exclusive direction and control', for them to fall under the responsibility regime that flows from Afghanistan's adherence to the Protocol. See Commentary on Article 6, p. 44.

67 Among commentators, only Jelena Pejic appears to imply that Additional Protocol II applies to all parties to the conflict, including foreign military forces, once the criteria and threshold of application for the Protocol have been met, but it is not certain that this is what she intended (and this position is not, as she suggests, generally accepted). Jelena Pejic, 'Status of armed conflicts', in E. Wilmshurst and S. Breau, above note 36, p. 92.



takes place in ‘the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups’.

Typically, commentators simply dismiss the possibility of any foreign military forces being expressly bound by the provisions of the Protocol in their operations in Afghanistan, without any attempt to argue their case (and without any express exclusion being included in the text of the Protocol – its application is limited to the armed conflict that meets certain criteria and not merely the parties included in those criteria).<sup>68</sup> Let us assume for a moment that they are correct. In the absence of agreement on the content of customary law, what treaty law would apply in the event that Afghan forces are fighting side by side with foreign military personnel? Do the Afghan forces apply Additional Protocol II but not the foreign military? What are the Taliban supposed to do? Try to distinguish between Afghan forces and foreign military forces in their conduct of hostilities and adapt their methods of warfare accordingly? Are they relieved of their Additional Protocol II obligations when fighting foreign military forces?

At the very least, the forces of states that are also party to Additional Protocol II should be considered formally bound by its provisions in their military operations in Afghanistan, as they are engaged in the armed conflict that pits Afghanistan government forces against at least one armed group meeting the Protocol’s criteria for application. Otherwise this could lead to interoperability concerns, as well as a possible lack of clarity in operations between the different parties to the conflict.

Only a few such states are not party to the Protocol, including the largest troop contributor, namely the US.<sup>69</sup> But there is even an argument that, since all foreign states are ostensibly present to support the Government of Afghanistan – at the very least as a matter of policy, if not law<sup>70</sup> – they should also expressly apply all of the provisions of the Protocol.<sup>71</sup> Indeed, in the existing agreement between ISAF and the Afghan authorities it is stipulated that, ‘ISAF Forces *will respect the laws and culture of Afghanistan*’.<sup>72</sup> For its part, the US ‘long has stated that it will apply the rules in its manuals whether the conflict is characterized as international or non-international, but this clearly is not intended to indicate that it is bound to do so as a matter of law in non-international conflicts’.<sup>73</sup>

68 See, e.g., D. Turns, above note 21, p. 239.

69 States not party to Additional Protocol II and whose military personnel were operating in Afghanistan as of the end of 2010 were the following: Azerbaijan (90 troops), Malaysia (40), Singapore (36), Turkey (1,790), and the US (est. 97,000).

70 Regrettably, and in contrast to Additional Protocol I, Additional Protocol II does not explicitly require that states parties ‘respect and ensure respect’ its provisions, as stipulated in all four Geneva Conventions.

71 If not, this could be considered an incentive for a territorial state to invite foreign forces that do not bear the same international obligations to conduct operations in its territory.

72 Military Technical Agreement, Afghanistan–ISAF, 4 January 2002, Annex 1, Point 4.

73 John B. Bellinger III and William J. Haynes II, ‘A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*’, in *International Review of the Red Cross*, Vol. 89, No. 866, p. 447.

## Customary international humanitarian law applicable to armed non-state actors

Whether or not Additional Protocol II is applicable to some or all of the parties to the conflict in Afghanistan, it is not contested that customary international humanitarian law is applicable to government and international armed forces, as well as to all armed non-state actors that meet the necessary criteria.<sup>74</sup> That being said, perhaps the main problem of customary international humanitarian law is that it does not sufficiently take into account the practice and *opinio juris* of ANSAs but only those of states for its formation.<sup>75</sup>

The International Committee of the Red Cross (ICRC)'s study of customary international humanitarian law adduced a series of rules (141 in total) applicable to any armed conflict of a non-international character.<sup>76</sup> Somewhat controversially, these rules are said not to be dependent on any specific characterization of the conflict beyond the fact that it does indeed constitute a conflict of a non-international character.<sup>77</sup> Controversies surrounding certain findings of the ICRC study remain, especially as presented by certain states, including the US. In particular, uncertainties persist with regard to the universal recognition and implementation of all of these rules. Indeed, if states themselves are reluctant to develop customary rules and obligations with respect to their own behaviour, that 'makes it hard to argue that the rules have become customary and creating new binding obligations on the armed non-state actors'.<sup>78</sup>

Despite these uncertainties, one can safely assert that, in addition to the customary law provisions of Common Article 3, the rules regulating the conduct of hostilities such as the principles of distinction and proportionality, and the prohibition of perfidy or precaution in attack are also part of customary international

74 See, e.g., ICTY, *Prosecutor v. Haradinaj*, above note 29, para. 60.

75 Article 38 of the Statute of the International Court of Justice. See also J. M. Henckaerts, above note 63; S. Sivakumaran, above note 38; M. Sassòli, above note 23, p. 40.

76 For a list of customary international law applicable in non-international armed conflicts, see the ICRC database available at: <http://www.icrc.org/customary-ihl/eng/docs/home> (last visited 18 January 2011). This section only addresses certain key rules. For a consolidated list of the ICRC's assessment of the rules applicable in armed conflicts of a non-international character, see, e.g., the applicable international law section of the Afghanistan profile on the Rule of Law in Armed Conflicts project database, available at: [http://www.adh-geneva.ch/RULAC/applicable\\_international\\_law.php?id\\_state=1](http://www.adh-geneva.ch/RULAC/applicable_international_law.php?id_state=1) (last visited 18 January 2011).

77 I.e., that it is not merely a situation 'of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'. Jelena Pejic has stated that 'the Study does not distinguish between the different thresholds of non-international armed conflict (under common Article 3 and Additional Protocol II), because it was found that in general States did not make this distinction in practice'. J. Pejic, above note 67, p. 88. The decision not to make any distinction between the different types of non-international armed conflict is regretted by one commentator who argues that it risks at least lessening, if not undermining, the protection afforded by human rights law. See, e.g., remarks by Françoise Hampson, in *Proceedings of the Bruges Colloquium: Armed Conflicts and Parties to Armed Conflicts under IHL: Confronting Legal Categories to Contemporary Realities, 10th Bruges Colloquium, 22–23 October 2009*, No. 40, Autumn 2010, p. 117, available at: <http://www.coleurop.be/file/content/publications/pdf/Collegium40.pdf> (last visited 18 January 2011).

