

WHICH LAW APPLIES TO THE AFGHAN CONFLICT?

By W. Michael Reisman and James Silk*

Soviet armed forces have been directly engaged in combat in Afghanistan for more than 8 years.¹ The level of international protest, sanctions and media coverage diminished after the initial outcry over the large-scale Soviet intervention in December 1979. With the conclusion in many diplomatic and professional quarters that the Soviet presence in Afghanistan would be of long duration, the focus of international disapproval shifted from the question whether the Soviet *presence* in Afghanistan was lawful or not to whether Soviet *conduct* in Afghanistan was lawful or not: from *jus ad bellum* to *jus in bello*.

Access to Afghanistan has been extremely limited, but various individuals, commissions and credible international organizations have reported extensive abuses of human rights by Soviet forces there; most of the reports are based largely on refugee testimony.² While the practices of the Soviet occupation and campaign have emerged with increasing clarity, the question of which law these practices are to be tested against is still controversial.

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¹ By the time this article is published, it is possible that the Soviet Union will, at least, have begun to withdraw its troops from Afghanistan. But even should the Soviet Union have begun its withdrawal, important legal and humanitarian issues arising from the conflict will continue to present themselves to the international community. The particular question we address here will not be rendered moot for a number of reasons. First, a Soviet withdrawal would require at least several months to complete. If the Geneva Conventions apply to the conflict that has torn Afghanistan since December 1979, they will continue to apply as long as Soviet troops remain involved in hostilities there. Second, even if all Soviet involvement in fighting ceases, at least part of the Conventions will apply as long as a situation of occupation continues. Finally, the resolution of the question of what law applies to the Afghan conflict has implications for the application of humanitarian law to similar situations.

² See, e.g., AMNESTY INTERNATIONAL, VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN THE DEMOCRATIC REPUBLIC OF AFGHANISTAN (1979); AMNESTY INTERNATIONAL, AFGHANISTAN: TORTURE OF POLITICAL PRISONERS (1986); AMNESTY INTERNATIONAL, 1980-1987 AMNESTY INTERNATIONAL REPORT (chapter on Afghanistan) (annual); HELSINKI WATCH, TEARS, BLOOD AND CRIES: HUMAN RIGHTS IN AFGHANISTAN SINCE THE INVASION, 1979-1984 (1984); HELSINKI WATCH/ASIA WATCH, TO DIE IN AFGHANISTAN (1985); HELSINKI WATCH/ASIA WATCH, TO WIN THE CHILDREN: AFGHANISTAN'S OTHER WAR (1986); INTERNATIONAL AFGHANISTAN-HEARING, FINAL REPORT (1984); Ermacora, Report on the situation of human rights in Afghanistan prepared in accordance with Commission on Human Rights resolution 1985/38, UN Doc. E/CN.4/1986/24; and Report of the Independent Counsel on International Human Rights on the Human Rights Situation in Afghanistan, 42 UN GAOR C.3 (Agenda Item 12), UN Doc. A/C.3/42/8 (1987).

An important issue is whether to apply the four Geneva Conventions of 1949 in their entirety,³ as well as the ensemble of customary and conventional law commonly known as the "law of The Hague," or only common Article 3 of the Geneva Conventions, which applies to "armed conflict not of an international character."⁴ The consequences of the resolution of this issue are hardly negligible. If the more detailed code were deemed to apply, much more of the behavior of all the parties to the conflict, some of which has been reported in the inquiries cited above, would become legally cognizable.

Though concerned with the appraisal of a particular conflict, the present inquiry is undertaken with the conviction that the policy issues it addresses are of major continuing importance. Analysis of the Afghan situation leads to conclusions that may have consequences for the application of humanitarian law to an increasingly important species of armed conflict, the full implications of which could not have been anticipated when the Geneva Conventions were drafted.

I.

The Geneva Conventions of August 12, 1949, provide in great detail for the protection of the diverse victims of war. Each Convention deals with a different category of victim. The third and fourth Conventions cover the treatment of prisoners of war and the protection of civilians in time of war.⁵ The four Conventions have several General Provisions in common, in particular, common provisions setting out the contingencies for their application.⁶ Common Article 2 establishes the criteria for the application of the Conventions to armed conflict. It states:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

³ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [hereinafter First Convention], Aug. 12, 1949, 6 UST 3114, TIAS No. 3362, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea [hereinafter Second Convention], Aug. 12, 1949, 6 UST 3217, TIAS No. 3363, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War [hereinafter Third Convention], Aug. 12, 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter Fourth Convention], Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287 [hereinafter Geneva Conventions].

⁴ Common Article 2 defines the applicability of the four Conventions. Common Article 3 sets forth the obligations of parties involved in noninternational conflicts. *Id.*

⁵ *Id.*

⁶ Common Article 1 states a general obligation: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." *Id.*

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.⁷

The first paragraph of Article 2 is the most straightforward, applying the Conventions to armed conflicts between states. While this includes what was, until World War II, thought of as “normal” war—i.e., declared war—it also includes “any other armed conflict” between states party to the Conventions, “even if the state of war is not recognized by one of them.” This paragraph represents an advance over earlier conventions, which were more formalistic. As Jean Pictet states in his *Commentary* on the Conventions, “There is no need for a formal declaration of war, or for the recognition of a state of war, as preliminaries to the application of the Convention. The occurrence of *de facto* hostilities is sufficient.”⁸ The application of Article 2(1) does not rest on judgments about the lawfulness of particular uses of force.⁹

The second paragraph of Article 2 “was intended to fill the gap left by paragraph 1.”¹⁰ The whole of the Conventions is to be applied whenever all or part of the territory of a party is occupied, even when the occupation “meets with no armed resistance.” The language is unqualified. Professor Schindler writes, “Whenever a State intervenes with its armed forces in another State, be it to alter the regime of that State or to exercise other acts of sovereign power, this is held to be an occupation within the meaning of Article 2(2).”¹¹ Pictet makes it clear that paragraph 2 was designed to protect the interests of protected persons in occupations achieved without hostilities when the government of the occupied country considered that armed resistance was useless. “It does not refer to cases in which territory is occupied during hostilities; in such cases the Convention will have been in force since the outbreak of hostilities or since the time war was declared.”¹² Between them, then, paragraphs 1 and 2 of common Article 2 appear to

⁷ *Id.*

⁸ 3 THE GENEVA CONVENTIONS OF 12 AUGUST 1949. COMMENTARY 22–23 (J. Pictet ed. 1952–60) (4 vols., one on each Convention) [hereinafter Pictet].

⁹ In this regard, it is consistent with the view that “[a]ny use of force which can be attributed to a State according to the rules of State responsibility will result in the applicability of the laws of war under international law.” Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 RECUEIL DES COURS 119, 131 (1979 II).

¹⁰ 4 Pictet, *supra* note 8, at 22.

¹¹ Schindler, *supra* note 9, at 132.

¹² 4 Pictet, *supra* note 8, at 21. Pictet adds:

The application of the Convention to territories which are occupied at a later date, in virtue of an armistice or a capitulation, does not follow from [paragraph 2], but from paragraph 1. An armistice suspends hostilities and a capitulation ends them, but neither ends the state of war, and any occupation carried out in wartime is covered by paragraph 1. It is, for that matter, when a country is defeated that the need for international protection is most felt.

Id. at 22.

apply the Conventions to all occupations in fact of one state party by the forces of another state.

Common Article 3 establishes a minimum set of protections that apparently apply to all other conflicts in which one party to the Conventions is engaged. Common Article 3 states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(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.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross (ICRC), may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.¹³

Common Article 3 represents an important regulation of so-called non-international conflict but is far from the functional equivalent of the legal regime applied by common Article 2. Unlike the plenary Conventions, which contain more than three hundred substantive articles (excluding the common articles), Article 3 sets forth general obligations but explicitly forbids only the most flagrant violations of humanitarian norms. Some scholars have contended that, even if observed by the parties to a conflict, the safeguards of Article 3 allow those parties, subject to other international legal prohibitions, to engage in practices forbidden by the plenary Conven-

¹³ Geneva Conventions, *supra* note 3.

tions.¹⁴ Moreover, Article 3, unlike the plenary Conventions, does not mandate supervision by a neutral "Protecting Power" or an organization such as the International Committee of the Red Cross (ICRC).¹⁵ An impartial humanitarian body may offer its services to the parties, but they are under no obligation to accept the offer.¹⁶ Although the ICRC may invoke Article 3 when thus offering its services, the provision adds little to the ICRC's general claim of a power to intervene in internal disturbances.¹⁷ Pictet's conclusion seems quite balanced. He says, "It is true that [Article 3] merely provides for the application of the principles of the Convention and

¹⁴ A relatively extreme interpretation in this regard may be found in Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict,"* 71 COLUM. L. REV. 37, 39-40 (1971). Farer cites examples of the inferior position of noncombatants under Article 3. For example, captured participants may not be tortured, but Article 3, according to him, does not prevent them from being executed for "treason." Also, if their punishment is limited to detention, the form of detention may, *pace* Farer, approach barbarity without manifestly violating established humanitarian law if the full protection of the third Convention does not apply. Without the protection of the Conventions, Farer says, civilians may be compelled by belligerents to serve in effect as slave labor. For discussion of other scholarly views on this issue, see *infra* note 17.

¹⁵ Article 8, common to all but the fourth Convention, provides:

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. . . . The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

First, Second and Third Conventions, *supra* note 3. See also Third Convention, Art. 126 (mandating permission for delegates of the protecting powers and the ICRC to visit places where prisoners of war are held and to interview prisoners without restriction on the duration and frequency of such visits); and Fourth Convention, Art. 143 (mandating permission for delegates of the protecting powers and the ICRC to visit all places where protected persons are and to interview such persons without restriction on the duration and frequency of such visits).

¹⁶ Farer, *supra* note 14, at 39.

