

Schaller, Christian

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Military Operations in Afghanistan and International Humanitarian Law

Christian Schaller

Until recently, German officials denied that the Bundeswehr was at war in Afghanistan, insisting that its role was to stabilize rather than to fight. In November 2009, Federal Minister of Defense Karl-Theodor Freiherr zu Guttenberg first referred to “warlike circumstances” and described the situation as a “non-international armed conflict” taking place in parts of Afghanistan. This position was now specified by Federal Foreign Minister Guido Westerwelle, who in an official government address to the German Bundestag stated that even the situation in the north of Afghanistan was to be qualified as an armed conflict within the meaning of international humanitarian law. But the search for appropriate terminology is much more than a matter of clear communication. It is above all a question of maximizing legal security for the forces on the ground.

The International Security Assistance Force (ISAF) in Afghanistan operates on the basis of a Security Council authorization under Chapter VII of the United Nations Charter. Its mandate is renewed by the Security Council at regular intervals (most recently, Resolution 1890 of 8 October 2009). Operation Enduring Freedom (OEF), on the other hand, is based on the right of self-defense as laid down in customary international law and Article 51 of the Charter. The exercise of this right in response to terrorist acts has been repeatedly endorsed by the Security Council following the attacks of 11 September 2001. The same line of argument was followed by NATO, which invoked Article 5 of the NATO Treaty immediately after the attacks (collective self-defense).

Although OEF does not possess a mandate of its own under Chapter VII, it has acquired additional legitimacy from the Security Council whose resolutions on the ISAF mandate regularly underline the importance of OEF. Moreover, the Afghan government has given its approval to both missions as reiterated for example in the Bonn Agreement of 2001 and the final communiqués of several Afghanistan conferences. This consent constitutes an additional and independent legal basis for military operations in Afghanistan.

The overall authority of the coalition armed forces to be present in Afghanistan has to be distinguished from the legality of specific military action taken on the ground in light of international humani-

tarian law (*jus in bello*). In Germany, the latter was intensely discussed after an air strike on two fuel tankers in the Kunduz area in early September 2009. The bombing, which had been requested by a German military officer, killed up to 142 persons, many of them civilians. The examination of the case and subsequent discussions demonstrated a need for clarifying the legal conditions under which armed forces operate in Afghanistan.

International humanitarian law applies to all situations of armed conflict. It is designed to limit the effects of such conflicts, to protect persons who are not participating in the hostilities and to strike a careful balance between humanitarian concerns and military requirements. The core of international humanitarian law is formed by the four Geneva Conventions of 1949 and the two Additional Protocols of 1977, the provisions of which in large part reflect customary international law. Although humanitarian law enjoys precedence as *lex specialis* in situations of armed conflict, international human rights law generally continues to apply to such situations with the effect that humanitarian law standards sometimes have to be supplemented by human rights provisions (principle of mutual complementarity).

Where foreign armed forces are stationed in a country in support of the local government, troop providers typically reserve the right to regulate the status of their forces vis-à-vis the receiving state either at a political level or under a separate legal agreement (status of forces agreement). This explains, for example, why legal jurisdiction over German soldiers deployed in Afghanistan is exercised by German rather than Afghan courts.

The character of the hostilities under international humanitarian law

Within the framework of the Geneva Conventions the term “war” does not have any specific relevance. Instead, international

humanitarian law distinguishes between international and non-international armed conflicts. An international armed conflict is generally defined as resort to armed force between two or more states. A non-international armed conflict, on the other hand, exists whenever there is protracted armed violence between governmental armed forces and the forces of one or more organized armed groups, or between such groups arising on the territory of a state.

Classifying an insurgent armed group as a party to the conflict does not imply that its members gain the right to take up arms and enjoy immunity from criminal prosecution for their participation in hostilities; nor does this assignment have any repercussions on the political status of the group. The identification of conflict parties is primarily a matter of attributing full responsibility under international humanitarian law to each of these groups and their members.