78 A. Clapham, above note 44, p. 12.

law applicable to non-international armed conflicts and are then also applicable to the non-state armed groups operating in Afghanistan.<sup>79</sup>

## International human rights law

International humanitarian law, through treaty and customary rules, potentially affords a significant level of protection, especially to civilians. Nevertheless, as its ambit is limited to those acts with the necessary nexus to the armed conflict, IHL only partly addresses the harmful actions perpetrated by ANSAs against the civilian population.<sup>80</sup> In Afghanistan, these include interference by ANSAs with the right to freedom of expression, freedom of assembly, work, food, health, and education, and systematic gender-based violence.<sup>81</sup> It is thus critical to assess if, how, and to what extent ANSAs operating in Afghanistan are bound to respect human rights.

Before embarking on an analysis of this question, it is necessary to reiterate that international human rights law also applies in situations of armed conflicts, whether international or of a non-international character. This has been formally confirmed on several occasions by the International Court of Justice.<sup>82</sup> At the same

79 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law – Volume 1: Rules*, Cambridge University Press, Cambridge, 2005, Rules 1, 2, and 5–24; Antonio Cassese, *International Law*, 2nd edition, Oxford University Press, Oxford, 2005, pp. 415–420. The International Commission of Inquiry on Darfur gave a list of norms binding on rebels such as ‘(i) the distinction between combatants and civilians; ... (ii) the prohibition on deliberate attacks on civilians; ... (iv) the prohibition on attacks aimed at terrorizing civilians; ... (xiv) the prohibition of torture and any inhuman or cruel treatment or punishment; ... (xvii) the prohibition on ill-treatment of enemy combatants *hors de combat* and the obligation to treat captured enemy combatants humanely’. International Commission of Inquiry on Darfur, above note 30, para. 166.

80 The scope of IHL extends throughout the territory of Afghanistan where hostilities are taking place (*ratione loci*) and must involve a person protected by the instruments (*ratione personae*). ICTY, *Prosecutor v. Tadic*, above note 26, paras. 69–70; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment and Sentence, 21 May 1999, para. 189. International tribunals have, however, developed slightly different tests to determine the requisite nexus between alleged crimes and the conflict. According to the judgment in the Tadic case: ‘It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict’. ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 573. According to ICTY, *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23, Appeals Chamber Judgment, 12 June 2002, para. 57: ‘As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict’. According to ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, para. 260: ‘[T]he alleged crimes ... must be closely related to the hostilities or committed in conjunction with the armed conflict’.

81 See Human Rights Watch, *The Ten-dollar Taliban and Women’s Rights*, 13 July 2010, available at: <http://www.hrw.org/node/91466> (last visited 18 January 2011). Afghanistan has adhered to, *inter alia*, the two 1966 International Covenants, the Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention against Torture, and the Convention on the Rights of the Child and its two optional protocols.

82 See the ICJ 1996 Nuclear Weapons Advisory Opinion, above note 26, as well as the Advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004, ICJ Reports 2004. The applicability of international human rights law in situations of armed conflict was

time, however, it should be noted that certain states involved in military operations in Afghanistan contest the fact that human rights law is applicable extraterritorially to the activities of their armed forces.<sup>83</sup>

## Does human rights law apply to armed non-state actors?

Most of the relevant case law and literature has focused on the ways in which *states* are bound by their human rights obligations while acting in situations of armed conflict.<sup>84</sup> The existence of human rights obligations of ANSAs in situations of non-international armed conflict remains highly controversial.

The main reason put forward to refute the applicability of human rights law to ANSAs is linked to the structure and alleged philosophy underlying international human rights law. Human rights treaties are characterized as setting norms meant to regulate the relationship between a state and the individuals living under its jurisdiction. Thus, such human rights treaties would be ‘neither intended, nor adequate, to govern armed conflict between the state and armed opposition groups’.<sup>85</sup>

Admittedly, in general, human rights treaties do not explicitly refer to non-state actors.<sup>86</sup> Thus, because of the wording and scope of application of those

also confirmed by the ICJ in the *Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Judgment of 9 December 2005, ICJ Reports 2005.

- 83 According to Stephen Pomper, attorney-adviser of the US Department of State (although writing in his private capacity), ‘despite important legal and policy changes during this period [2001–2008] ... the United States maintained its legal position with respect to the non-application of its human rights obligations to extraterritorial armed conflicts’. Stephen Pomper, ‘Human rights obligations, armed conflict and Afghanistan: looking back before looking ahead’, in M. N. Schmitt, above note 22, p. 526. For another view on that issue, see Françoise Hampson, ‘Is human rights law of any relevance to military operations in Afghanistan?’, in *ibid.*, pp. 491 *et seq.* See also UK House of Lords, *Al-Skeini and others (Respondents) v. Secretary of State for Defence (Appellant)*, [2007] UKHL 26, available at: <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.htm>; and UK Supreme Court, *R (on the application of Smith) (FC) (Respondent) v. Secretary of State for Defence (Appellant) and another*, [2010] UKSC 29, available at: <http://www.bailii.org/uk/cases/UKSC/2010/29.html> (both last visited 19 January 2011).
- 84 See, among others, Noam Lubell, ‘Challenges in applying human rights law to armed conflict’, in *International Review of the Red Cross*, Vol. 87, No. 860, 2005, pp. 737–754; Cordula Droegge, ‘Elective affinities? Human rights and humanitarian law’, in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 501–548; Alexander Orakhelashvili, ‘The interaction between human rights and humanitarian law: fragmentation, conflict, parallelism, or convergence?’, in *European Journal of International Law*, Vol. 19, No. 1, 2008, pp. 161–182.
- 85 L. Zegveld, above note 27, p. 54.
- 86 For some authors, though, certain provisions of human rights treaties, such as Article 5(1) and Article 20 of the International Covenant of Civil and Political Rights, must be interpreted as also being directly applicable to the behaviour of non-state actors. Article 5 (1) reads: ‘1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant’; and Article 20 stipulates that: ‘1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’. See Theodor Meron, *Human Rights in Internal Strife: Their International Protection*, Grotius, Cambridge, 1987, p. 34; *contra* Nigel Rodley, ‘Can armed opposition groups violate human rights?’

treaties, judicial or quasi-judicial organs – such as the European Court of Human Rights or UN human rights treaty monitoring bodies – have exercised jurisdiction only with regard to states' behaviour.<sup>87</sup>

There are, however, two human rights treaties that specifically mention armed groups. The first notable one is Article 4 of the *Optional Protocol to the Convention on the Rights of the Child* on the involvement of children in armed conflict, to which Afghanistan is a party.<sup>88</sup> Looking at the wording of that article, it appears that the direct legal obligation is imposed, through paragraph 2, on *states* parties and not on armed groups, to ensure that children under 18 are not recruited by armed groups. That argument should, though, be considered in the light of the recent practice of the UN Security Council in relation to the situations of children in armed conflict.