¹⁷ Schindler, *supra* note 9, at 147. Others have identified a variety of deficiencies in common Article 3. See, e.g., Cassese, *A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 461, 492-93 (A. Cassese ed. 1979) (Article 3 covers only nonparticipants and persons who have laid down their arms; it does not regulate combat or protect civilians against the effects of hostilities. There are gaps in Article 3's humanitarian provisions. It does not define "noninternational armed conflict" or entrust to any international authority "the task of verifying whether or not a domestic disorder is in progress which should be deemed to fall under the purview of its provisions." The application of its provisions remains largely at the discretion of the parties to the conflict); Baxter, *Ius in Bello Interno: The Present and Future Law*, in LAW AND CIVIL WAR IN THE MODERN WORLD 518, 521-29 (J. N. Moore ed. 1974) (It is difficult to make distinctions between "armed conflict not of an international character" and other forms of domestic violence that may not rise to the level required for application of common Article 3. Whether or not Article 3 binds insurgents has been controversial. Its terms are so general that they cannot serve as an adequate guide to the conduct of belligerents); K. SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE 17 (1984) (Article 3's "lack of clear applicability to guerrilla warfare in general and guerrillas in particular" causes confusion); Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253, 264 (1983) (The lack of "juridical precision" in the term "armed conflicts not of an international character" makes it difficult to apply Article 3).

not for the application of specific provisions, but it defines those principles and in addition lays down certain imperative rules."¹⁸

The 1977 Protocols Additional to the Geneva Conventions left intact the distinction between international and noninternational conflicts in international humanitarian law, while narrowing appreciably the range of the second concept. Article 1(3) of Protocol I makes the Protocol applicable "in the situations referred to in Article 2 common to those [Geneva] Conventions." Protocol I also applies its provisions and the Conventions to what is commonly referred to as "wars of national liberation," a term of art referring to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination."¹⁹

Protocol II applies to noninternational conflicts, but not to all those covered by Article 3 of the Conventions. Article 1(1) applies Protocol II "to all armed conflicts which are not covered by Article 1 [of Protocol I]" but then imposes several additional conditions that make Protocol II apply to a narrower range of phenomena than does common Article 3 of the 1949 Conventions. Its application depends on the control of territory by the group opposing the established government and on that group's ability to apply the Protocol. Furthermore, it only applies to conflicts between the government and insurgents. Protocol II is to apply automatically if its requirements are met; it requires no declaration.²⁰ But important humanitarian activities of relief societies such as the ICRC are "subject to the consent of the High Contracting Party concerned."²¹ Perhaps most salient to the present inquiry is the fact that the relevant parties to the Afghan conflict have ratified the

¹⁸ 1 Pictet, *supra* note 8, at 48.

¹⁹ Art. 1, paras. 3 and 4, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter Protocol I], *opened for signature* Dec. 12, 1977, INTERNATIONAL COMMITTEE OF THE RED CROSS, PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 3 (1977), 16 ILM 1391 (1977). Schindler concludes that "these provisions have small chances ever to be applied." Schindler, *supra* note 9, at 144. He notes that the Protocol was really aimed at wars of liberation from European colonialism and that "alien occupation" has been interpreted to include only a few situations. *Id.* at 137-38. The Protocol can only come into effect if the authority representing the liberation effort issues a declaration invoking it and consenting to comply with applicable international law. Protocol I, *supra*, Art. 96. Even if the Afghan resistance were likely to issue such a declaration, it is doubtful whether it would be valid. The language of the Protocol suggests that only an authority with a certain degree of organization and discipline may be able to issue a declaration. Thus, a declaration would probably not be valid for a resistance that is actually composed of many liberation movements. *See* Schindler, *supra* note 9, at 140, 143. The fact that the various mujahidin groups control large amounts of territory and have coalesced with varying success may not meet the standard of Protocol I. Finally, during most of the conflict, the Soviet Union, its allies and the Afghan regime have viewed the opposition as composed of counterrevolutionaries seeking to undo the already successful national liberation that put the regime in power.

²⁰ Art. 1, para. 1, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter Protocol II], *opened for signature* Dec. 12, 1977, INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 19, at 89, 16 ILM 1442 (1977).

²¹ *Id.*, Art. 18(2).

1949 Geneva Conventions but not the Protocols Additional to the Conventions.

II.

The "distinction" between international wars and internal conflicts is no longer factually tenable or compatible with the thrust of humanitarian law, as the contemporary law of armed conflict has come to be known. One of the consequences of the nuclear stalemate is that most international conflict now takes the guise of internal conflict, much of it conducted covertly or at a level of low intensity. Paying lip service to the alleged distinction simply frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs.

This fact has long been appreciated.²² But eliminating the legal distinction has been impossible for obvious political reasons; a majority of states are unwilling either to subject what they consider their "internal" affairs to international scrutiny or to create an international regime that might grant recognition to current or future domestic rebel groups. In 1971 and 1972, the ICRC proposed applying the rules of international humanitarian law, or at least those on the treatment of prisoners of war and internees, to civil wars where foreign troops intervened. The suggestion was rejected by many government experts; they feared that it would encourage the parties in a

²² According to Cassese, the body of the law of war existing before the drafting of Protocols I and II, including the Geneva Conventions, has been "worn out by the 'new reality' of international and civil wars in the last few years. The new features of wars are well known." His list is extensive:

the multiplication of struggles of national liberation, which are still formally treated as "internal armed conflicts" . . . while the international community, through the pronouncements of the U.N. General Assembly, has for some time come to consider them international conflicts; the spread of previously unknown or little-used methods of warfare such as guerrilla warfare . . . and electronic or ecological warfare as well as the recourse to increasingly cruel and sophisticated weapons . . . ; the staggering increase in civil wars, often fomented from abroad or manipulated by great Powers; the ever-greater risks to which the civilian population . . . is exposed, both in international and in civil wars; the inefficiency of the existing machinery for supervising the implementation of the laws of warfare; and finally, the failure of States to bring to trial all those who so often violate the laws of war in the course of armed conflicts.

Cassese, *supra* note 17, at 461-62.

Schindler has also described the problems in distinguishing between international and non-international armed conflicts since 1949. The conception, under the Geneva Conventions, of wars of national liberation as noninternational has gradually changed since 1960. With the General Assembly's recognition of the right of self-determination for colonial peoples, the claim was put forward that wars of national liberation are to be considered international conflicts. Also, according to Schindler, there has been a large increase in noninternational armed conflicts "as a result of the growing number of States and of the instability of many regimes. Non-international conflicts are mostly carried out with greater cruelty than international ones." The "rudimentary rules" of common Article 3 have been inadequate to protect people in these conflicts. Foreign interventions in civil wars, which, Schindler notes, have increased, "show that non-international and international conflicts have increasingly mingled." Schindler, *supra* note 9, at 126-27.

See also Baxter, *supra* note 17, at 521-23; Draper, *supra* note 17, at 253-54.

civil war to seek foreign intervention so as to bring the Conventions into effect²³ or, in the case of insurgent groups, to enhance their legal status.²⁴ At the deliberations that produced the Protocols, an effort to abandon the distinction and to create a single law for international and internal conflicts was defeated.²⁵

As a result, two laws of war hover like brooding omnipresences over each conflict. The whole of the law of Geneva and the law of The Hague applies to conflicts between an established government and a state intervening on behalf of the opposition; it also applies to conflicts between states intervening on behalf of the opposing sides in a civil war. It applies as well to belligerent occupations. However, aside from those customary norms that are independent of conventional instruments, only the conventional regime of Article 3 and, perhaps, Protocol II, if and insofar as it is deemed to be customary international law, will apply to an armed conflict between a government and its opposition.²⁶ The relationship between the opposition and the forces of a state intervening on behalf of the established government creates a more ambiguous legal situation.²⁷

This latter problem must be addressed in determining which international humanitarian law applies to the conduct of Soviet forces and of Afghan resistance forces. We propose to examine in detail the facts of the conflict before assessing the application of Articles 2 and 3 to them. As will become clear, the facts of the intervention largely determine which of the alternative international legal regimes applies.

III.

The war in Afghanistan has never been either purely internal or purely international. Any determination is further complicated by the lack of neutral accounts of the conflict. Afghanistan is caught up in the politics of

²³ Schindler, *supra* note 9, at 150.

²⁴ Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U.L. REV. 145, 146 (1983).

²⁵ *Id.*

²⁶ See Schindler, *supra* note 9, at 150; and Gasser, *supra* note 24, at 147. For purposes of this discussion, the point is moot if Protocol II is not customary law, for Afghanistan is not party to the instrument.

²⁷ Schindler opines that only the rules for noninternational conflicts would apply because insurgents are not subjects of international law. Schindler, *supra* note 9, at 150. Schindler, in other work, has suggested the possibility of a different view. See *id.* n.35; and Schindler, *Die Anwendung der Genfer Rotkreuzabkommen seit 1949*, 22 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 75, 95 (1965). See also D. BINDSCHIEDLER-ROBERT, A RECONSIDERATION OF THE LAW OF ARMED CONFLICTS 52-53 (1971); Wilhelm, *Problèmes relatifs à la protection de la personne humaine par le droit international dans les conflits armés ne présentant pas un caractère international*, 137 RECUEIL DES COURS 311, 356-59 (1972 II); Bothe, *Völkerrechtliche Aspekte des Angola-Konflikts*, 37 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 572, 590-92 (1977). The circularity here is lamentably characteristic of law. The relationship is not international because insurgents are allegedly not international subjects. They are not international subjects because the war is not international. Of course, the entire body of contemporary human rights law is premised on the susceptibility to international law of the relation between a government and its nationals.

East-West rivalry, and most reports of the conflict there rely, to a large degree, on sources with a clear preference for or tie to one side or the other in the larger rivalry. Accounts by the Soviets and the Afghan regime are very different factually from Western accounts. The former present a history that justifies or legitimates the Soviet intervention; the latter tend to establish the factual predicate for proving the illegality of the Soviet intervention. But the problem is not very different, or more daunting, than the ascertainment of the facts in any legal controversy. Indeed, there is substantial consensus on those key facts that are particularly pertinent to our inquiry.