A non-international armed conflict

During the early phase of OEF – from October to December 2001 – an international conflict existed between the US led coalition of states and the de facto regime of the Taliban who at that time possessed effective control over large parts of the country. The defeat of the Taliban regime and the institution of a new government transformed the character of the conflict under international humanitarian law. The present situation qualifies as a non-international armed conflict between the Afghan government and insurgents including the Taliban as well as other organized armed groups.

The duration and intensity of the fighting as well as its grave consequences and the degree of organization all show that these confrontations cannot be written off as mere internal disturbances or as tensions to which international humanitarian law would not apply. The means and methods used by non-state actors are irrelevant as to the classification of the conflict. For

example, where the impact, duration and geographical distribution of terrorist attacks represent massive and systematic use of force, such a situation can also be qualified as an armed conflict.

To determine concrete zones of combat within Afghanistan would be more or less impossible due to the extremely dynamic character of the hostilities. Even as there are periods in which the intensity of the fighting decreases from time to time in some parts of the country, it should be assumed in the interests of legal security that the armed conflict extends to the whole territory of the state with the effect that international humanitarian law must be applied in all military operations taking place in Afghanistan. Otherwise forces on the ground may find themselves in a precarious situation not knowing whether their action in a specific area would actually be covered by the law of armed conflict.

The minimum humanitarian standards that apply to non-international armed conflicts are spelled out in common Article 3 of the four Geneva Conventions. The Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) is not applicable to situations in which the armed forces of a state fight against organized armed groups on the territory of another state. Many of the principles and rules contained in international humanitarian treaties, however, have become part of customary international law applicable to both types of armed conflict. Every state is under an obligation to ensure that these norms are observed by its armed forces in all their operations. This requires, inter alia, that military rules of engagement, operations plans and other reference documents are accommodated to international humanitarian law standards and soldiers are specifically trained to comply with such standards.

Germany as a party to the conflict

The fact that the Afghan government receives military support from other states does not change the character of the conflict under international humanitarian law. A military intervention directed against non-state actors on the territory of another state leads to a non-international armed conflict as long as it is covered by the consent of the affected state. Only if the deployment is carried out against the will of the state and infringes upon its sovereignty, the conflict would be international in nature.

An intervening state becomes party to a non-international conflict as soon as its armed forces get involved in the hostilities. Therefore, Germany as a troop contributing country under the ISAF mandate is a party to the conflict in Afghanistan. From the perspective of international law this means nothing more than that the Bundeswehr during its operations is bound to the full extent by humanitarian law. In this regard it is of no relevance whether the forces act in self-defense or actively pursue and combat insurgents. Moreover, it is irrelevant how the military deployment is politically tagged or strategically designed. Even a UN peacekeeping or stabilization mission sent to an area of armed conflict may have to take recourse to armed force in order to execute its mandate and, thus, would be bound by international humanitarian law.

The status of insurgents under international humanitarian law

Whether and to what extent German and other coalition forces in Afghanistan are entitled to take military action against insurgents depends on the status of these persons under international humanitarian law. The principle of distinction, which is one of the fundamental pillars of the laws of war, also applies to non-international armed conflicts. Articles 1 and 13 of Additional Protocol II, for example, distinguish between armed forces, organized armed groups and civilians. The term “armed forces” is used analogously to the terminol-

ogy of international conflicts (as laid down in Article 43 of Additional Protocol I) to designate the military forces of a state party to the conflict, whereas the military forces of non-state conflict parties are usually subsumed under the term “organized armed groups”.

The law of non-international armed conflict does not grant any privileges comparable to those of a combatant and prisoner of war in international armed conflict. This is particularly relevant for determining the status of members of organized insurgent groups and of civilians who take up arms on a spontaneous, sporadic or unorganized basis.

Insurgents as members of organized armed groups

The members of organized armed groups belonging to a party to a non-international armed conflict do not enjoy any protection afforded to civilians by international humanitarian law. For the duration of their membership they may be attacked as military targets at any time, even when they are temporarily unarmed or have withdrawn to their quarters.