In 2005, the Security Council established a mechanism to monitor and report on six 'grave violations' committed by states and armed groups on children, one of them being 'recruiting and using child soldiers'.<sup>89</sup> One of the consequences for ANSAs of committing these violations is to be listed in an Annex of the Report of the Secretary-General on children and armed conflict, which can lead to sanctions being imposed against such groups.<sup>90</sup> In that context, the age limit of recruitment of children is set at 18 years old, as in the *Optional Protocol to the Convention of the Rights of the Child*, and not 15 years old, which is the standard

in Kathleen E. Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-first Century*, Martinus Nijhoff, The Hague, 1993, pp. 307–308.

- 87 However, human rights violations committed by individuals and other non-state actors, such as companies, have been addressed in the case law of different human rights courts, as well as in domestic litigation. For example, the concept of 'Drittwirkung', developed by German courts, allows an individual plaintiff to sue another individual on the basis of a national bill of rights or constitutional provisions. Similarly, in the context of the European Convention of Human Rights, the court has on several occasions held the government responsible for failing to prevent, through judicial or law enforcement methods, the violation of a person's human rights by another person or a private, non-state actor (see, for example, a case relating to marital rape, *SW v. United Kingdom*, Judgment of 22 November 2005). Through the *Alien Tort Claims Act of 1789*, US national courts have established that, in some cases, private companies can be held directly accountable for human rights violations. On these issues, see generally Andrew Clapham, *Human Rights Obligations of Non-state Actors*, Oxford University Press, Oxford, 2006; and Andrew Clapham, 'The "Drittwirkung" of the Convention', in Ronald St. J. Macdonald, Franz Matscher, and Herbert Petzold (eds), *The European System for the Protection of Human Rights*, Martinus Nijhoff, Dordrecht, 1993, pp. 163–206.
- 88 Which states: '1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years. 2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices. 3. The application of the present article shall not affect the legal status of any party to an armed conflict'.
- 89 The six violations are: 'killing and maiming of children, recruiting and using child soldiers, attacks against schools or hospitals, rape or other grave sexual violence against children, abduction of children, and denial of humanitarian access for children'. See UN Security Council Resolution 1612 of 26 July 2005.
- 90 The Council has nevertheless been cautious, 'stressing that the present resolution does not seek to make any legal determination as to whether situations which are referred to in the Secretary-General's report are or are not armed conflicts within the context of the Geneva Conventions and the Additional Protocols thereto, nor does it prejudice the legal status of the non-State parties involved in these situations'. Preamble, UN Security Council Resolution 1612 (2005).

required in Additional Protocols I and II.<sup>91</sup> The application of this higher age is confirmed in practice if we look specifically at Afghanistan. The Special Representative for Children in Armed Conflict has noted that the Taliban ‘have been listed in the 8<sup>th</sup> report of the Secretary-General on children and armed conflict for the recruitment and use of children under the age of 18 years’.<sup>92</sup> Although the Security Council is not applying the Optional Protocol as such, practice at international level suggests that armed groups are widely considered to be bound by this norm.<sup>93</sup>

Another treaty relevant to the overall discussion is the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* of 2009 (The Kampala Convention), which goes further than the aforementioned Optional Protocol. Article 2 explains that one of the objectives of the treaty is also to ‘[p]rovide for the respective obligations, responsibilities and roles of armed groups, non-state actors and other relevant actors, including civil society organizations, with respect to the prevention of internal displacement and protection of, and assistance to, internally displaced persons’. Article 7 goes on to enumerate a list of obligations that could be imposed on those actors.<sup>94</sup> Even while it stipulates that ‘the protection and assistance to internally displaced persons under this Article shall be governed by international law and in particular international humanitarian law’, it also includes human rights obligations (such as ‘denying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter’). One should be cautious, however, before drawing sweeping conclusions about the impact of Article 7 on the issue of the human rights obligations of non-state armed groups. First, the second paragraph of Article 7 recalls the importance of state responsibility in this context<sup>95</sup> and,

91 Additional Protocol I, Art. 77(2); and Additional Protocol II, Art. 4(3)(c).

92 Mission Report of the Visit of the Special Representative for Children in Armed Conflict to Afghanistan, 20–26 February 2010, available at: [http://www.un.org/children/conflict/\\_documents/countryvisits/afghanistan.pdf](http://www.un.org/children/conflict/_documents/countryvisits/afghanistan.pdf) (last visited 29 January 2011).

93 However, as there are different standards applied to armed non-state actors and states (who can lawfully recruit under 18 years of age), it is even more difficult to justify – and convince – ANSAs that this provision directly applies to them.

94 Article 7 reads: ‘Members of armed groups shall be prohibited from: a. Carrying out arbitrary displacement; b. Hampering the provision of protection and assistance to internally displaced persons under any circumstances; c. Denying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter; and separating members of the same family; d. Restricting the freedom of movement of internally displaced persons within and outside their areas of residence; e. Recruiting children or requiring or permitting them to take part in hostilities under any circumstances; f. Forcibly recruiting persons, kidnapping, abduction or hostage taking, engaging in sexual slavery and trafficking in persons especially women and children; g. Impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons; h. Attacking or otherwise harming humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons and shall not destroy, confiscate or divert such materials; and i. Violating the civilian and humanitarian character of the places where internally displaced persons are sheltered and shall not infiltrate such places’.

95 Article 7(2) reads: ‘Nothing in this Convention shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State’.



second, it covers the obligations of individual *members* of armed groups and not those of the group itself.

## Application of human rights law to armed non-state actors in Afghanistan

It seems to us that the fact that these two human rights treaties mention armed groups is a reflection of the nature of contemporary armed conflicts. Conflicts are essentially non-international in nature, opposing a multiplicity of different actors in hostilities that may last for years, as in the case of Afghanistan. This evolution demands that human rights law and not just humanitarian law be applicable to regulate the situation of all actors concerned. Indeed international humanitarian law seems unable to cover all the violations that are committed by the armed groups against the civilian population but that do not relate to the armed conflict. Neither Common Article 3 nor Additional Protocol II provides an answer to violations of these norms committed by armed groups, which leaves us with human rights. Of course, in that case, the Afghan state has the primary obligation to comply with its positive duty to exercise due diligence to protect the population from harmful interference by ANSAs, but in many instances that is not practically feasible, especially in areas under the control of the Taliban.