The Soviet Union has played a significant role in Afghanistan for some time. Tsarist Russia had competed with Britain for influence in Afghanistan, particularly in the late 19th century. As early as 1919, the new Soviet Government sent material and technical aid to Afghanistan.²⁸ While Soviet influence diminished after 1929, Afghanistan benefited from trade with the Soviet Union, particularly in the 1920s and 1930s. After 1950, favorable trade agreements contributed to a rapid increase in trade with the Soviet Union.²⁹ When a 1953 coup brought Mohammad Daoud Khan to power in Afghanistan, its reliance on Soviet economic, technical and military aid increased rapidly.³⁰

Daoud resigned in 1963, and King Zahir Shah introduced a new constitution that became law on October 1, 1964. The country was governed under it for the next 10 years. Perhaps stimulated by talk of a new constitution, a variety of political groups became more active after 1963. In January 1965, a group of Marxists formed the People's Democratic Party of Afghanistan (PDPA). The new democracy underwent political polarization in the mid-1960s, with factions on the extreme left and right gaining strength. PDPA split into two main factions on the left while, on the right, Islam-inspired groups attracted support. Religious demonstrations against the trend toward secularism and student strikes over demands at Kabul University in 1970 were seen as signs of the Government's weakness. At the same time, the parties of the left were recruiting members and gaining strength.³¹

In July 1973, a coup put Prime Minister Daoud back in power. The presence among his backers of many who were associated with the two main

On a related issue, see the excellent study by Louise Doswald-Beck on the lawfulness of military intervention at the invitation of the government of the state into which troops are sent. Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189 (1985). She examines situations where the troops of one state enter another state to support a government that has lost or is in danger of losing control over the country. In particular, she analyzes the situation in Afghanistan, the reliance of the USSR on outside interference as its justification for intervening and other states' condemnation of the intervention as interference in the internal affairs of another country. *Id.* at 230-34.

²⁸ L. DUPREE, AFGHANISTAN 451 (2d printing 1978). For the history of Afghanistan up to the Saur Revolution, see generally *id.* at 430-666; J. COLLINS, THE SOVIET INVASION 8-45 (1986); A. HYMAN, AFGHANISTAN UNDER SOVIET DOMINATION, 1964-83, at 41-71 (1984); H. BRADSHER, AFGHANISTAN AND THE SOVIET UNION 13-73 (1985).

²⁹ L. DUPREE, *supra* note 28, at 493-94. ³⁰ A. HYMAN, *supra* note 28, at 28-30.

³¹ See generally *id.* at 54-60; L. DUPREE, *supra* note 28, at 559-658.

PDPA splinter parties, Parcham and Khalq, led to suspicion in the West that the coup was pro-Soviet. But Daoud soon replaced Khalqi and Parchami supporters. He also closed down the independent press, which led to the publication of underground, antigovernment leaflets by the left and the religious right. A crackdown on fundamentalist Muslim groups in 1974 sent a small number of fundamentalists into exile in Pakistan, from which, in the summer of 1975, they organized attacks inside Afghanistan.³² In 1977, Khalq and Parcham joined forces in response to their common disappointment with Daoud. A series of assassinations in late 1977 and early 1978 was indicative of the overall political instability of the country.³³ At the same time that Daoud was removing Khalq and Parcham members from positions of importance, Afghanistan was decreasing its dependence on the Soviet Union for foreign aid. In foreign policy, too, the Daoud Government was taking positions that were increasingly opposed to Soviet interests.³⁴

The arrests of left-wing leaders in April 1978 prompted a quick, bloody coup on April 27, styled the Saur Revolution, which was led by the PDPA. Daoud was killed, and Radio Kabul announced that power was in the hands of the Revolutionary Council of the Armed Forces. Insecure because of its lack of popular support, the PDPA regime was nevertheless determined to transform Afghanistan rapidly. Officials who sympathized with the old regime were reportedly pressured to resign and even tortured in efforts to identify enemies of the new regime.³⁵

From the beginning, three bitter rivals emerged as the dominant political figures in the new regime: Nur Mohammad Taraki, the President, and Hafizullah Amin, both Khalqi, and Babrak Karmal, a Parchami. The Khalqis, dominant in numbers and in the military, predominated and soon began to purge the Parcham leadership. The regime was also busy arresting other suspected enemies. By August, the Khalq party was completely in control, with all the key Parcham leaders exiled abroad as ambassadors. Karmal and the other Parcham leaders remained in Eastern Europe after they were dismissed as ambassadors there by the Afghan Government.³⁶

The Taraki regime pushed ahead with ambitious reforms in the countryside, but corruption, insensitivity to deep rural traditions and poorly

³² A. HYMAN, *supra* note 28, at 66-68. ³³ See *id.* at 61-71.

³⁴ A. ARNOLD, *AFGHANISTAN: THE SOVIET INVASION IN PERSPECTIVE* 62-66 (1985). Collins believes that Daoud's pursuit of a nonaligned foreign policy perhaps annoyed the Soviet Union and that the Soviets began in late 1976 to prepare for an eventual post-Daoud Afghanistan, but that "there is no substantive evidence that they began to plot his ouster." J. COLLINS, *supra* note 28, at 38-41.

³⁵ A. HYMAN, *supra* note 28, at 75-78. Collins evaluates the evidence and concludes that "there is no substantive proof that the Soviets planned, directed, or participated in the coup." He acknowledges that Soviet urging was important in the reunification of Khalq and Parcham. J. COLLINS, *supra* note 28, at 48-52.

³⁶ Hyman suggests that claims of Soviet management of the coup were inconsistent with the fighting between Khalq and Parcham and the widespread purges, which were of no benefit to the Soviet Union. Also, it was assumed that the Soviets preferred the Parcham faction to Khalq, which was considered more independently nationalist. Thus, the ascendancy of Khalq calls into question Soviet control of the Government in Kabul. A. HYMAN, *supra* note 28, at 81-85.

planned land reform offended rather than attracted the rural poor, who were instead recruited by local elites to oppose the regime with armed resistance. By the summer of 1979, resistance reached the level of civil war.³⁷ The kidnapping and killing of the U.S. ambassador in February 1979 embarrassed the regime and drew into question the Government's control over the country. An uprising in the western, conservative city of Herat in mid-March turned into a major crisis for the Government. Some soldiers joined the uprising, which was eventually put down by bombing and strafing from Russian-built planes, tanks and helicopters. Among the heavy casualties, estimated to be as many as 5,000, were several hundred Khalqi officials and army officers killed by the people and some 50 Soviet citizens, military advisers and their families, who were tortured and killed by the angry mobs.³⁸ The incident led to changes in the Government, and Amin emerged with greater powers. Despite attempts to restore confidence in the Government, stability continued to decline as localized armed resistance spread.³⁹

After the Saur Revolution, the number of Soviet advisers in Afghanistan increased quickly.⁴⁰ While Taraki denied dependence on the Soviet Union, Soviet advisers, particularly the ambassador, were thought to exercise a great deal of power. Yet it seemed that, by rejecting Soviet advice on moderating their political strategy, Taraki and Amin were asserting their independence from the Soviet Union. Nevertheless, the Soviet Union defended the regime, particularly with military aid against the growing resistance. Indeed, Soviet aid to the Khalq regime increased through 1979, and included training the Afghan secret police.⁴¹

The widespread terror, unrealized economic expectations among the poor, the introduction of a red flag and the painting red of buildings in Kabul, various insults to the Muslim faith, the personality cult of President Taraki, nepotism, the abuse of power to settle personal grudges and further personal ambition, and, most of all, the brutality of the regime increasingly alienated even those who initially sympathized with the revolution.

By the end of 1978, Peshawar, just across the border in Pakistan, had become a center of opposition activity. Attacks by Afghan fundamentalist groups from western Pakistan, as well as local resistance, were becoming

³⁷ See *id.* at 85-92; J. COLLINS, *supra* note 28, at 65.

³⁸ That only Soviet citizens were killed, while other Eastern Europeans were spared, is for Hyman evidence of the strong anti-Soviet feelings behind the uprising. "The growing dependence of the Taraki regime on Soviet advisers, arms and finances, when combined with the openly avowed sympathies of Khalq leaders for the 'Great Northern Neighbor' (as the Soviet Union was styled) had resulted in popular suspicion that Russian communists now ruled Afghanistan." A. HYMAN, *supra* note 28, at 99-101. See also H. BRADSHER, *supra* note 28, at 101-02.

³⁹ A. HYMAN, *supra* note 28, at 101-05.

⁴⁰ According to Hyman, there were about 3,000 Soviet advisers working in the ministries, on civil projects and with the armed forces at the end of Daoud's regime. He estimates that about one-third of the estimated 4,500 Soviet advisers in Afghanistan by April 1979 were assigned to the armed forces. *Id.* at 105.

⁴¹ Hyman cites evidence that Soviet advisers were, at least, involved in brutal acts against real or imagined opponents of the regime in prisons and interrogation centers. *Id.* at 105-08.

more and more serious. Refugees from the border areas streamed into Pakistan, where camps were established and aid provided by the Pakistani Government. In one reported incident in a border village, Afghan soldiers, with Soviet advisers present, allegedly massacred most of the male inhabitants above the age of 12.⁴² As the fighting grew, more refugees fled to Pakistan, and more men joined in the fight against the regime.

By the summer of 1979, not only was rural resistance more successful than the Taraki regime had expected; Kabul was also "seething with resentment."⁴³ In June, a large organized demonstration was put down by heavily armed troops. In the aftermath, the level of repression increased. The following month, the regime rounded up suspected opponents, who later disappeared. The spreading guerrilla war was taxing the Government and sapping the morale of the army. The Soviet Union provided massive new amounts of military equipment, especially air power. But the growing Soviet presence through 1979 alienated many Afghan officers, even Khalqi. At the time of the Saur Revolution, Afghanistan had a conscript army of about 80,000,⁴⁴ but it was shrinking, and the draft of fresh conscripts could no longer be enforced.⁴⁵

Amin assumed greater power in July and tried to reverse the growing alienation of the army's officers and troops. An unsuccessful rebellion within the army and a rash of guerrilla attacks led in mid-September to Amin's taking over as the undisputed leader of the regime. Taraki and Amin escaped injury in a violent gunfight, but within weeks, in mysterious circumstances, Taraki was dead. It is thought that, despite expressions of confidence, the Soviet Union had serious doubts about Amin from the beginning.⁴⁶ But, apparently in return for improvements in his regime's policies toward the population, the Soviet Union continued its support. The country's dependence on the Soviet Union and the Soviet influence had not diminished. In fact, during the first months of the Amin regime, there was a buildup of Soviet forces in Afghanistan, and Soviet officers were involved in the Afghan army down to the company level. By the fall of 1979, the Government's reliance on Soviet military help had become even more pro-

⁴² Estimates of the number of the dead vary from 640, J. COLLINS, *supra* note 28, at 59-60, to 1,170, A. HYMAN, *supra* note 28, at 126.