The controversial issue of defining the conditions for membership in such groups was recently taken up by the International Committee of the Red Cross (ICRC) in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009). This document is not legally binding but nonetheless possesses considerable weight due to the international reputation of the ICRC, its outstanding expertise and its important role in the development, interpretation and dissemination of international humanitarian law. According to the view of the ICRC, which is shared by many legal scholars and practitioners, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (continuous combat function).

This criterion serves to distinguish members of the organized fighting forces of a non-state party from civilians who directly participate in hostilities only spontaneously, sporadic, or in an unorganized fashion.

A continuous combat function is assumed, for example, by persons who are constantly involved in preparing, executing or commanding acts or operations amounting to direct participation, or who are specifically recruited, trained and equipped for such purposes. Members of organized armed groups must abandon their continuous combat function and identifiably dissociate from the group in order to regain the protection of civilian status.

Spontaneous, sporadic and unorganized fighting and the concept of direct participation in hostilities

In the case of Afghanistan the coalition forces are not only confronted by organized units but also by persons who take up arms only from time to time. Persons not assuming a continuous combat function as members of an organized armed group must be considered civilians even if they generally support the insurgency.

In contrast to members of organized armed groups, the civilian population and individual civilians enjoy general protection against the dangers arising from military operations. In particular, they must not be the target of a direct attack. This protection, however, is only granted to civilians who do not take an active part in hostilities. Otherwise they forfeit their right to protection and can be fought with military means in accordance with the rules of international humanitarian law. Moreover, any person taking a direct part in hostilities in a non-international armed conflict may be held accountable for such participation under national criminal law.

The concept of direct participation in hostilities is not defined in the Geneva Conventions and Protocols and its interpretation is one of the most controversial issues in international humanitarian law.

With its Interpretive Guidance of May 2009, the ICRC offered an in-depth analysis of the problems and challenges inherent in the notion of direct participation. The document is drafted in a way as to assist states with the application of the concept in military practice.

According to the ICRC, a specific act must cumulatively fulfill the following three criteria in order to qualify as direct participation in hostilities:

“1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and

2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and

3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).”

The report contains ample references and concrete examples in order to clarify the meaning of these criteria. The first criterion (threshold of harm), for instance, does not necessarily presuppose that the harm actually materializes. Rather, it is sufficient that harm may be reasonably expected to result from such act (objective likelihood). The second criterion (direct causation) in particular serves to distinguish between direct participation in hostilities and acts that are merely part of the general war effort, such as the production and transport of weapons, or the provision of supplies. Nevertheless, even unarmed acts may amount to direct participation in hostilities. The decisive test is whether the act in question may reasonably be expected to directly cause harm to the adversary or whether it merely contributes to maintain-

ing or building up the military capacity of a party to the conflict.

Where a specific act of support constitutes an integral part of a concrete and coordinated military operation, the requirement of direct causation would still be fulfilled. This would be the case, for example, if a civilian truck loaded with weapons or explosives is driven directly to the target of an operation.

The third criterion (belligerent nexus) has to be distinguished from subjective intent or motivation. During a military operation it would be almost impossible to reliably identify a person's state of mind. Therefore, belligerent nexus relates to the objective purpose of the act. Consequently, civilians take a direct part in hostilities even if they are forced to fight by armed groups.

The temporal scope of the concept of direct participation includes measures preparatory to the execution of a specific act of direct participation, as well as the deployment to and the return from the location of execution, to the extent that these activities constitute an integral part of that act.

Finally, it is important to note that civilians lose protection against direct attack only for the duration of their direct participation in hostilities, whereas members of organized armed groups cease to be civilians and lose such protection for as long as they assume a continuous combat function. This implies that civilians directly participating in hostilities on a merely spontaneous, sporadic or unorganized basis may regain protection against direct attack simply by ending their engagement in a hostile act. This rule is sometimes criticized as creating a “revolving door effect” in favor of “part-time” insurgents in that it considerably restricts the freedom of military action against such individuals. However, the rule should not be considered a flaw in international humanitarian law but as being an important safeguard to protect the civilian population from erroneous or arbitrary attack.