The contemporary practice of international organizations has been rather inconsistent in dealing with ANSAs in terms of human rights law, since it mostly denounces and condemns harmful acts or abuses committed by these actors in Afghanistan without considering them *per se* as human rights violations. For instance the UN Security Council has expressed 'its concern over the harmful consequences of the insurgency on the capacity of the Afghan Government to provide security and basic services to the Afghan people, and to secure the full enjoyment of their human rights and fundamental freedoms' and has called 'for full respect for human rights and international humanitarian law throughout Afghanistan'.<sup>96</sup>

The Council has been more far-reaching in its statement when it '*call[ed] upon all parties to uphold international humanitarian and human rights law and to ensure the protection of civilian life*'.<sup>97</sup> In his March 2010 report on the situation in Afghanistan, under the section on human rights, the UN Secretary-General further noted that '*closely linked to impunity and the abuse of power are attacks on freedom of expression, carried out by both State and non-State actors*'.<sup>98</sup>

96 See, e.g., UN Security Resolutions S/RES/1662 (2006); S/RES/1776 (2007); and S/RES/1890 (2009).

97 UN Security Resolution S/RES/1746 (2007), para. 25.

98 Report of the Secretary-General, *The Situation in Afghanistan and its Implication for International Peace and Security*, 10 March 2010, UN doc. A/64/705-S/2010/127, para. 38.

The UN High Commissioner for Human Rights also observed that ‘the violence, intimidation and harassment to which journalists and media workers continued to be subjected in 2009, at the behest of the Government or at the hands of the armed opposition, impacted on freedom of expression in Afghanistan’.<sup>99</sup>

UNAMA denounced the alarming issue of extrajudicial killing of children and the impact of the conflict on access to basic services, such as health and education.<sup>100</sup> Finally, a more direct reference to the human rights obligations of ANSAs can be found in a recent resolution issued by the UN Human Rights Council. The resolution was meant to address widespread attacks on schools in Afghanistan allegedly committed by the Taliban during the first months of 2010. While it reaffirms that ‘Governments have the primary responsibility to protect their citizens’, it nonetheless ‘urges *all parties* in Afghanistan to take appropriate measures to protect children and uphold their rights’.<sup>101</sup>

The implications of the references made by these different international organizations about human rights violations committed by ANSAs could simply be interpreted as an appeal or an exhortation to respect human rights as *standards* or *principles*, rather than pointing at the violations of binding legal obligations on such actors.<sup>102</sup> Whether or not these references reflect standards rather than strict binding legal obligations merits further debate. Nevertheless, they clearly demonstrate a need expressed by the international community to hold actors accountable for the violations committed against the civilian population, whatever their source. As underlined by one author:

the most promising theoretical basis for human rights obligations for non-state actors is first to remind ourselves that the foundational basis of human rights is best explained as rights which belong to the individual in recognition of each person’s inherent dignity. The implication is that these natural rights should be respected by everyone and every entity.<sup>103</sup>

99 Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights, 11 January 2010, A/HRC/13/62, para. 55.

100 UNAMA, above note 12, p. 11.

101 Human Rights Council, ‘Addressing attacks on school children in Afghanistan’, UN doc. A/HRC/14/15 (emphasis added). From another angle, it is also interesting to note that this resolution was co-sponsored by the UK and the US, two states that have been traditionally reluctant to accept the applicability of human rights in situations of armed conflict.

102 As Zegveld puts it, the ‘qualification of particular acts of armed opposition groups as human rights violations must be distinguished from the denunciation of these acts as abuses of human rights. International bodies have often condemned acts of armed opposition groups as harming human rights without considering their acts to be breaches of human rights law’. L. Zegveld, above note 27, p. 39.

103 See A. Clapham, above note 44; and, more generally, Andrew Clapham, ‘Human rights obligations of non-state actors in conflict situations’, in *International Review of the Red Cross*, Vol. 88, No. 863, September 2006, pp. 491–523.

## Human rights obligations of armed groups exercising de facto authority over a population

Even if it is difficult to establish direct legal human rights obligations of armed groups in general, there seems to be a broader agreement that armed groups could be bound when they exercise element of governmental functions and have de facto authority over a population. This will normally be the case when an armed group controls a certain portion of the territory. Indeed, the need to regulate the relationship between those who govern and those who are governed, which characterizes the *raison d'être* of human rights law, would be reproduced and thus would justify the application of that body of law.<sup>104</sup>

Imposing human rights obligations on non-state armed groups that exercise de facto control over a population has the advantage of clarifying the relationship between human rights and humanitarian law in armed conflict situations, in particular concerning the 'fair trial' requirement of Common Article 3.<sup>105</sup> Many ANSAs, including the Taliban, have established some form of judicial system or even have courts in the territory that they control.<sup>106</sup> It is therefore necessary to determine, based on human rights law, what would constitute fair trial procedures in the case of courts or judicial authorities being set up by ANSAs, given that Common Article 3 is not sufficiently explicit on this issue.<sup>107</sup>

104 As Rodley emphasizes, 'human rights are those rules that mediate the relationship between, on the one hand, governments or other entities exercising effective power analogous to that of governments and, on the other, those who are subject to that power'. N. Rodley, above note 86, p. 300; see also L. Zegveld, above note 27, p. 149.

105 Common Article 3 refers in this regard to a prohibition on '(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'. As noted by Marco Sassoli and Laura Olson: 'Another factor in non-international armed conflicts which renders our discussion particularly complex (and is very neglected in scholarly writings and even in the ICRC study) is that the humanitarian law in non-international armed conflict is, as Article 3 common to the Geneva Conventions points out, equally binding for "each party to the conflict" – that is, for the non-state armed group just as much as the government side. This raises the question whether human rights are equally addressed to armed groups or whether, by virtue of the operation of the *lex specialis* principle, the answer to our questions is not the same for the government and for its opponent'. Marco Sassoli and Laura M. Olson, 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts', in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 602–603.

106 In the case of the Taliban, 'courts' seem to be instituted to examine everyday life problems and not those relating to detention of enemy combatants, which is the situation contemplated by Common Article 3. On the Taliban courts, see 'Afghanistan: Taliban justice "fairer" than state's', in *Human Rights Tribune*, 20 August 2010, available at: <http://www.infosud.org/spip.php?article8710> (last visited 18 January 2011); Rod Norland, 'In bold display, Taliban order stoning deaths', in *New York Times*, 16 August 2010, available at: <http://www.nytimes.com/2010/08/17/world/asia/17stoning.html> (last visited 18 January 2011); Soraya Sarhaddi Nelson, 'Taliban courts filling justice vacuum in Afghanistan', in *NPR*, December 2008, available at: <http://www.npr.org/templates/story/story.php?storyId=98261034> (last visited 18 January 2011).