⁴³ A. HYMAN, *supra* note 28, at 148.

⁴⁴ *Id.* at 147.

⁴⁵ *See id.* at 149-52; J. COLLINS, *supra* note 28, at 65.

⁴⁶ A. HYMAN, *supra* note 28, at 153-55. A correspondent in Karachi reported early in October that Russian exchanges with Amin indicated "grave doubts about Amin being able to stabilize the Afghan situation." The account went on, "According to informants with connections among the ruling Khalq party the Russians [a]re reported to have then given Amin 30 days to establish his authority throughout the land or make way for the Afghan extremists of the Parchamite party salted away in Eastern Europe, notably Karmal and Anita Ratziban." Daily Telegraph (London), Oct. 8, 1979, at 5, col. 3. A week later, an article with a Kabul dateline reported, "Diplomatic circles in Kabul were given the impression that Mr. Amin would either establish his authority within that time [30 days] or be replaced by the extremist Russian-backed Parchamites." *Id.*, Oct. 15, 1979, at 6, col. 6. Tensions between Amin and the Soviet Union were again reported early in November. *Id.*, Nov. 5, 1979, at 5, col. 1.

nounced, with Soviet pilots flying missions in jet fighters and helicopter gunships.⁴⁷

While Amin continued to show signs of wanting to move Afghanistan away from its dependence on the Soviet Union, it was already impossible. His regime was too unpopular, both within the country and among possible alternative foreign supporters, and the Soviets were exercising effective control over the Government. Some 1,500 Soviet officials were working in the civilian ministries, and between 3,500 and 4,000 Soviet officers and technicians were in the armed forces. An estimated half of the 8,000 officers and noncommissioned officers in the Afghan army at the time of the coup had been purged for political reasons by October 1979.⁴⁸

By September 1979, there were some 250,000 Afghan refugees in Pakistan and Iran. Amin's efforts at reconciliation were a failure. The war was still spreading and there was a wave of guerrilla attacks in Kabul itself.⁴⁹ By early December, the Soviet official media and government communications began to omit personal references to Amin.⁵⁰ On December 19, Amin moved with a force of trusted guards from the House of the People in the city to a palace outside Kabul. By this time, Soviet forces had been built up just across the border in the Soviet Union.⁵¹

⁴⁷ A. HYMAN, *supra* note 28, at 155–57. Early in November, the *Daily Telegraph* of London reported that 20 Soviet battalions had been rushed into Afghanistan to protect Afghan bases from Muslim rebels. The report suggested that the USSR had concluded that it was beyond Amin's capability to control the Muslim resistance. According to the same report, the Afghan army, once some 100,000 strong, was down to less than half that number, many troops having joined the Muslim rebels. *Daily Telegraph* (London), Nov. 3, 1979, at 6, col. 3.

⁴⁸ H. BRADSHER, *supra* note 28, at 123. Diplomatic sources, in mid-November, reported an increased infusion of Soviet arms and indicated that while the number of Soviet advisers had remained around 3,000, there had been a significant qualitative change. The Soviet Union had top political and military officials in advisory positions. One source said that there was evidence of Soviet organization and command of the military and that Russians were piloting aircraft, including helicopter gunships, and operating tanks. *The Times* (London), Nov. 17, 1979, at 7, col. 5. Estimates of the number of Soviet advisers in Afghanistan varied throughout this period. At the end of October, intelligence reports were cited estimating that there were 3,000 Soviet military specialists and 3,500 civilian advisers in Afghanistan. The same report noted that the Soviet Union had built a military complex in Afghanistan at Farah, some 65 miles from Iran, and enlarged an air base at Shindand. According to the report, the USSR had committed large sums to boosting the Afghan economy, had signed trade contracts worth £100 million and planned to supply the internal security forces with £3.3 million of equipment. *Daily Telegraph* (London), Oct. 31, 1979, at 4, col. 3. According to a *Times* article from Delhi, Amin had asked for outside help so he could cut his dependence on the Soviet Union. Pakistani President Zia ul-Haq told the reporter that Amin had approached his Government early in December with "frantic messages for an immediate meeting." Diplomatic sources in Kabul said that Amin had also approached the United States. *The Times* (London), Feb. 14, 1980, at 7, col. 6.

⁴⁹ A. HYMAN, *supra* note 28, at 157–58. By mid-December, Russian troops were said by Western sources to be defending key positions around Kabul. *The Times* (London), Dec. 19, 1979, at 7, col. 4.

⁵⁰ H. BRADSHER, *supra* note 28, at 124–25.

⁵¹ *Id.* at 178–79. U.S. government officials, several days after the coup, said that Amin had been too independent and had rejected the introduction of Soviet troops to fight the Afghan rebels. The officials stated that the United States first considered that an invasion was possible after the increase in the Soviet military presence on Dec. 8 and 9; a "special brigade" arrived at

On December 24, Soviet troops began landing at the Kabul airport and at other air bases in Afghanistan. The airlift of troops into Kabul continued until, by the morning of December 27, an estimated 5,000 Soviet soldiers were in the city.⁵² At the same time, Soviet troops and tanks were crossing into Afghanistan.⁵³ Meanwhile, Soviet advisers already in Afghanistan reportedly told their Afghan troops that an exercise was on and ordered them to turn in their ammunition for blanks; they also had batteries removed from tanks to be winterized.⁵⁴

On the evening of the 27th, Soviet troops attacked Amin's palace complex, where they encountered loyal Afghan troops.⁵⁵ During this fighting, a speech by Babrak Karmal declaring that he had been elected Prime Minister and that Amin had been executed was broadcast on the frequency of Radio Kabul. But Western intelligence evidence indicates that the speech was prerecorded and broadcast from a Soviet transmitter in Soviet Central Asia, overpowering the actual Radio Kabul signal, which continued its normal broadcast.⁵⁶ It is not clear exactly how Amin died, but accounts agree that

the Bagram air base, then moved to Salang Pass, the route of invasion from the Soviet Union, and secured it from rebel control. *N.Y. Times*, Jan. 2, 1980, at A14, col. 4.

⁵² A. HYMAN, *supra* note 28, at 159; H. BRADSHER, *supra* note 28, at 179. The massive airlift of Soviet troops into Kabul was reported in the West by Dec. 27. The U.S. Department of State said that the USSR had concentrated five divisions along the Afghan border and estimated that between 4,000 and 5,000 troops were in Afghanistan. People leaving from the Kabul airport on Dec. 26 reported seeing at least 12 Soviet transport planes land and unload armored vehicles and combat troops. *The Times* (London), Dec. 27, 1979, at 1, col. 3.

⁵³ A. HYMAN, *supra* note 28, at 159.

⁵⁴ H. BRADSHER, *supra* note 28, at 179-80; A. ARNOLD, *supra* note 34, at 93-95. The *Sunday Times* of London gave a similar account. According to an eyewitness report and a "highly-placed Afghan now in New Delhi," Amin was deceived during the final stages of the coup. The Soviets had advised him to move from the presidential palace downtown to the fortified Darulaman Palace 2 miles out to be "closer to 'protection' of the Soviet embassy." From there, Amin's contact with the Afghan army was tenuous. Then, Afghan officers guarding the radio station with 20 tanks were told by Russians that these tanks were being replaced with new Soviet models, but that since fuel was scarce, their diesel had to be transferred. Once the tanks were immobilized, the Afghans' radio transmitter was seized, and an attack launched on Darulaman Palace. *Sunday Times* (London), Jan. 6, 1980, at 17, col. 1.

⁵⁵ H. BRADSHER, *supra* note 28, at 180.

⁵⁶ *Id.*; A. HYMAN, *supra* note 28, at 165; A. ARNOLD, *supra* note 34, at 78; E. GIRARDET, *AFGHANISTAN: THE SOVIET WAR* 15 (1985). The first press reports of the coup relied on U.S. State Department sources. They cited eyewitness accounts of Soviet troops leading the assault on Kabul's radio station, fighting gun battles in armored personnel carriers in Kabul, fighting near the presidential palace and taking Afghan prisoners. Amin was reported executed on the 27th. Radio Kabul announced the sentence and execution of Amin and the election of Karmal as the new President and General Secretary of the People's Democratic Party. But the news account said that Tashkent Radio in the USSR, monitored by Reuters in Tehran, had broadcast a speech by Karmal. In another Radio Kabul broadcast monitored in Tehran, the Afghan Revolutionary Council was reported to have announced its support for Karmal. *Afghanistan President Executed after Soviet-backed Coup*, *The Times* (London), Dec. 28, 1979, at 1, col. 7. *See also Afghanistan President Is Ousted and Executed in Kabul Coup, Reportedly with Soviet Help—An Exile Takes Over*, *N.Y. Times*, Dec. 28, 1979, at A1, col. 6. No conclusions were drawn at that time about the whereabouts of Karmal, but the fact that his speech was only monitored on Radio Tashkent provided an early suggestion that something was amiss. A *New York Times* report from

he was dead by the end of the 27th.⁵⁷ Just after midnight, TASS, the Soviet news agency, broadcast a report that Karmal had spoken over Radio Kabul "on behalf of and on the instructions of" the PDPA Central Committee, the Revolutionary Council, and the Afghan Government, but did not explain how these instructions were given.

Only at 2:40 A.M. on December 28 did Radio Kabul broadcast an announcement that it said was from the Revolutionary Council's secretariat, naming Karmal council president and, thus, President of Afghanistan. That was followed by a broadcast demand for Soviet support, "including military aid," to defend Afghanistan and the Saur Revolution against continued aggression by foreign enemies. The announcement invoked the December 5 Treaty of Friendship.⁵⁸ A short time later, an announcement from "the

Islamabad on Dec. 29 said, "Diplomats here monitoring broadcasts from Radio Kabul and receiving information from embassies and other channels, were puzzled that Mr. Karmal had made no public appearances, even on television, since his takeover." The report then stated that the broadcast of Karmal's speech by Radio Tashkent several hours before it was first broadcast in Kabul suggested that it had been "taped, and rais[ed] the question of the whereabouts of Mr. Karmal, who is thought to have been in exile in Eastern Europe, under Soviet protection, for at least a year." *Id.*, Dec. 30, 1979, at A10, col. 3. On Jan. 1, the State Department said there was evidence of Soviet participation in the coup, including reliable indications that the initial radio reports were prerecorded tapes broadcast from the USSR. When those reports were being broadcast, the Department said, Radio Kabul was transmitting its normal programs. U.S. officials believed the reports were actually broadcast from the Soviet border city of Termez. *The Times* (London), Jan. 2, 1980, at 1, col. 1.