Police action against civilians who have taken a direct part in hostilities

Persons who have regained civilian protection because they disengaged from an organized armed group or ceased to directly participate in the fighting are not exempted from prosecution for violations of domestic and international law committed during the hostilities. The same applies to persons who are active in support of the insurgency without having taken up arms themselves. In all these cases suspected persons may be apprehended by police forces for the purpose of criminal prosecution or maintaining public security. The spectrum of admissible enforcement measures includes the use of force, as may be necessary – albeit subject to legal conditions much stricter than the requirements for military operations under the laws of armed conflict. Police forces must always act under a framework which is in conformity with international human rights law. Under this framework the standards of proportionality are considerably higher than the ones applied to military attacks.

The protection of civilians against direct attack

In order to determine whether a person is a civilian and whether he or she is directly participating in hostilities, all feasible precautions must be taken. In case of doubt, the person in question must be protected against direct attack. The fact that insurgents make use of particular means and methods of asymmetrical warfare, sometimes with the active support of the civilian population, creates special problems for the armed forces. The tactics of guerrilla warfare include that fighters operate in small and highly mobile units, hide in a civilian environment and carry out their attacks mostly in the form of ambushes and raids against vulnerable targets, including medical and humanitarian personnel. Moreover, the insurgents do not distinguish themselves from the civilian population and often use civilians

as human shields. Under such conditions armed forces find it almost impossible to distinguish between enemy fighters and civilians as required by international humanitarian law. Where insurgent groups operate within a civilian environment, individual civilians are exposed to an increased risk of being killed or wounded simply because of their proximity to such groups, in particular when they provide support or shelter to the insurgents.

The causing of incidental harm to civilians as a consequence of a military operation does not automatically constitute a violation of international humanitarian law. According to the fundamental principle of proportionality, an attack is prohibited as indiscriminate only if it may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. In practice, however, the application of the principle creates serious problems as it is difficult to identify any objective criteria for assessing proportionality. Such assessment must always strike a balance between basic humanitarian values and the military interests that are at stake in each specific case. Especially the weighing of human life raises fundamental moral and ethical questions. Moreover, the assessment of proportionality in combat situations often must rely on vague information and has a strongly prognostic character. The decision taken by the person responsible for the attack must, therefore, always be judged on the basis of the information which was available to that person at the time of decision-making, and not in hindsight.

Outlook

An accurate analysis of the conflict in Afghanistan in terms of international law is imperative in order to maximize legal security for the soldiers on the ground. At the same time, state armed forces involved

in asymmetrical armed conflicts such as the one in Afghanistan often find themselves in a dilemma. On the one hand, they are obliged to respect international humanitarian law even if they are confronted with non-state actors who systematically violate these norms. On the other hand, armed forces may be subject to considerable legal restrictions when combating such actors according to international humanitarian law. In inter-state armed conflicts the mutual expectation that the other side will endeavor to observe the laws and customs of war (principle of reciprocity) helps to ensure that international humanitarian law is actually respected by all parties. In asymmetrical conflicts, however, this expectation is often frustrated. Non-state actors sometimes deliberately provoke illegal military responses by state armed forces in order to fuel political or moral arguments and to mobilize public resistance against the state in question. Under such extreme conditions international humanitarian law runs a high risk of losing much of its practical force and impact. To counteract this trend, the applicable law must be translated into clear instructions reflecting an adequate balance between aspects of military necessity and humanitarian principles which can be effectively implemented during an operation. Moreover, it is crucial to develop new approaches to sensitizing non-state actors towards international humanitarian law and to strengthen their humanitarian responsibility.*

* For detail see Christian Schaller, *Humanitäres Völkerrecht und nichtstaatliche Gewaltakteure: Neue Regeln für asymmetrische bewaffnete Konflikte?* SWP-Studie 34/2007 (Berlin: SWP, December 2007), www.swp-berlin.org/common/get_document.php?asset_id=4581.

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SWP
Stiftung Wissenschaft und Politik
German Institute for International and Security Affairs

Ludwigkirchplatz 3-4
10719 Berlin
Telephone +49 30 880 07-0
Fax +49 30 880 07-100
www.swp-berlin.org
swp@swp-berlin.org

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