107 See, however, Jonathan Somer for a more cautious view on the application of human rights provisions on fair trial to armed opposition courts: Jonathan Somer, 'Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict', in *International Review of the Red Cross*, Vol. 89, No. 867, September 2007, pp. 655–690. See also Sandesh Sivakumaran, 'Courts of armed opposition

In Afghanistan, armed groups and warlords actually control villages or broader parts of the territory. As noted by a study on armed groups operating in the country:

[t]here are two different forms of warlords—strongmen in Afghanistan, largely categorized in terms of the scale of their control and their position in terms of traditional structures. National and regional warlords control provinces and parties – such as Dostum and Ismail Khan. However, the vast majority of strongmen operate at the local level, within provinces or districts or between a collection of villages.<sup>108</sup>

Moreover, the Taliban call themselves the ‘Islamic Emirate of Afghanistan’, thus indicating that they claim or at least aspire to represent more than merely an armed group. In that case, the application of human rights law to the Taliban appears to be an appealing and logical theory, as it is necessary to ensure that persons living under their control be protected by international law. This would be even more true were the Afghan state to have no possibility of preventing or punishing the human rights violations committed by such an armed group. Ensuring human rights accountability of armed groups that exercise control over a population also seems to be congruent with the principle stated in Article 10 of the Draft Articles on State Responsibility, which declares that ‘the conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law’.<sup>109</sup> Following the approach of the International Law Commission, if the Taliban were ultimately to replace – or become part of<sup>110</sup> – the Afghan government, the state that they represented would be responsible under international law for all the violations of humanitarian law – and arguably of human rights law – that the Taliban had committed during the armed conflict. One should note, however, that this retroactive attribution to the state of the conduct of an armed group is problematic. First, such responsibility cannot be implemented during the armed conflict and therefore it has limited

groups: fair trials or summary justice’, in *Journal of International Criminal Justice*, Vol. 7, Issue 3, 2009, pp. 489–513.

108 See Michael Bhatia, ‘Armed groups in Afghanistan’, in Michael Bathia and Mark Sedra (eds), *Afghanistan, Arms and Conflict: Armed Groups, Disarmament and Security in a Post-war Society*, Routledge, London and New York, 2008, p. 84.

109 See Draft Articles on Responsibility of States for Internationally Wrongful Acts, above note 66. See also Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 37.

110 How this alternative might come about is not obvious, and would depend on the role played by the insurrectional movement in the new government. In this regard, the Commentary to Article 10 underlines that: ‘The State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed government. Thus, the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming’. Draft Articles on Responsibility of States for Internationally Wrongful Acts, above note 66, Commentary to Article 10, para. 7. See also Gérard Cahin, ‘Attribution of conduct to the state: insurrectional movements’, in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility*, Oxford University Press, Oxford, 2010, pp. 247–251.

practical value when it is most needed.<sup>111</sup> Second – and more generally – it is said to be a rather peculiar approach, ‘because it makes a State responsible for the act of an actor over whom it did not have any influence at the time of the act’.<sup>112</sup>

Apart from this particular issue of state responsibility, other problems arise with regard to the theory that purports to apply human rights law to the groups exercising de facto authority over a population. First of all, there is no clear legal source that indicates what level of ‘authority’ or control over a population is required to impose human rights obligations on ANSAs. In Afghanistan, the situation of the Taliban before and in 2001 – that is, at the point when they actually ran almost the entire country and represented the de facto government – surely fulfilled the criterion of de facto authority over a population.<sup>113</sup> As of 2011, the Taliban control a significant part of the territory in Afghanistan, but it remains unclear whether a sufficient level of control has been reached as to hold them accountable under human rights law. One could further ask what human rights norms would be applicable in that case. The hypothesis would be that almost all rights, linked perhaps to the capacity of the group to implement those rights (akin to one of the requirements for the application of Additional Protocol II, namely the capacity to implement that Protocol), could be applicable. To allow a wide scope of application of human rights norms to non-state actors exercising de facto authority over a population seems justifiable if we accept that the people living under the control of an armed group must be protected as much as possible.

Further reflection is demanded to determine when the requisite threshold of authority has been met, who decides what that threshold is, and what rights might then be applicable. Interpretation by analogy of the criteria of ‘control’ developed by the Human Rights Committee with regard to the scope of extra-territorial obligations of states parties to the International Covenant on Civil and Political Rights could be a way forward.<sup>114</sup> Furthermore, the tripartite typology of obligations to *respect*, *protect*, and *fulfil* developed by UN human rights treaty bodies for state parties could be used as a valuable conceptual framework for the analysis of the extent of the human rights obligations of ANSAs.<sup>115</sup> The content of

111 Gérard Cahin, ‘The responsibility of other entities: armed bands and criminal groups’, in James Crawford *et al.*, above note 110, p. 334. For an opposing view, see Jean D’Aspremont, ‘Rebellion and state responsibility: wrongdoing by democratically elected insurgents’, in *International and Comparative Law Quarterly*, Vol. 58, April 2009, p. 427.

112 M. Sassöli, above note 34, p. 8.

113 See Rüdiger Wolfrum and Christian E. Philipp, ‘The status of the Taliban: their obligations and rights under international law’, in *Max Planck Yearbook of United Nations Law*, Vol. 6, 2002, pp. 559–601.

114 With regard to the scope of obligations of states parties, the Committee has underlined that states parties must respect and ensure the rights protected by the Convention ‘to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party’. See Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 29 March 2004, CCPR/C/21/Rev.1/Add. 13, para. 10.

115 This typology is widely used by treaty bodies in assessing the level of obligations imposed on states parties. Reference to this framework is made in regard to economic and social rights as well as civil and political rights. See, Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy*, Princeton University Press, Princeton, 1980. See also Asbjørn Eide, *The Right to Adequate Food as a Human Right*, UN/Commission on Human Rights, Special Rapporteur, UN doc. C/CN.4/Sub.2/1987/23, 7 July 1987.

the obligation would be determined by the level of control of the armed group. For example, in determining an ANSA's scope of obligations it could be argued that, as a minimum, the armed group should refrain from interfering directly or indirectly with the enjoyment of rights by every individual under its control (obligation to respect). Thus, the Taliban, depending on their level of control of territory, would be obliged to respect the right to education of children and not discriminate against women. The scope of obligations would be proportionate to the ANSA's actual level of control, thus not excluding the obligation to ensure or secure human rights, although it might be questionable as to whether such an entity would have any responsibility to deliver education or enact legislation on gender equality.

