Vigilantism and State Responsibility

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Abstract: Afghanistan has been in war for over two decades now. It has turned form once a thriving country into a state of disaster and a failed state machinery. Along with horrific Human Rights Violations, the country has seen a surge in vigilantism and for this act, no one is taking the responsibility. Who should be held responsible for increasing vigilantism and how far is the government of Afghanistan responsible, this needs to be comprehended?

Keywords: Afghan Local Police, Vigilante, Vigilantism, State Responsibility, Khost Protection Force, Geneva Conventions 1949, ICRC, Armed Conflict

Introduction
Vigilantism is an act of operating outside the law for the preservation of the status-quo. It is also defined as the practice of the ordinary people in a place taking unofficial action to prevent crime or to catch and punish people believed to be criminals. According to Merriam-Webster, a vigilante is a self-appointed doer of justice. A Law Library online encyclopedia defines Vigilantism as, “The act of taking the law into one’s own hands and attempting to enact justice according to one’s own understanding of right and wrong; action taken by a voluntary association of persons who organize themselves for the purpose of protecting a common interest, such as liberty, property, or personal security; action taken by an individual or group to protest existing law; action taken by an individual or group to enforce a higher law than that enacted by society’s designated law making institutions; private enforcement of legal norms in the absence of an established, reliable, and effective law enforcement body.”

Vigilantism starts when there is injustice in any state, thereby as a result of the Injustice, people start taking law into their hands and major issue arises when they start committing criminal acts towards innocent people. Thus, we have such scenario in Afghanistan in the form of Afghan Local Police (ALP) and Khost Protection Force (KPF). They are those paramilitary forces which have been primarily recruited for the protection of civilians in villages and provinces of Afghanistan. According to resources which will be mentioned in this paper say, that they have been committing arbitrary acts therefore the purpose of this paper rests to examine whether the state can be held responsible for the acts committed by these vigilante groups in Afghanistan. First, the history of these vigilante groups will be examined. Second, the Common Article 3 of Geneva Conventions and the Additional Protocol II will be assessed in order to understand whether Afghanistan was/is embroiled in non-international armed conflict. Third, various tests constructed by courts for the determination of state’s responsibility will be studied and applied for the determination of legal status of the vigilante groups. Last, criminal liability for the States will be established. In the process one can see that a certain level of support and interest in the activities of the vigilante group by the state is required for its liability.

Historical Background
The history of vigilante groups and their ongoing conflict will be studied in order to provide clarity to the matter at hand. The vigilante groups discussed shall be Afghan Local Police (ALP) and Khost Protection Force (KPF) in regard to Afghanistan. Afghanistan has seen its fair share of vigilantism. Post 9/11 United States involvement in Afghanistan led to US government experimentation with local forces in response to the declining security situation because of the Taliban led insurgency. Afghan Local Police (ALP) was officially established in 2010 with the approval of the Afghan government and was made answerable to the Afghanistan’s Ministry of Interior and district chief of police. Both the US and the Afghan government have supported the ALP through financial remuneration, weaponry and training. ALP does not have enforcement powers. It was created in order to provide support to the Afghan National Police (ANP). ALP is answerable to the Afghan Ministry of Interior and district chief of police. ALP, along with other US supported forces, has been shown to engage in “looting, illegal detention, beatings, killings, sexual assault, and extortion”.

ALP is not the only troubling presence in Afghanistan right now. Khost Protection Force (KPF), a paramilitary force, is operating in the eastern part of Afghanistan. The operations of KPF are directed by the United States and coordinated with National Directorate of Security of Afghanistan (NDS). It is not answerable to the local government. According to a former commander, KPF only holds itself accountable to Americans. It has been acknowledged by the Afghan government that KPF has engaged in activities such as killing of civilians, torture and ill-treatment and kidnapping. There have been witness accounts which suggest that the US based operatives were present when these violations were taking place.

Common Article 3 of the Geneva Conventions
The determination of non-international conflict has to satisfy Common Article 3 of Geneva Conventions. The Geneva Conventions of 1949 form the fundamental basis for humanitarian law and allow protection to various parties who are not part of an armed conflict or have ceased to engage in the armed conflict. Afghanistan ratified the Geneva Conventions in 1956. The relevant article for Afghanistan’s conflict with militants is Common Article 3. It is present in all the Geneva Conventions and covers conflict which is non-international. The Common Article 3 refers to safeguards that should be made available to persons who fall within realm of direct control of the parties and is unambiguous regarding its application upon and by non-state actors. As pointed out by Bellal...
et al, the two-tier test for the determination of non-international armed conflict was constructed by the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY)\(^{18}\). First, the armed violence must be protracted in nature. The indicative factors were summarized by in ICTY and were taken to include:

“...the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and caliber of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones..."\(^{19}\)

Second, the armed non-state actors must exhibit a certain level of organization. For the satisfaction of the organizational criteria, certain indicative factors may be assessed such as the establishment of command structure, presence of headquarters, ability to obtain and distribute arms, capability for carrying out military operations and to engage in negotiations\(^{18}\). It can be argued that the security situation in Afghanistan does qualify for non-international armed conflict through the two-tier test constructed under Common Article 3. For this purpose, Afghanistan’s conflict with the Afghan Taliban (AT) will be studied.