⁵⁷ A. HYMAN, *supra* note 28, at 169. *The Times* of London reported, however, that Soviet forces killed Amin: he had died in a small building near Darulaman Palace when six armored personnel carriers directed a "torrent of machine gun bullets" at the President's offices. "Popular—though not government—belief has it that Soviet troops fired the fatal rounds at the politically bankrupt dictator . . ." *The Times* (London), Jan. 18, 1980, at 14, col. 1. According to another report, "Afghan sources confirm that . . . Hafizullah Amin was killed in cold blood by the Russians on the night of December 27." *Sunday Times* (London), Jan. 20, 1980, at 1, col. 3. However, the Afghan Interior Minister, speaking at a news conference in January, made a statement that contradicted earlier announcements in both Kabul and Moscow that Amin had been killed shortly after the coup. "It appeared to fix Dec. 29 as the date when Mr. Amin was put to death." *N.Y. Times*, Jan. 22, 1980, at A10, col. 3.

⁵⁸ H. BRADSHER, *supra* note 28, at 181. Moscow radio announced the coup within hours, carrying extracts of Karmal's statement. In its first report, however, *The Times* of London said, "In spite of the unusually speedy announcement there is no evidence that the Soviet Union engineered the reported coup against President Amin, but it can only be pleased with his overthrow." *The Times* (London), Dec. 28, 1979, at 4, col. 3. The first mention of Karmal's speech in the *New York Times* came in an article that said the text of a speech by Karmal broadcast over Radio Kabul had been distributed in English, by TASS, the Soviet press agency. *N.Y. Times*, Dec. 28, 1979, at A13, col. 3. Bradsher's account seems to differ from the reports in the Western press on Dec. 28 that announcements by Radio Kabul of Amin's downfall and Karmal's election were monitored on the 27th. *See supra* note 56. The USSR justified its airlift of troops into Afghanistan by saying that it had responded to an urgent request for help from the Afghan Government. TASS said that, on the basis of the Treaty of Friendship, the new Government had "approached the Soviet Union with an insistent request for urgent political, moral and economic aid, including military aid." But in later versions of the statement, TASS added a phrase to this description of the request: "which the Government of the Democratic Republic of Afghanistan repeatedly requested from the Government of the Soviet Union

revolutionary tribunal," which was never further identified, said that Amin had been sentenced to death and executed. The Karmal regime and Soviet spokesmen have maintained that the action against Amin was carried out by Afghan forces, but Westerners in the city at the time said that Soviet soldiers alone were involved in the assault on the palace.⁵⁹ Although Karmal later put forward conflicting accounts, he is not known to have been in Kabul until his first public appearance there on January 1.⁶⁰

previously." This made the airlift seem less related to the coup. The Times (London), Dec. 29, 1979, at 1, col. 7. The TASS statements that the Afghan Government had requested aid in a Dec. 28 broadcast did not answer the questions already being asked about when and by what authorities the request was made since the Karmal Government came to power well after the airlift of Soviet troops began. N.Y. Times, Dec. 29, 1979, at A6, col. 6. In January, a Hungarian press agency dispatch from Kabul cited Karmal as having said that the Afghan Revolutionary Council had asked the USSR for help even before Amin was overthrown, but that Moscow had acted only when help was urgently needed. N.Y. Times, Jan. 11, 1980, at A6, col. 2.

In February, Karmal was quoted as having said, in an interview with the "pro-Moscow Indian newspaper Patriot," that Soviet troops had intervened 10 days before the coup. This was said to be the first admission that Soviet forces were in the country when Amin was overthrown. Karmal said that the PDPA had forced Amin to call for Soviet troops during the second week of December. *Id.*, Feb. 8, 1980, at A10, col. 1.

⁵⁹ H. BRADSHER, *supra* note 28, at 182. A Soviet statement in *Pravda* acknowledged that Soviet troops went to Afghanistan to help repel outside aggression, but denied that they had played any part in internal Afghan events. N.Y. Times, Dec. 31, 1979, at A1, col. 4. U.S. administration officials later said that elements of the Soviet airborne division that had landed at the Kabul airport on the 27th moved quickly across the city in armored vehicles and, after a brief, but violent, clash, wiped out the Afghan guard at Darulaman Palace, and captured and shot President Amin. *Id.*, *supra* note 51.

⁶⁰ Bradsher cites reports that Karmal arrived in a Soviet military plane at about 2:00 A.M. Dec. 28, which would have meant that he left Soviet Central Asia about the time Amin was killed. H. BRADSHER, *supra* note 28, at 186. Karmal later claimed to have secretly entered Afghanistan before the invasion and organized supporters within PDPA against Amin. According to Bradsher, Karmal gave several different versions of the time of this return—between August and mid-November and even later. *Id.* at 174. Karmal claimed that by the second week of December, an overwhelming majority of the PDPA Central Committee and the Revolutionary Council had successfully pressured Amin to request Soviet military assistance. Thus, Soviet troops entered Afghanistan beginning on Dec. 17 at the request of the Government. In Karmal's version, a majority of the Central Committee and Revolutionary Council had tried Amin, decided to execute him and elected Karmal to power before Dec. 27. Bradsher points out the inconsistencies in this and Soviet accounts of the request for troops and the election of Karmal. Among these inconsistencies was a Radio Kabul report on Dec. 28 that the PDPA Politburo had met and elected Karmal General Secretary and that the Revolutionary Council had elected him President that day. There was no mention, until much later, of Karmal's earlier secret election to the posts. *Id.* at 176. On Dec. 28, Radio Kabul said that the USSR had "acted in response to an official request from Afghanistan." The report on this broadcast pointed out that the Soviet buildup of troops preceded the new Afghan Government. It also said that Karmal had reportedly returned to Kabul during the week of the coup. N.Y. Times, Dec. 29, 1979, at A1, col. 3. At least one report at the time of the coup said that Karmal was believed to have returned to Kabul from Soviet Central Asia with other Afghan exiles among the Soviet troops airlifted into Afghanistan in the days before the action. The Times (London), Dec. 29, 1979, at 4, col. 1. The *New York Times* said that while President Karmal had not been seen in public by Dec. 31, he had been reliably reported to have met in private with some government supporters and at least one Eastern European ambassador. N.Y.

IV.

According to diplomats and to travelers who had driven to Pakistan, Kabul was, by December 31, "virtually a Soviet garrison town" with troops patrolling the streets. Soviet troops were also reported to have moved out of Kabul to take control of most of the rest of Afghanistan, and a force estimated at 15,000 by U.S. officials reportedly crossed into Afghanistan on December 29.⁶¹ The Afghan Air Force was said to be dominated by the Soviet Air Force, most combat aircraft being flown by Soviet pilots.⁶²

As the new year began, the Afghan Government appeared to be largely in Soviet hands.⁶³ By mid-January, the Soviet Union was reportedly in effective control of Afghanistan. The number of Soviet civilian advisers had increased dramatically since the coup, and they were said to be running the ministries.⁶⁴ Soviet troops had disarmed the Afghan army and then selec-

Times, Jan. 1, 1980, at A1, col. 2. U.S. officials stated that Karmal was flown to Kabul on Sunday, Dec. 30. *Id.*, *supra* note 51. The *Times* of London reported that Karmal made his first public appearance on Jan. 4. The *Times* (London), Jan. 5, 1980, at 4, col. 1. On Jan. 10, Soviet officials presented Karmal to foreign reporters. When asked why the Revolutionary Council, presided over by President Amin, would have called in Soviet troops if Amin was an American agent as Karmal had claimed, Karmal responded that the Revolutionary Council that requested Soviet help was the one over which he presided. N.Y. *Times*, Jan. 12, 1980, at A5, col. 1. (The article contended that Karmal was flown into Afghanistan by the Russians the day of the coup.)

⁶¹ The *Times* (London), Dec. 31, 1979, at 6, col. 5. President Carter received intelligence reports that an additional 15,000 to 20,000 Soviet troops, including an airborne division, had crossed into Afghanistan around Dec. 29, raising the total number of Soviet military personnel there to between 25,000 and 30,000. N.Y. *Times*, Dec. 30, 1979, at A1, col. 6.

⁶² The majority of some 160 combat aircraft in the Afghan armed forces was reportedly flown by Soviet pilots. There were also reports that at least two squadrons of fighters had been flown in to help combat the Afghan rebels. And all the M-24 helicopters being used against the rebels were flown by Soviet crews. All of the command, control and maintenance functions were reported to be in Soviet hands. N.Y. *Times*, Dec. 28, 1979, at A1, col. 5.

⁶³ A Western European diplomatic source said that Afghan functionaries at the Foreign Ministry were showing up for work, but not attempting to do anything. Other sources said the Ministries of the Interior and of Education were controlled by Russians. Soviet tanks were guarding Radio Kabul, and Soviet sentries were at the post and telegraph office and the Interior Ministry. The *Times* (London), Jan. 3, 1980, at 1, col. 7. Soviet troops were reported to have spread out all over Afghanistan, setting up encampments that "reportedly have an air of permanence. The Soviet forces are believed generally to be in control." Soviet forces had reportedly taken control of all civilian airports and the air bases at Kandahar and Shindand. N.Y. *Times*, Jan. 8, 1980, at A1, col. 3. A U.S. Defense Department analysis, though, said that the depleted Afghan army was doing most of the fighting, with Soviet troops largely in a supporting role; and that the USSR appeared to be giving top priority to rebuilding the Afghan army, which had been reduced from about 100,000 troops a year earlier to some 25,000. This account differed from the State Department's and from some press reports from the region, which indicated that Soviet forces were bearing the brunt of the combat. *Id.*, Jan. 9, 1980, at A5, col. 1.