Finally, a more general problem concerning the argument linking human rights obligations to a certain level of 'control' or 'authority' over a population is that it increases the perception of legitimacy of the armed group. As noted by Clapham,

it is well-known that neither governments nor international organizations will readily admit that rebels are operating in ways which are akin to governments. Linking rebel obligations to their government-like status is likely to result in there being few situations where human rights obligations can be unequivocally applied to insurgents.<sup>116</sup>

Here, one way of overcoming the issue of legitimacy is to recall that having human rights obligations is independent of political and legal recognition.<sup>117</sup>

## Armed non-state actors are bound by Core Human Rights Obligations

There is another possible argument on how to hold ANSAs accountable for violations of international human rights law. In a recent study, the International Law Association reached the conclusion that even though 'the consensus appears to be that currently NSAs [non-state actors] do *not* incur direct human rights obligations enforceable under international law', ANSAs would still be bound by *jus cogens* norms<sup>118</sup> and insurgents should comply with international humanitarian

Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999): on the right to adequate food (Art. 11 of the Covenant); General Comment No. 13 (1999): on the right to education (Art. 13 of the Covenant); General Comment No. 15 (2002): on the right to water (Arts. 11 and 12 of the Covenant). Nowak interprets the words 'to ensure' in Article 2(1) of the ICCPR as incorporating the obligations to protect and to fulfil. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition, Engel, Kehl am Rhein, 2005, pp. 37–41. See also Human Rights Committee, above note 114.

116 A. Clapham, 'Human rights obligations of non-state actors in conflict situations', above note 103, p. 502.

117 See, in that sense, Article 7(1) of the Kampala Convention, which states that: 'The provisions of this Article shall not, in any way whatsoever, be construed as affording legal status or legitimizing or recognizing armed groups and are without prejudice to the individual criminal responsibility of the members of such groups under domestic or international criminal law.'

118 Norms of *jus cogens* – the peremptory norms of international law – are defined by Article 53 of the 1969 Vienna Convention on the Law of Treaties as norms 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. The ILC



law.<sup>119</sup> No mention of a degree of control of territory or a level of de facto authority over a population is included in the reference to *jus cogens*, which could mean that every ANSA would be bound by core human rights norms that are part of *jus cogens* norms. That appears to be the principle lying behind the practice of the Security Council with regard to children in situations of armed conflict. The Security Council and the Special Representative for Children in Armed Conflict do not distinguish as to the type or structure of an armed group when it comes to its listing in the Annex of the Secretary-General's Reports on Children in Armed Conflict. All that is required for its inclusion is that the group has committed one of the six grave violations mentioned in Security Council Resolution 1612.

Which human rights norms are part of *jus cogens* has not been settled. In its commentary on the draft articles on State Responsibility, the International Law Commission has identified as peremptory norms of international law the 'prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination'.<sup>120</sup> This list is, however, exemplary rather than definitive.<sup>121</sup> The UN Human Rights Committee has identified the following as acts that would violate *jus cogens* norms: arbitrary deprivations of life, torture and inhuman or degrading treatment, taking hostages, imposing collective punishments, arbitrary deprivations of liberty, and deviating from fundamental principles of fair trial, including the presumption of innocence.<sup>122</sup>

Holding non-state armed groups accountable for the violation of core human rights norms also seems to be in line with the development of international criminal law, which assesses the criminal responsibility of individual members of armed groups when international crimes not necessarily committed in relation to an armed conflict (and thus outside the ambit of international humanitarian law) have been perpetrated. This is the case regarding the crime of genocide and crimes against humanity, situations in which human rights violations are criminalized.<sup>123</sup>

In conclusion, there is still room for discussion as to how and to what extent ANSAs are bound by human rights law, but one can already note a clear and growing tendency to hold those groups accountable for human rights violations

Draft Articles foresee superior means of enforcement for *jus cogens* norms, by including special regulation for both the responsible state and for all other states in the case of violations. See Christian J. Tams, 'Do serious breaches give rise to any specific obligations of the responsible state?', in *European Journal of International Law*, Vol. 13, 2002, pp. 1161–1180.

119 International Law Association, The Hague Conference 2010, *Non State Actors*, First Report of the Committee (Non-state actors in international law: aims, approach and scope of project and legal issues), para. 3.2 (emphasis original).

120 Commentary on Article 26, in *Yearbook of the International Law Commission*, above note 66, p. 85.

121 A. Clapham, *Human Rights Obligations of Non-state Actors*, above note 87, p. 88.

122 Human Rights Committee, 'General Comment No. 29: States of Emergency (Article 4)', UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, pp. 4–5.

123 See Rome Statute, Arts. 6 and 7; Jan Arno Hessbruegge, 'Human rights violations arising from conduct of non-state actors', in *Buffalo Human Rights Law Review*, Vol. 21, No. 11, 2005, pp. 41–44. See also Philippe Currat, *Les crimes contre l'humanité dans le statut de la Cour pénale internationale*, Bruylant/L.G.D.J./Schulthess, Brussels, 2006.

committed in the course of armed conflicts despite legal uncertainties. This can be explained for different reasons. First, there is a need to protect the civilian population against the threats posed by ANSAs in areas beyond the control of the state. Second, most contemporary armed conflicts last for years, even decades. International humanitarian law was not meant to regulate the everyday life of people living in areas under the control of ANSAs over such an extended period of time. In Afghanistan, civilians living in Taliban-controlled areas strive to lead a ‘normal’ life despite conditions of extreme violence: people do business; journalists try to report; women go to work. The behaviour of the Taliban is certainly a threat to the human rights of the population, especially of women, children, or journalists, as denounced by the numerous resolutions issued by international organizations as well as reported by human rights non-governmental organizations. The Afghan government seems unable to ensure that these rights are protected, with the result that impunity appears to be the rule rather than the exception across the country.<sup>124</sup> However, when it comes to the protection of core human rights and dignity, it does not matter in the eyes of the victims whether the violation has been committed by the state or by a non-state actor. Even though all the legal answers have yet to be elaborated, holding ANSAs directly accountable for violations of international human rights law is certainly the direction in which the international community is heading, and rightly so.

