

Legal Pluralism and Militia Regulation: International, Domestic, and Community Accountability Frameworks for Sub-State Forces in Afghanistan

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Abstract

This article¹ will examine how these different accountability and regulatory

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regimes apply to one of the most difficult areas to regulate - the conduct of local armed groups and militias. In Afghanistan, experiments with legal pluralism and the strong international presence have led to a layered accountability approach, with efforts to apply Afghan state, community-based, and international or foreign-law based accountability mechanisms to the largest and most long-standing community defence force model, the Afghan Local Police (ALP). There have been greater attempts to apply all three frameworks to ALP not only because of its size and longevity (active from 2010 and in 34 provinces), but also because it has been a lightning rod for criticism, with allegations of abuse continually prompting efforts to develop accountability measures and prevent future abuses. All three mechanisms have struggled to address these allegations, in part due to lack of political will and poor application of legal controls, but also in part due to some of the structural and practical difficulties of attempting to extend legal accountability to armed actors with greater sway (by virtue of their local power and control of force) than the rule of law.

1. Introduction

A general challenge for the Afghan state has been the extension of the state's regulatory authority, and the development of effective accountability mechanisms for those who are exercising state authority. This has been an area of particular focus and greater attention in the post-2001 period. As in many developing and post-conflict states, extending the writ of the central state has proven challenging. In addition to the surrounding conflict dynamics, enforcing state authority is difficult due to the historically weak central control in Afghanistan. Actors in the periphery have long enjoyed significant autonomous power and authority, among them warlords and other armed groups.

Accountability mechanisms can exist not only within state organs, however, but also through other international or other, informal domestic actors. A recurring theme within legal literature is the degree to which the jurisdiction or accountability frameworks that exist internationally or within more developed states can extend to third-party countries, particularly in cases where the third-party country's accountability mechanisms are less than robust, as in countries like Afghanistan. A separate strain prominent in both legal academia and among rule of law practitioners is the recognition of legal pluralism within developing rule of law contexts. Practitioners have explored whether non-state, alternative dispute resolution mechanisms, for example tribal or community-based mechanisms,

might provide some justice delivery outside the state. In Afghanistan, both approaches have been tried to a greater extent than in many other contexts, due to both the strong and extended international presence and the relative strength of community-based structures compared with the weak Afghan judicial system.

This article will examine how these different accountability and regulatory regimes apply to one of the most difficult areas to regulate - the conduct of pro-government armed groups, including non-state militias, those with a state mandate, and the range of quasi-state actors in between those extremes. All three accountability frameworks - through community-based mechanisms, through the Afghan state, and through extension of foreign or international accountability mechanisms - have been applied to the range of non-state and quasi-state militias in Afghanistan. In particular, all three frameworks were developed to try to constrain and control the largest and most long-standing community defence force model, the Afghan Local Police (ALP). There have been greater attempts to apply all three frameworks to ALP not only because of its size and longevity (active since 2010 and now in 31 of 34 provinces), but also because it has been a lightning rod for criticism, with allegations of abuse continually prompting efforts to develop accountability measures and prevent future abuses. All three mechanisms have struggled to address these issues, in part due to lack of political will and poor application of legal controls, but also in part due to some of the structural and practical difficulties of attempting to extend legal accountability to armed actors with greater sway (by virtue of their local power and control of force) than the state.

2. Background: Militias in Afghanistan and Development of the ALP

Throughout Afghanistan's history, there has been a tension between state authority, and authority held beyond the state, that is, under the control of other regional and local stakeholders. Tribal leaders and structures have taken responsibility for local self-defence, governance, and dispute resolution and enforcement. Powerful warlords, with their own significant armed militias, have operated autonomously of the state and exercised actual control and authority across wide stretches of Afghanistan. These militias and non-state or quasi-state armed forces have dominated or competed with the Afghan state for as long as there has been a state.²

2. For a summary of militia formations and allegiance patterns since 1979, see Gaston and Clark (n1).

Following on the heels of a near complete dominance by militias in the 1990s, reining in local commanders and militia groups, and developing an accountable state force has been a particular challenge since 2001. After the U.S.-led intervention forced out the Taleban in 2002, there was no standing national force. Taking control of the country and establishing stability depended for the most part on turning to existing, primarily former Northern Alliance, militias and vesting them with some state authority. Militias were incorporated wholesale into early iterations of the Afghan National Security Forces (ANSF). Despite more than a decade and a half of reform and demobilization efforts to try to break up these militia structures, significant parts of the current ANSF are still dominated by the patronage networks and militia commanders of the 1990s.³ Meanwhile, the continued weakness of the Afghan state, an emerging protection racket, growing sources of illicit economy, and other factors enables powerbrokers to support and maintain militia forces (often through quasi-state or privatized force structures) outside of the ANSF.