⁶⁴ According to the *Sunday Times*, a senior Afghan government official said that a Soviet adviser had told him not to come to the office except to get paid and that the same thing was happening to "hundreds of my colleagues." An estimated 4,000 civilian advisers had been flown into Afghanistan since the Soviet troops had entered. The arriving advisers were not subjected to passport or customs checks. Each of Karmal's 19 ministers was reported to have at least two Russian advisers attached and ever present. The report said, "The Russians have

tively rearmed less than half of it. There were an estimated 70,000 Soviet troops in Afghanistan, supported by 1,750 tanks, 2,100 armored personnel carriers and two air divisions with 400 fighters, bombers and helicopters.⁶⁵ At the end of February, when martial law was declared, it reportedly gave effective government authority to the Soviet commander in Kabul.⁶⁶

From fewer than 10,000 before December 1979, the number of Soviet troops in Afghanistan climbed to an estimated 85,000 by March 1980.⁶⁷ By April, Karmal was said by some observers to have lost any grasp that he had on the Soviet army. Government sources in Afghanistan said he was a "virtual prisoner" of the Russians.⁶⁸ After mass desertions, the Afghan

taken over the policy-making and executive functions in most departments, though these are still notionally exercised by Afghan civil servants." The state security bureau KAM was reportedly dismantled and rebuilt around 640 Soviet intelligence officers. The report said that the Soviets were using the Afghan army as "cannon fodder" against the Muslim rebels. *Sunday Times* (London), *supra* note 57. See also *N.Y. Times*, Jan. 23, 1980, at A6, col. 1 (analysts said Soviet administrators, including many KGB officers, were directing the "reorganization of the government bureaucracy"). A report from Rawalpindi, Pakistan, said, "Journalists leaving Afghanistan, other travelers and diplomats here reading cablegrams from Kabul all say the Karmal Government shows no signs of actually functioning." Karmal was reported at a summer palace near Kabul under Soviet guard. Statements, relayed through Moscow, were issued on his behalf. *N.Y. Times*, Jan. 27, 1980, §1, at 12, col. 1. Afghans who managed to slip into Pakistan at the end of January said, "Russians give orders and Afghans follow them." At some government buildings, Afghans reportedly entered by one door, where they were searched, while Russians passed freely in and out through another. Russians were also said to write the news scripts for radio and television and to monitor Afghan broadcasts to be sure they were read correctly. *N.Y. Times*, Feb. 2, 1980, at A5, col. 1.

⁶⁵ Diplomats in Kabul estimated Soviet troop strength at 80,000 to 85,000, made up of an advisory group in command of Afghan army units, helicopter and jet fighter pilots, an airborne division and five motorized rifle divisions. At the same time, the Afghan army was said to be disintegrating, its numbers now estimated by Western military analysts as less than 40,000. *N.Y. Times*, Jan. 17, 1980, at A12, col. 1. Another report said that intelligence sources discounted press reports of between five and seven full Soviet divisions in Afghanistan and believed the total number of Soviet troops in Afghanistan to be about 50,000, with others mobilized just inside the Soviet Union. *The Times* (London), Jan. 18, 1980, at 14, col. 1. The U.S. Defense Department revised its estimate of Soviet troop strength down to 70,000 in February and estimated that another 30,000 were mobilized on the Soviet side of the border. *The Times* (London), Feb. 22, 1980, at 7, col. 3.

⁶⁶ "The decree imposing martial law on Friday in effect gave government authority to the Soviet commander in Kabul, and reports yesterday said he appeared to have taken over." *N.Y. Times*, Feb. 27, 1980, at A1, col. 3.

⁶⁷ J. COLLINS, *supra* note 28, at 79; STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 98TH CONG., 2D SESS., *HIDDEN WAR: THE STRUGGLE FOR AFGHANISTAN* 12 (Comm. Print 1984). The U.S. State Department said there were 85,000 Soviet troops in Afghanistan, another 35,000 along the border in the Soviet Union. *The Times* (London), Apr. 19, 1980, at 5, col. 8.

⁶⁸ The reporter, Chhotu Karadia, who had interviewed Karmal, said that, except for a dozen sentries at the main gate, the security of the People's House was in Russian hands. He said that Karmal's bodyguard, doctor and six chief advisers were Russians. He also cited such direct measures of Soviet control over the Afghan population as the replacement of English as the second language in schools with Russian, and of local television programs with Russian ones. *Sunday Times* (London), Apr. 20, 1980, at 1, col. 4.

army was reduced to fewer than 40,000 men by the end of May 1980.⁶⁹ Reports continued that Soviets were in control of most government departments. Furthermore, the Soviet Union was providing almost the entire food supply of Afghanistan and dominating the economy.⁷⁰

By early 1981, defections and casualties had reduced the Afghan army to an estimated 10,000 to 15,000 effective fighting troops.⁷¹ With forced conscription, the number was back up to as many as 50,000 by 1983, still far fewer than the 100,000 estimated to have made up the army prior to the invasion. But the morale of the remaining soldiers was low, men were fleeing the cities to avoid conscription, conscripts were deserting at rates of several thousand per month and many of the army's officers regularly collaborated with the resistance.⁷² In addition, by that time, more than 115,000 Soviet troops were in Afghanistan, and Soviet advisers ran the Afghan army.⁷³ Clearly, the bulk of the fighting against resistance groups,

⁶⁹ An increase was also noted in the number of dependents of Soviet military personnel brought into Afghanistan, as well as in the number of Soviet engineers engaged in large improvement and construction projects at military bases. *The Times* (London), May 29, 1980, at 1, col. 1. At the end of June, the *Times* defense correspondent estimated that the Afghan army had between 40,000 and 50,000 troops. *Id.*, June 27, 1980, at 8, col. 1. In September, their number was estimated to be 35,000, according to a diplomatic source in Delhi. They were described as a demoralized and unreliable force of questionable loyalty, whose capacity and morale were continuing to deteriorate. While they were poorly equipped, the Russian troops were supplied with new equipment and vehicles. Although Soviet troop strength was commonly estimated at more than 100,000, this source said it was between 80,000 and 85,000. However, the number of civilian advisers had increased and there were more than 1,000 civilian families in Kabul. According to this source, Soviet advisers held key positions in all the ministries and controlled telecommunications, and Soviet editors controlled Radio Kabul and the Farsi and English daily newspapers. *Id.*, Sept. 11, 1980, at 7, col. 1.

⁷⁰ According to a U.S. government analysis, Soviet officials occupied the senior positions in every Afghan ministry except the Foreign Ministry where they held the post of deputy director. All decisions were Soviet. The most Soviet-dominated ministry was said to be the Ministry of Information and Culture; virtually all information releases were produced by Soviet staff. A Soviet adviser assigned to the education system had begun preparing textbooks immediately after the December revolution. *The Times* (London), May 30, 1980, at 7, col. 7. Also, "a virtual blizzard of economic, trade, and technical assistance agreements" was said to be tying the Afghan economy tightly to that of the USSR and the Eastern European countries. "Afghan judges, lawyers, teachers, medical workers, scientists, and even truck drivers are being sent to the Soviet Union to absorb—and presumably bring back—Soviet systems, methods, and skills." *Christian Sci. Monitor*, Mar. 4, 1981, at 3, col. 1.

⁷¹ H. BRADSHER, *supra* note 28, at 282–83.

⁷² A. HYMAN, *supra* note 28, at 198–99, 213.

⁷³ H. BRADSHER, *supra* note 28, at 282–83. The Area Handbook Series report on Afghanistan says that estimates of Soviet troop strength in the mid-1980s ranged from 105,000 to 150,000, but were usually around 118,000. D. Seekins, *Government and Politics*, in R. NYROP & D. SEEKINS, *AFGHANISTAN, A COUNTRY STUDY* 209, 250 (Area Handbook Studies No. DA Pam 550–65, 1986). According to Hyman, Soviet forces in 1983 included many squadrons of warplanes and more than 400 helicopter gunships. Soviet military and civilian advisers conducted the war and the administration, all of which was financed by the Soviet Union. "So heavy was the Karmal government's dependence on the USSR that by any objective standards its very independence could be questioned." A. HYMAN, *supra* note 28, at 213. Hyman also

whose numbers have been estimated at about 100,000, has been carried out not by Afghan, but by Soviet, troops.

While resistance forces have controlled, or threatened to control, significant parts of the territory of Afghanistan, and Soviet forces have been content to hold the main towns, roads and military bases, one area is apparently under complete Soviet domination. By June of 1980, Soviet forces had sealed off the Wakhan corridor from Afghanistan, leaving it accessible only from Soviet Central Asia. The corridor, a long, narrow finger of land extending from the northeast corner of Afghanistan, between the Soviet Union and Pakistan, and touching China at its tip, was created in 1895 to separate tsarist Russia from Britain's Indian empire. By establishing Soviet garrisons at the two main passes into China and Pakistan, occupying the entrance to the corridor from Afghanistan, improving the road to the Soviet frontier and mining the passes from China and Pakistan to stop arms movements, the Soviet Union effectively cut the corridor off. The area's main inhabitants, the Kirghiz tribesmen, had already fled into Pakistan a year earlier. Most of the rest are members of the Ismaili minority, which has traditionally suffered at the hands of the dominant Sunni tribesmen of Afghanistan. They were reportedly passive after the 1978 coup, even welcoming the change.⁷⁴

By November, the official Pakistani news agency reported that the Soviet Union was in the process of annexing the Wakhan corridor, moving large numbers of troops into the area and improving its communication infrastructure.⁷⁵ Pakistan's President Zia stated publicly that the corridor was "now under the Soviet Union." It was reported in March 1981 that he had told an Indian journalist that an estimated 5,000 Soviet troops occupied the Wakhan.⁷⁶ The area was being administered directly by military authorities in the Soviet Union, rather than by the Soviet military command in Afghanistan, diplomatic sources said.⁷⁷

On June 16, 1981, the Soviet Union and Afghanistan signed a treaty formally delineating their border along the Wakhan corridor.⁷⁸ An Afghan resistance leader said that Karmal had agreed to a border adjustment in the Wakhan area when he visited Moscow in June 1981. According to the

notes the extent of Soviet economic assistance to Afghanistan, particularly citing projects which "have had the effect of integrating the Afghan economy into the Soviet Central Asian system." *Id.* at 207.