Afghanistan’s engagement in non-international armed conflict is accepted by the international community. In 2002, International Committee of Red Cross (ICRC) classified Afghanistan as being involved in a non-international armed conflict\(^{19}\) since the establishment of the new Afghan government and the US and NATO taking up the mantle as supporting forces in the fight against the Taliban and al-Qaeda. According to estimations, as of 2016, Afghani Taliban (AT) controls at least one-fifth of territory in the country\(^{20}\). Reports have shown that between 2001 and 2014, 26,270 civilians were killed in Afghanistan due to armed conflict\(^{21}\). 2015 marked the most brutal year for civilians with more than 11,000 dead and wounded\(^{22}\). This conflict does not show any signs of stopping with the increasing number of casualties.

AT has engaged in negotiations which reflect its organization. In 2015 it entered into negotiations with the Afghan government\(^{23}\). As of February 2016, the active members of the Taliban were estimated to be around 25,000\(^{24}\). AT procures majority of its arms through the channels set up by the US Based agencies during the Soviet occupation in the 1980s. It obtains its financing from its poppy and drug trade, timber trading, extortion, mining operations, Islamic charities and other countries from the Gulf region and Pakistan\(^{25}\). Its organization cannot be disputed since majority of the indicative factors required for the qualification of the second part of the test have been satisfied. The fact that Afghanistan is engaged non-international armed conflict has been accepted by the international community given that the conflict has proven itself to be protracted with severe civilian casualties and AT’s control over the territory. AT also exhibits organization by engaging in negotiations with the government, obtaining armaments and setting up a finance system from a wide variety of sources.

One of the major issues that have emerged regarding the determination of non-international armed conflict is the apparent ease with which TTP and AT cross borders into Pakistan/Afghanistan to avoid detection. This has become more common for the TTP since Operation Zarb-e-Azab was launched\(^{26}\). This suggests the argument that since the TTP is not limited by the border territories of Pakistan the armed conflict has ceased to be non-international and as a consequence Common Article 3 fails to apply. However this argument is rejected by Jelena Pejic (senior legal adviser in ICRC) who suggests, using the example of Israel and Hezbollah, that where the forces of a state are engaged in an armed conflict with the organized armed group operating from another state then it can still be considered a non-international armed conflict as long as the second state does not provide support to the organized armed group\(^{27}\). Pejic is of the opinion that since the host state is not involved in the armed conflict between the organized armed group and the other state the conflict does not become international.

This controversy is not a new one. The United States government during the Bush presidency argued that the Global War on Terror was not an international armed conflict since Al-Qaeda is a non-state actor\(^{28}\). But at the same time Common Article 3 could also not apply as the War on Terror did not qualify as a non-international armed conflict for Al-Qaeda’s operations were not limited to a single territory. This argument was rejected by the US Supreme Court in the Hamdan v Rumsfeld\(^{29}\). It was held that the Common Article 3 did apply to the armed conflict due to treaty obligations of the USA and in the process implied that the conflict was of non-international nature. The Court’s interpretation of Common Article 3 was due to the nature of the parties involved in the conflict as opposed to their geographical location. It can be argued that the security situation in Afghanistan with respect towards AT has satisfied the two-tier test. Even if TTP and AT have taken advantage of loose border regulations between Pakistan and Afghanistan, it still does not mark the conflict as international unless there is evidence to suggest that the state has provided support to the non-state actor engaged in conflict with the other state. As held in the Hamdan case, the nature of the parties involved should be the instrumental factor as opposed to the geographical movement/location of the non-state actors.

**Additional Protocol II**

Additional Protocol II (AP II) is the 1977 amendment to the Geneva Convention with the object of building upon the protections available to the victims of non-international armed conflict under Common Article 3. Afghanistan acceded to Additional Protocol II in 2009 and as a consequence is legally bound to uphold it\(^{30}\).

AP II has a greater threshold for its application as opposed to Common Article 3. Article 1 lists four stipulations in order for the conflict between organized armed group and the state to qualify as non-international armed conflict. Article 1 reads as follows:

“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 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\(^{31}\) ’”

Firstly, there must be responsible command within the organized armed group. According to the International Committee of Red Cross report, these criteria has been satisfied due to the Afghani Taliban’ Code of Conduct. It suggests evidence of a system which assigns command and responsibility\(^{32}\). Secondly, the organized armed group must have some control over part of the territory and thirdly, it must have carried out “sustained and concentrated” armed attacks. As of July 2016, AT did control one-fifth of the total
territory of Afghanistan and could possibly influence of up to half of the country. Afghanistan continues to be one of the most dangerous countries with 26,270 civilians being killed from 2001 to 2014. Severe casualties have occurred every year since 2001 and coupled with AT’s control over territory reflects continuous and strategic efforts by the group to subvert the Afghan government and any support it may receive from the US and NATO. Fourthly, the organized armed group should have the capacity to carry out AP II. This is considered to be fundamental criteria and requires minimum organizational structure for implementation.