## 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.<sup>125</sup> 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*

<sup>124</sup> In its mid-year report of 2010, the UNAMA noted that: ‘Anti-Government Elements operate with impunity in Afghanistan. UNAMA HR observed that while the Taliban have made public commitments to avoid civilian casualties, including those found in several provisions of the 2009 Taliban Code of Conduct, no information exists on whether and how Taliban commanders have ensured effective implementation of the provision on the ground ... The Afghan Government often fails in its duty to investigate, arrest and punish perpetrators, including any member of an anti-government element, for violations under domestic criminal laws, international humanitarian law or applicable human rights law’. UNAMA, above note 12, p. 11.

<sup>125</sup> For proposals to improve compliance by ANSAs, see the preliminary findings of the ongoing research project led by the Geneva Academy into ways to improve the protection of civilians in armed conflict, especially by ANSAs: ‘Armed non-state actors and international norms: towards a better protection of civilians in armed conflicts: summary of initial research and discussions during an expert workshop in Geneva in March 2010’, September 2010, available at: <http://www.adh-geneva.ch/news/armed-non-state-actors-international-norms> (last visited 18 January 2011). See also Marco Sassòli, ‘Possible legal mechanisms to improve compliance by armed groups with international humanitarian law and international human rights law’, paper delivered at the Armed Groups Conference, Vancouver, 13–15 November 2003.

*effectively and to minimize the impact of the conflict on basic human rights are more urgent than ever.*<sup>126</sup>

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. 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. 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.

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 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.<sup>127</sup> This could be combined with other applicable customary rules into ‘special agreements’<sup>128</sup> 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.<sup>129</sup> 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.

126 UNAMA, above note 12, p. i (emphasis added).

127 Preferably without the crude propaganda-like language that all too often characterizes entries on ISAF’s website.

128 Article 3(3) of the Geneva Conventions.

129 ‘The stated committee should [be] given a free hand to survey the affected areas as well as people in order to collect the precise information and the facts and figures and disseminate its findings worldwide’. Cited in Jon Boone, ‘Taliban call for joint inquiry into civilian Afghan deaths considered: UN and Nato cautiously consider proposal, which follows reports of high levels of civilian deaths caused by insurgents’, in *The Guardian*, 16 August 2010, available at: <http://www.guardian.co.uk/world/2010/aug/16/taliban-afghan-civilian-deaths-nato-un> (last visited 18 January 2011). This echoes the common provisions of the Geneva Conventions whereby a party to an international armed conflict is entitled to request an inquiry into any alleged violation of the Conventions (GC I, Art. 52; GC II, Art. 53; GC III, Art. 132; and GC IV, Art. 149).

Second, lines of communication with the Taliban and other ANSAs that are currently focusing on a possible route to a peace agreement<sup>130</sup> need to encompass civilian protection and other humanitarian concerns.<sup>131</sup> 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.<sup>132</sup>

Third, with regard to specific means and methods of warfare, there are ways in which the Taliban might be seen to respect international humanitarian law governing the conduct of hostilities. UNAMA has called for all IED (improvised explosive device) attacks, a weapon of choice of the Taliban, to cease entirely. According to UNAMA, since ‘AGEs [Anti-Government Elements] predominantly targeted military objectives using ... IEDs’,<sup>133</sup> in such cases the attacks have respected the principle of distinction (though they might still be said to violate the rules on proportionality in attack).<sup>134</sup> The tactic has seemingly been extremely

130 Efforts to bring the long-standing conflict to an end through negotiation have increased in recent months. In March 2010, the Afghan President, Hamid Karzai, met, for the first time, a delegation from the country’s second biggest militant group, Gulbuddin Hekmatyar’s Hizb-I-Islami, to discuss the possibility of a peace agreement. BBC, ‘Afghan Hezb-e-Islami militants hold peace talks in Kabul’, 22 March 2010, available at: [news.bbc.co.uk/2/hi/8579380.stm](http://news.bbc.co.uk/2/hi/8579380.stm) (last visited 18 January 2011). In November 2010, the group reportedly told the BBC that they would agree to a ceasefire if the US forces remained in their bases. Syed Shoaib Hasan, ‘Afghan rebel group offers truce terms’, in *BBC News online*, 18 November 2010, available at: <http://www.bbc.co.uk/news/world-south-asia-11773520> (last visited 18 January 2011). At a peace conference in Kabul in June 2010, the President announced the creation of a High Peace Council to start a dialogue with the Taliban. BBC, ‘Afghan Peace Council begins bid for talks with Taliban’, 7 October 2010, available at: <http://www.bbc.co.uk/news/world-south-asia-11494247> (last visited 18 January 2011). On 11 October 2010, the Afghan President confirmed that ‘unofficial contacts’ with the Taliban had been taking place ‘for quite some time’ to end the insurgency. See, e.g., BBC, ‘Afghan President Karzai confirms Taliban “contacts”’, 11 October 2010, available at: <http://www.bbc.co.uk/news/world-south-asia-11511866> (last visited 18 January 2011); and BBC, ‘Nato’s “safe passage” for Taliban’, 15 October 2010, available at: <http://www.bbc.co.uk/news/world-south-asia-11553388> (last visited 18 January 2011).

131 In response, Amnesty International warned that ‘Plans for a peace deal with the Taleban in Afghanistan could seriously jeopardize the rights of the Afghan people, in particular Afghan women, unless concrete human rights benchmarks are incorporated’. Amnesty International, ‘Afghanistan conference raises fears of sacrificing rights for short-term peace’, 19 July 2010, available at: <http://www.amnesty.org/en/news-and-updates/afghanistan-conference-raises-fears-sacrificing-rights-short-term-peace-2010-07-19> (last visited 18 January 2011).

132 In its August 2010 report, the UN called on the Taliban and other ‘Anti-Government Armed Groups’ to ‘withdraw all orders and statements calling for the killing of civilians, including civilian Government officials; adopt and enforce codes of conduct or other directives that prohibit any and all attacks on civilians; accept that civilians’ cooperating with the Afghan Government and International Military Forces are protected against any attack and immediately cease targeting those civilians’. UNAMA, above note 12, p. v. It appears that this call has so far been rejected, given that apparently after the report was published the Taliban issued an updated ‘Islamic Emirate of Afghanistan Rules for Mujahideen’ that included a determination that anyone working for coalition forces or the Afghan government was a legitimate target. CBC News, ‘Taliban issue new code of conduct’, 3 August 2010, available at: <http://www.cbc.ca/world/story/2010/08/03/conduct-code-taliban.html> (last visited 18 January 2011).