⁷⁴ *Russia amputates an Afghan finger*, *ECONOMIST*, Aug. 9, 1980, at 32, col. 1.

⁷⁵ *Christian Sci. Monitor*, Nov. 6, 1980, at 2, col. 2; *N.Y. Times*, Nov. 16, 1980, at A4, col. 4.

⁷⁶ While reports of the Soviet occupation of the Wakhan corridor had been coming from Pakistan since 1980, diplomatic sources said reliable confirmation had been received only more recently. *Christian Sci. Monitor*, *supra* note 70.

⁷⁷ There were reports that the Soviets had been building underground bunkers and permanent barracks, improving an east-west road to China and widening a north-south road leading to a pass on the Pakistan border. *Id.*

⁷⁸ *Fingerwork*, *ECONOMIST* (U.S. ed.), July 4, 1981, at 33, col. 2. This treaty has apparently not yet been submitted to the United Nations for registration and publication in the *UN Treaty Series*.

resistance leader, "the official Kabul radio had spoken of an 'annexation' of part of the Wakhan district." He also reported that Soviet Tadjiks were being moved into the corridor to replace the local Afghan population, which had been relocated further west.⁷⁹ By late 1982, if not earlier, the Soviet Union had effectively annexed the Wakhan corridor.⁸⁰

V.

Despite the obviously substantial role of Soviet forces in the Afghan war, the question whether or not the conflict can be called international for purposes of applying international humanitarian law has not been resolved decisively. The ICRC offered its services to Afghanistan in 1979 and 1980. Before the events of December 1979, the ICRC had categorized the conflict as noninternational.⁸¹ In January 1980, Karmal received an ICRC delegation and assured the ICRC "that he would respect the principles of the Geneva Conventions under all circumstances and that all armed forces in Afghan territory would comply with their obligations under the Conventions."⁸² The ICRC was given authorization to assist political and "security" prisoners and prisoners of war. But in mid-June 1980, after some limited activities, the ICRC delegates were forced to leave Afghanistan.⁸³ The ICRC continued to seek permission to carry out its humanitarian activities, but, through 1986, its requests were rejected by the Afghan Government.

The ICRC also made appeals to the Soviet Union in 1980, pointing out "the responsibility, under international humanitarian law, of States whose armed forces participated in an armed conflict, even on the basis of a treaty or other agreements."⁸⁴ Later that year, a Soviet spokesman told an ICRC mission that humanitarian problems caused by the Afghan conflict did not concern the Soviet Union because its forces had not participated in any combat.⁸⁵ The ICRC also called regularly on the resistance groups to conform to the provisions of Article 3.⁸⁶ Appeals to the Afghan and Soviet Governments in 1981 were similarly rejected; the Afghan authorities stated that "the Geneva Conventions had no bearing on the situation in their country."⁸⁷

In April 1986, however, the Government of Afghanistan received an ICRC mission for talks on a proposed program of visits to detainees. In

⁷⁹ N.Y. Times, July 3, 1982, at A2, col. 3. Western intelligence analysts also reported such a population exchange. *Id.*, Dec. 26, 1983, at A8, col. 3.

⁸⁰ "Intelligence experts said this strip, called the Wakhan corridor, had in effect been annexed by the Soviet Union." *Id.*, Dec. 8, 1982, at A5, col. 1. After discussing the tenacious resistance the Soviet Union was encountering throughout Afghanistan, the *Washington Post* said, "An exception is the Wakhan corridor and Pamir region—the sparsely populated north-eastern panhandle that stretches to the Chinese border—which the Soviets have virtually annexed, according to diplomats and correspondents who have recently visited the area." *Wash. Post*, Oct. 21, 1983, at A1, col. 2, A14, col. 1.

⁸¹ Gasser, *supra* note 24, at 150.

⁸³ *Id.* at 44–45.

⁸⁵ *Id.*

⁸⁷ 1981 ICRC ANN. REP. 37.

⁸² 1980 ICRC ANN. REP. 47.

⁸⁴ *Id.* at 45.

⁸⁶ *Id.*, and following ICRC ANN. REPS.

August and September, the Government confirmed that it had agreed in principle to ICRC visits to people "captured bearing arms or arrested on account of the events."⁸⁸ In January 1987, the ICRC returned to Afghanistan and began establishing programs in Kabul to provide medical and orthopedic assistance to those wounded in the war and medical assistance to the civilian population. The Afghan Government also authorized the ICRC to visit all prisoners in Afghan prisons, in accordance with standard ICRC procedures, but a visit to Pul-I-Charki prison, begun in March, "had to be interrupted the same month, after completion of the first stage."⁸⁹ Negotiations were continuing for the resumption of ICRC prison visits.

The ICRC made no determination of the legal character of the conflict. Hans-Peter Gasser suggests that the new Government's consent to the Soviet presence "may have put an end to the conflict between those two countries."⁹⁰ We will examine below the immediate and longer term implications of these legal and factual conclusions. Gasser also recommends that the Afghan Government and Soviet forces fighting the insurgents "should be equally committed to respecting at least" common Article 3, pointing out that even a treaty that may make the Soviet intervention legal cannot affect the applicability of international humanitarian law to the armed conflict.⁹¹ But, Gasser writes, "In view of the opposing interests of the different parties to the conflict, it would be wishful thinking to postulate the application of the whole body of international humanitarian law to the relations between the intervening power and the insurgents."⁹² Gasser adds, though: "Nevertheless, humanitarian policy demands protection for all actual and potential victims of the conflict. Among the top priorities must be achieving greater respect for the civilian population, treating captured combatants similarly to prisoners of war, and guaranteeing respect for the protective emblem. This is precisely what the ICRC attempts."⁹³

The special rapporteur appointed in 1984 by the United Nations Commission on Human Rights to examine the human rights situation in Afghanistan, Felix Ermacora, considered the legal status of the conflict in his report of February 1985. Noting the extraordinary nature of the hostilities and the fact that the parties have not acceded to the Protocols, he concludes that the

⁸⁸ 1986 ICRC ANN. REP. 49-50.

⁸⁹ ICRC BULL., No. 142, November 1987.

⁹⁰ Gasser, *supra* note 24, at 151. Gasser points out that his article does not analyze what happens

when a new government is installed after the arrival of a foreign power. Suffice it to state that the government currently established in Kabul is the only government claiming to represent the country—there is no government in exile—and that the international community has recognized it de facto: it is represented in the United Nations.

Id. at 151-52 n.15.

⁹¹ *Id.* at 152.

⁹² *Id.*

⁹³ *Id.* In our view, a conclusive characterization of the nature of the conflict and the law that applies is legally sound and consistent with the policy of contemporary international law. Specialized institutions with continuing responsibilities may sometimes find cogent reasons *not* to reach a conclusion on such a matter even when the facts warrant it, believing that the purposes of humanitarian law will better be served in some cases by a certain unclarity. For a particularly sensitive and candid examination of the issue, see *id.* at 157-59.

conflict is "one of a non-international character within the meaning of article 3 of the Geneva Conventions."⁹⁴ This is not, however, a conclusion that only Article 3 applies; the special rapporteur reiterates that it is difficult to conclude whether the conflict is international or noninternational, but that Afghanistan and the Soviet Union, as parties to the Geneva Conventions, are "at least bound by common article 3."⁹⁵ Whether or not the Conventions in their entirety apply thus remains an unanswered question for him. Ermacora notes violations of even the limited provisions of Article 3 and the inability of the opposition to ensure the application of international norms by its forces.⁹⁶

VI.

Scholars, writing as scholars, are entitled to reject factitious distinctions in legal instruments, but scholars, writing as jurists who seek to apply those instruments, must accept the terms as given. The terms "international" and "noninternational" conflicts import a bipartite method that attempts to provide only two factual reference points on a spectrum of possibilities. *Eo ipso*, they represent a decision that some conflicts, no matter how violent, will not be considered international. The method is not one that comports easily with the manifest policy of the contemporary law of armed conflict. That corpus of law seeks to introduce as many humanitarian restraints as possible into conflict, without judgments about its provenance or about the justice of either side's cause. In the contemporary context, the distinctions may vouchsafe incremental gains in the actual acceptance of humanitarian law. Yet, of central importance here, the bipartite factual approach may yield the conclusion that a conflict is not international and thus is insulated from the plenary application of the law of armed conflict—even though that particular conflict may be more violent, extensive and consumptive of life and value than an "international" one.

In our view, the armed conflict in Afghanistan is subject to the plenary application of the Geneva and Hague laws, by virtue of common Article 2, paragraph 1, or, alternatively, common Article 2, paragraph 2. Our review of the facts has persuaded us that the Government of the Democratic Republic of Afghanistan (DRA) after December 27, 1979, could no longer be deemed to be an independent government. The factual record indicates that the alleged invitation issued to the Soviet Union to enter Afghanistan did not emanate from the Government of Afghanistan at that time. On the contrary, it was issued within the Soviet Union by an Afghan who had no official position in the Government. On the basis of this "invitation," Soviet forces invaded Afghanistan, attacked the presidential palace, killed the President, and installed in his place the person who had "invited" them in the first place.⁹⁷

⁹⁴ Ermacora, *supra* note 2, at 42-43.

⁹⁶ *Id.* at 47-48.

⁹⁵ *Id.* at 47 (emphasis added).

⁹⁷ See section III *supra*.

To suggest that this sort of stratagem can transform an invasion by one state's military forces into the territory of another from an armed conflict into either an internal war or no war at all is to signal the end of a large part of the law of armed conflict. If concocted scenarios like this were to be taken at face value, any state could maintain a stable of political would-bes and has-beens of varying national pedigrees. At the appropriate time, one with the right nationality would be saddled and bridled and brought to the ring to issue the necessary "invitation." Once the armed forces of the foreign state had invaded his country, destroyed the existing government and put him in its place, the new leader, now clothed with authority, would then retroactively validate his government's "invitation."

Imagine the outcry, for example, if the United States were to claim that General Somoza had issued an invitation to U.S. troops from Managua, when he was actually broadcasting from Miami (or Ferdinand Marcos from Manila, when actually in Honolulu), and the United States then accepted the invitation by invading Nicaragua, killing Daniel Ortega, bringing Somoza back and keeping him in power with an enormous expeditionary force of U.S. troops involved in combat against Nicaraguans, all the while maintaining that the conflict was an internal one. This scenario would be absurd.⁹⁸ The initial outrage over the invasion itself would be followed by rejection of the U.S. "claim" that the conflict was internal. The analogy with Afghanistan, obviously, is imperfect, but it illustrates the predicament that designating such conflicts as "noninternational" leads to.