Given AT’s control over territory and 25,000 active members it can be concluded that AT does have the capability to implement AP II. Afghanistan’s conflict with AT does satisfy the criteria laid down in Article 1 of APII. AT’s Code of Conduct coupled with control over territory, severe number of civilian casualties and a certain level of organization which makes application of APII by AT possible, all reflect the satisfaction of the test constructed.

State Responsibility
Various tests constructed by courts will be studied in order to assess state responsibility towards various lashkars and paramilitary groups operating within the territory of the state supposedly for the country’s interests. With regards to analysis, the tests constructed by Nicaragua v United States of America, Prosecutor v Tadic and International Law Commission Draft Articles on State Responsibility for Internationally Wrongful Acts (ASR) 2001 will be examined.

ALP was established in 2010 by the President of Afghanistan and was made answerable to the Interior Ministry. This shows that ALP has the status of a de jure organ of the state and as a consequence Afghanistan has full legal responsibility for the acts of ALP. Article 4(1) of ASR reads:

“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”

This is followed by Article 7 which holds the position that the “…conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority…” will be considered to be an act of the State even if it contravenes the actual instructions.

Hence according to these articles the Afghan Government will be held responsible for the acts committed by the ALP after its incorporation into the functionaries of the government in 2010. However, the status of locally based paramilitary groups formed between 2001 and 2010 is an entirely different issue. As opposed to the Strict Liability test there is the Effective Control test, constructed in Nicaragua v US, which is more concerned with attribution instead of the de jure or de facto status of an organ.

The Effective Control test precedes Article 8 of the ASR which reads:

“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

The Effective Control test is applied where the relationship between the state and non-state actor is that of a partial dependence. This partial dependence may be inferred by the selection of the leaders, the provision of training and equipment, operation planning and support along with selection of targets. Furthermore, it is necessary to prove that the de jure organs of the state have exercised effective control over the operation in which the conduct has been committed. This ought to be assessed on a case by case basis. The first step of the test is likely to be easily satisfied. KPF, which would satisfy the first criteria. According to news reports, KPF was funded, equipped with arms and trained by the CIA. CIA was also involved in planning operations with the KPF. The second criteria depend upon the evidence available. There have been testimonies by several witnesses regarding the actions of KPF which suggests that American operatives of the CIA were present in multiple incidents where the KPF was engaged in acts of torture, ill-treatment and arbitrary deprivation of life.

The Effective Control test comes down to actual evidence linking the States to specific conduct of the non-state actor who has violated international humanitarian law. Depending upon the availability of evidence with regard to the second criteria it can be satisfied in the case of KPF.

The Overall Control test in contrast to the Effective Control test is much more compromising. Overall Control test was constructed in Prosecutor v Tadic where the Court held that it was a more appropriate test as opposed to the Effective Control test which should only be applied upon individuals. According to Taleman, there is a two-tier test. Firstly, there has to be assistance through finance, training, operational support and equipment by the State to the non-state actor. Secondly, there must be involvement by the State in the planning, organizing and coordination of the military operations carried out by the non-state actor.

The Overall Control test KPF will, in all likelihood, fulfill the criteria for the test with flying colors. As noted, before, all the salaries of KPF were paid by the CIA which also trained the members and provided them with weaponry. The second test can also be said to be satisfied given that CIA was involved in planning operations with KPF. This appears to be confirmed by former members and witnesses who point out that these CIA operatives also travel with the KPF. Government of Afghanistan can also be linked to KPF under the Overall Control test given that the activities of KPF were coordinated with the NDS.

Criminal Liability for Afghanistan
Afghanistan and United States will, in all likelihood, will be held criminally liable for ALP and KPF respectively. It is possible that both United States and Afghanistan will be held responsible for the actions of KPF as both the governments were involved through CIA and NDS.

By engaging in acts such as ‘...looting, illegal detention, beatings, killings, sexual assault, and extortion...' ALP have violated Common Article 3(1) (a)-(d) which Afghanistan is legally obligated to uphold since the ratification of the Geneva Conventions. KPF has carried out acts such as killing of civilians, torture and ill-treatment, kidnapping and hence both US and Afghanistan can be criminally liable for Common Article 3(a)-(d). Both the US and Afghanistan has ratified the Geneva Conventions in 1955 and 1956 respectively.
Conclusion

Thus, an observation can be made that the US can be held responsible for the acts of KPF under the Effective Control test as well as the Overall Control test. Whereas, in all likelihood, I believe, Afghanistan can only be held responsible for the acts of KPF under the Overall Control test. In my opinion, Afghanistan is also criminally liable for the acts of ALP because of its status as the organ of the state to which strict liability will apply. In an effort to avoid accountability in domestic and international sphere the states have equipped local vigilante groups but it appears that they have opened themselves to liability either way.

The root cause of why the Vigilante groups turn on their own people, to whom they are primarily supposed to give protection, I firmly believe, is because of the fact, they have been given arbitrary powers and are most of the times let unaccounted for their acts which in turn makes them immune to any criminal prosecution. When they know they won’t be apprehended, they start agonizing their own people and this is the present case in Afghanistan.

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