133 UNAMA, above note 12, p. 1.

134 It appears that, often (but by no means always), IEDs are command detonated and that attacks are coordinated against ISAF troops. See, e.g., Landmine and Cluster Munition Monitor, ‘Afghanistan country profile, mine ban policy: use’, last updated 4 October 2010, available at: [http://www.the-monitor.org/index.php/cp/display/region\\_profiles/theme/476](http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/476) (last visited 18 January 2011).

effective against government and especially international military forces.<sup>135</sup> However, UNAMA affirms that such actors ‘often used these tactics in civilian areas where a military target or objective was not clear. Certain tactics and weapons, in particular IEDs and suicide attacks, also appeared in some cases to target specific civilian individuals’.<sup>136</sup> Furthermore, UNAMA claims that:

IEDs kill and injure more civilians than any other tactic used in the conflict. ... IEDs have been placed on roadsides, in bazaar and commercial areas, outside the homes and offices of Government officials, in bicycles and rickshaws. IEDs are detonated in a variety of ways – they can be triggered by remote-controlled IEDs (RCIED), wire-triggered, or by victims (pressure or sensitive-plated IEDs). When detonated, an IED explosion is indiscriminate and affects everyone in the vicinity of the explosion.<sup>137</sup>

Thus, dialogue could perhaps focus on how civilian casualties could be minimized, given that the Taliban are hardly likely to agree to cease all use of IEDs.

Fourth, the issue of suicide attacks, prevalent in the conflict in Afghanistan, needs to be addressed. Any attack targeted against individual civilians or the civilian population as such is clearly unlawful and constitutes a war crime. Even where such attacks are targeted against military objectives, there are still issues of indiscriminate attacks, proportionality, and perfidy to be considered.<sup>138</sup> The Taliban addressed proportionality and precautions in attack indirectly in the new version of the ‘Code of Conduct’ issued by Mullah Omar in 2009.<sup>139</sup> Codes of conduct issued by ANSAs may facilitate engagement for a better respect of

135 In October 2010, the UK Foreign Secretary, William Hague, told Sky News that IEDs posed the biggest threat to Britain’s armed forces in Afghanistan: ‘These are the main threats to our forces – these are the weapons of choice of the Taliban. ... So we are spending a lot on improving the protection of vehicles, on having some remote controlled vehicles and, of course, a lot of military effort goes into detecting and disrupting the networks that make and plant the IEDs’. Andy Jack, ‘IEDs are biggest threat to UK forces – Hague’, in *Sky News Online*, 21 October 2010, available at: <http://news.sky.com/skynews/Home/World-News/Foreign-Secretary-William-Hague-Says-Taliban-IED-Roadside-Bombs-Biggest-Threat-To-UK-Forces/Article/201010315764166?f=rss> (last visited 18 January 2011).

136 UNAMA, above note 12, p. 1. However, UNAMA uses the term IED to cover many different attacks, including, apparently, suicide attacks. See *ibid.*, Glossary.

137 *Ibid.*, p. 2.

138 With respect to perfidy, according to the ICRC customary law study: ‘Killing, injuring or capturing an adversary by resort to perfidy is prohibited’. J.-M. Henckaerts and L. Doswald-Beck, above note 79, Rule 65. Perfidy is defined in Additional Protocol I as ‘[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence’ (Art. 37). Thus, simulation of civilian status by a suicide bomber to enable him or her – according to UNAMA, above note 12, p. 4, the first ever reported suicide attack in Afghanistan that involved a female occurred in Kunar province on 21 June 2010 – to reach military personnel in safety would fall within this prohibition. This may be the case in many, probably even the overwhelming majority, of instances.

139 ‘Rule 41- Make sure you meet these four conditions in conducting the suicide attacks: A- Before he goes for the mission, he should be very education [*sic*] in his mission. B- Suicide attacks should be done always against high ranking people. C- Try your best to avoid killing local people. D- Unless they have special permission from higher authority, for every suicide attack must be approved by the provincial authority’. Rule 46 also includes a general order that bombers must do their best to avoid civilian casualties. See Program for Cultural and Conflict Studies, above note 32, p. 3.

international norms because the expression of the group to commit themselves in written codes enhances the feeling of ownership of the norms and encourages respect.<sup>140</sup> Of course, such a commitment needs to be consistent with humanitarian principles. Regarding the Taliban Code of Conduct, developed on their own initiative, some of its rules are clearly not compatible with international norms.<sup>141</sup> Nevertheless, it represents a basis on which an agreement could be built to limit the use of suicide attacks. For example, UNAMA has made a number of references to its provisions, calling upon the Taliban to respect them.<sup>142</sup>

Fifth, in our view it is time to put an end to the almost visceral rejection of the applicability of human rights law to ANSAs and accept that the world has transformed into one where a variety of non-state actors potentially have a range of international human rights law obligations. The origin of human rights law was the need to offer legal protection to the individual against the almighty power of the state. But today, can it be seriously entertained that the individual does not require legal protection against non-state armed groups in Afghanistan and that the recognized state is capable of providing it? The Taliban should therefore be recognized as an entity that has a broad range of legal obligations consonant with international human rights law, especially in areas that it controls and administers,<sup>143</sup> and the obligations incumbent upon it should be made explicit.

## Conclusion

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. 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

140 A. Clapham, 'Human rights obligations of non-state actors in conflict situations', above note 103, p. 512.

141 See some of the rules of the 2006 version of the Taliban's code of conduct: '(24) It is forbidden to work as a teacher under the current puppet regime, because this strengthens the system of the infidels. True Muslims should apply to study with a religiously trained teacher and study in a Mosque or similar institution. Textbooks must come from the period of the Jihad or from the Taliban regime. (25) Anyone who works as a teacher for the current puppet regime must receive a warning. If he nevertheless refuses to give up his job, he must be beaten. If the teacher still continues to instruct contrary to the principles of Islam, the district commander or a group leader must kill him'. Reproduced in *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, above note 21, p. 17.

142 UNAMA, above note 12, p. 5.

143 Thus, according to UNAMA, in 2009–2010, 'AGEs controlled the civilian population through a range of measures often involving violence, assassinations and abductions'. UNAMA, above note 12, p. 1. Fergusson presents another side to the Taliban, claiming that the 'official provincial government simply could not compete with the services the Taliban offered – particularly ... when it came to the administration of justice. A villager involved in, say, a local land dispute, used to have to bribe every official and wait months before a resolution could ever be reached. By stark and shameful contrast, the judgments of the Taliban's Sharia councils were instant as well as free'. J. Fergusson, above note 6, p. 144.



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 Taliban, 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’.<sup>144</sup> 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 civilians demand programmes, advocacy, and, especially, direct engagement with ANSAs. All of these elements need to be pursued if we are truly to make the law anything approaching a reality.

144 *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, above note 21, para. 42.