There is no way of excluding the operation of common Article 2, paragraph 1, together with the corpus of the Hague law, in the Afghan situation. No matter how the facts are viewed, forces of the Soviet Union entered Afghanistan and engaged in combat with loyal Afghan government forces, which brought about a change of government. The claim that the existing Amin Government invited Soviet troops to bring about its own downfall lacks any credibility. The Soviet Union quickly expanded its role in fighting the Afghan resistance forces until that role was not only predominant, but, in terms of administration and command, nearly complete. Thus, the situation in Afghanistan must be characterized as an armed conflict that became an occupation.⁹⁹ Pictet rejects the notion that the Conventions do not apply

⁹⁸ Such scenarios are further complicated when the "new" government is generally deemed to be competent to perform many international and intergovernmental functions, including, for example, holding a seat in organizations and maintaining embassies abroad. This kind of recognition, which is driven by the trend to recognize on de facto grounds, complicates further the status of insurgents under humanitarian law. We cannot consider these issues within the confines of this article. Their intractability is symptomatic of the unclarity of this part of international humanitarian law.

⁹⁹ Pictet makes it very clear that the transition from invasion to occupation has no effect on the application of the Conventions. They apply throughout. He says, "There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation." 4 Pictet, *supra* note 8, at 60. Pictet's discussion of this point is in regard to the Fourth Convention, *supra* note 3, Article 6, and the relations between the occupying power and civilians. Similar reasons, however, call for the continuity of the application of the plenary Conventions through the transition from invasion to occupation.

to an armed conflict in which both parties deny the existence of a state of war. "Even in that event it would not appear that they could, by tacit agreement, prevent the Conventions from applying. It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests."¹⁰⁰

Thus, where the forces of one state enter the territory of another, engage in hostilities, however limited, with the forces of that state's government and install a new, compliant government, an international conflict is constituted. When the outside forces transform their role into one of occupation, paragraph 1 of common Article 2 continues to operate according to its terms.

Common Article 2, paragraph 2 of the Conventions brings into operation the plenary law of war in cases of partial or total occupation of a contracting state's territory even if there is no resistance. The language used is mandatory ("the Convention shall also apply").¹⁰¹ If state *A*'s military forces occupy part of the territory of state *B* without resistance from the government of state *B*, the situation would not fulfill the contingency of common Article 2, paragraph 1, because it is not a "declared war," or any other armed conflict, between two or more of the high contracting parties.¹⁰² As a result, the situation would not call into operation the plenary laws of war under Article 2, paragraph 1. But this situation would meet the requirement of common Article 2, paragraph 2, whose operation would achieve the same effect as the operation of paragraph 1.

If the claim is made that Soviet forces entered Afghanistan without resistance from Afghan government forces—discounting the factual accounts of the events in Kabul on December 27, 1979—and that there was therefore no armed conflict between two parties to the Convention, it would preclude operation of common Article 2, paragraph 1. But this rendition of the facts of the Soviet intervention would simply move the situation into the gap that paragraph 2 was designed to fill; the Conventions would still apply.¹⁰³

Even assuming that the DRA, throughout the period in question, has been an independent government, and even assuming that this independent government existed before December 24, 1979, and even assuming that, freely and entirely of its own accord, it invited Soviet forces into Afghanistan, the factual record confirms that parts of Afghanistan are under "partial or total occupation" by Soviet forces.¹⁰⁴ Adam Roberts has concluded: "The evidence from conventions, practice, judgments and writings all points unambiguously to the conclusion that the generic term 'military occupation' (or just 'occupation'), though by no means infinitely elastic, is a very broad one."¹⁰⁵ He also notes that the ICRC and the United Nations have often asserted that international humanitarian law is applicable to particular situations, "irrespective of the issue as to whether they count as

¹⁰⁰ *Id.* at 21.

¹⁰¹ See *supra* text accompanying note 7.

¹⁰² *Id.*

¹⁰³ See *supra* notes 10–12 and accompanying text.

¹⁰⁴ See section IV *supra*.

¹⁰⁵ Roberts, *What Is a Military Occupation?*, 55 BRIT. Y.B. INT'L. L. 249, 299 (1984).

international armed conflicts and/or occupations."¹⁰⁶ After a brief, but cogent, description of the Afghan situation,¹⁰⁷ Roberts concludes, "The international element in such conflicts appears to be so marked that the better developed body of international law governing international armed conflicts and occupations may well be viewed as applicable."¹⁰⁸ Roberts also notes the disadvantages of an approach that tends to limit the application of the law relating to occupations to cases of classic belligerent occupation. Most important for our purposes, such an approach "goes against a large body of practice and court opinion [and] would leave many activities of armed forces outside their own country in something of an international legal limbo."¹⁰⁹ These concerns are clearly relevant to the situation in Afghanistan. Under the circumstances, we believe, the four Geneva Conventions must apply to the conflict by virtue of common Article 2.

It is appalling to realize that the *lex lata* seems to view an invitation by a government to another government to occupy its territory against the wishes of the inhabitants as not triggering the plenary application of the Geneva Conventions, no matter what the resistance or deprivation of rights suffered. *De lege ferenda*, that factual situation should lead to the opposite legal conclusion. As Pictet noted in a different, but relevant, context: "[H]ere once more the interests at stake (namely, human lives), and the upholding of the principles on which civilization is based, are too important to be circumscribed by rigid rules."¹¹⁰ Textual arguments can be marshaled

¹⁰⁶ *Id.* at 302.

¹⁰⁷ Roberts writes:

Take, for example, a deeply divided and weak country, facing civil war. It has an unpopular government with a clear external ideological orientation, which invites in a sympathetic superpower ally. That ally then largely dominates indigenous political developments, and there are even allegations that it had complicity in the assassination of the embarrassingly unpopular head of the government which had invited it in. It also gets deeply involved in counter-insurgency operations against the regime's opponents. This is a rough approximation of the situation in Afghanistan since the Soviet intervention of December 1979.

Id. at 278.

¹⁰⁸ *Id.* Roberts identifies

some markers which may help to indicate the existence of an occupation, or may suggest the need for the law on occupations to be applied. These include: (i) there is a military force whose presence in a territory is not sanctioned or regulated by a valid agreement, or whose activities there involve an extensive range of contacts with the host society not adequately covered by the original agreement under which it intervened; (ii) the military force has either displaced the territory's ordinary system of public order and government, replacing it with its own command structure, or else has shown the clear physical ability to displace it; (iii) there is a difference of nationality and interest between the inhabitants on the one hand and the forces intervening and exercising power over them on the other, with the former not owing allegiance to the latter; (iv) within an overall framework of a breach of important parts of the national or international legal order, administration and the life of society have to continue on some legal basis, and there is a practical need for an emergency set of rules to reduce the dangers which can result from clashes between the military force and the inhabitants.

Id. at 300-01. The situation in Afghanistan is marked by each of these conditions.

¹⁰⁹ *Id.* at 304.

¹¹⁰ 1 Pictet, *supra* note 8, at 30.

and some cases may be brought into point, but the drafters of the Convention either rejected or intentionally overlooked this situation. However, this lacuna, while appropriate for high priority on the lawmaker's agenda, is not relevant to the Afghan case. There, as the record shows, the "invitation" was self-issued; the Government of Afghanistan did not extend it. Where a bona fide invitation *has* been extended, it violates reason and conscience to insist that the invitation legitimates the foreign occupation or makes it not an occupation, even when it ceases to have popular support or real indigenous governmental support, indeed even when the country rises in resistance.

The factual continuum that was adopted as the method for determining which of two laws applies to armed conflicts plainly contemplates the possibility of a noninternational conflict in which there will be participation, e.g., at the invitation of the local government, of the military forces of a third state. Presumably, such participation could include joint military operations, the use of military advisers sent by the foreign state and, possibly, independent exercises by the forces of the foreign state under the general direction of the local government. The calculus that emerges from Article 2 does not have a quantitative threshold beyond which the outside force becomes dominant, making an erstwhile noninternational conflict international.

We submit that where outside forces are in effective control of the conflict and have incorporated local forces into their own operations, the conflict has been factually internationalized. While the evidence in the Afghan conflict on this particular matter is not unequivocal, our study of the record leads us to conclude that Soviet generals have directed the operations of the Afghan armed forces, both land and air (insofar as Afghan forces are an effective element in the conflict), and not vice versa. Furthermore, the number of Soviet troops active in Afghanistan has, throughout, far outweighed the number of Afghan army troops. Finally, Soviet officials have been in effective control of, at least, the most important ministries of the Afghan Government.

CONCLUSION

We conclude that key facts of the Soviet intervention in Afghanistan do, indeed, make the conflict an international one according to the provisions of common Article 2 of the Conventions. Therefore, the Conventions in their entirety, together with the ensemble of law of armed conflict, are applicable for judging the conduct of the parties to the conflict.

First, Soviet forces invaded Afghanistan and removed the Amin Government from power. They were resisted by loyal Afghan government troops. The evidence that Karmal was in the Soviet Union at the time, that his broadcast originated in Soviet Central Asia, and that he only entered Afghanistan after Soviet troops were in control of Kabul and Amin dead belies the claim that the Soviet military was invited by the existing Government. Thus, it would appear that, from the time of the invasion, the conflict met

the criteria of the first paragraph of Article 2, applying the Conventions to conflicts between states. Even if the Afghan Government offered no resistance, neither did it offer a legitimate invitation. Thus, the Conventions would apply by virtue of the second paragraph of common Article 2.

Second, the Soviet participation in the conflict against the resistance absorbed the Afghan army's participation. All accounts of the increase in Soviet troop strength following the intervention in December 1979 and the parallel disintegration of the Afghan army, as well as the control of the army and civilian ministries by Soviet advisers, lead to one conclusion: the Soviet presence in Afghanistan, whether or not there was a bona fide invitation by the existing Afghan Government, has been an occupation of the territory of another state within the meaning of common Article 2. Again, the Conventions must apply.