Notwithstanding the general state-building trend of enhancing central state forces and control, throughout the post-2002 decade, international forces and Afghan state actors looking to improve their reach into regional areas have at times built up local and regional powerbrokers and forces. This has included sometimes vesting local or so-called 'community' forces with quasi-state authority to legitimize the effort.⁴ Most important for the focus of this article, beginning in 2009 and 2010, international military forces began experimenting with different models of standing up local or community forces to fill gaps in state security provision. This local security force initiative, which de facto deputized local militias to work with state forces, was anchored in the counterinsurgency strategy that gained traction from 2009 onward. The new counterinsurgency strategy proposed a greater focus on communities: the theory was that using community actors to provide security and other services would both address the gaps in government service provision (the lack of which was itself a grievance among communities) and provide those services through actors who were seen as less corrupt, more legitimate, and so less likely to spur anti-government sentiment. In this way, the thinking presumed that this locally focused approach would address some of the

3. *ibid*; Deedee Derksen, 'Non-State Security Providers in Afghanistan' (2016) Centre for Security Governance Papers <http://secgovcentre.org/wp-content/uploads/2016/11/CSG_Paper_3_NSSPs_in_Afghanistan_March_2016.pdf> accessed 30 March 2018.

4. See Gaston & Clark (n1) for descriptions and further sources on development of campaign forces, Afghan National Auxiliary Police (ANAP) and Afghan Public Protection Force (APPF).

grievances that had fuelled Taliban support, and help win these communities over to the government side. This bottom-up push was also propelled by a parallel shift in state-building and rule of law strategies that proposed a greater focus on communities and 'alternatives to the state' as the remedy for the failures of the 'first generation' of top-down state-building and rule of law strategies.⁵

This 'bottom-up', community-focused shift drove a plethora of new hybrid, quasi-state structures at a local level.⁶ Within the governance and development realm, international policymakers poured money into provincial, district, or village level decision-making *shuras* like the Community Development Councils (CDCs) and governance-focused District Community Councils (DCCs).⁷ Within the justice realm, there was a greater push to recognize Afghanistan's tradition of legal pluralism, in the form of tribal justice and Islamic law frameworks. Practitioners experimented with ways that tribal, community-based, or Islamic law frameworks might contribute to, or co-exist with the state-based rule of law framework, including building up or relying on "informal justice" and tribal or community dispute resolution to fill gaps in state justice.⁸ In the security realm, donors looked to tribal or community militias, which were traditionally known in some communities as *arbakai*.⁹

In 2009, U.S. Special Operations Forces, in coordination with the MoI

5. Erica Gaston and Erik Jensen, 'Rule of Law and State-Building in Afghanistan: Testing Theory with Practice' in Scott Smith and Colin Cookman (eds), *State Strengthening in Afghanistan: Lessons Learned 2001-14* (USIP 2016) 69-81; Astri Suhrke, *When More is Less: The International Project in Afghanistan* (Columbia University Press 2012).

6. Suhrke (n5) 563-564; Gaston and Jensen, (n5) 69-81.

7. *ibid*; Frances Z. Brown, 'The U.S. Surge and Afghan Local Governance' (2012) United States Institute of Peace Special Report < <https://www.usip.org/publications/2012/09/us-surge-and-afghan-local-governance> > accessed 30 March 2018; Hamish Nixon, 'The Changing Face of Local Governance' (2008) Afghanistan Research and Development Unit <<http://www.areu.org.af/EditionDetails.aspx?EditionId=64&ContentId=7&ParentId=7&Lang=en-U.S.>> accessed 7 November 2017.

8. Gaston and Jensen (n5); Noah Coburn, 'Informal Justice and the International Community' (2013) United States Institute of Peace Peaceworks <<http://www.usip.org/publications/informal-justice-and-the-international-community-in-afghanistan>> accessed 7 November 2017; Geoffrey Swenson, 'Why U.S. Efforts to Promote the Rule of Law in Afghanistan Failed' (2016) 42(1) *International Security* 114-151.

9. For a discussion of how new peace-building strategies and bottom-up theories informed development of community defence forces see Sam Vincent, Florian Weigand and Hameed Hakimi, 'The Afghan Local Police - Closing the Security Gap?' (2015) 4(1) *Stability: International Journal of Security and Development* 6-8; Jonathan Goodhand and Aziz Hakimi, 'Counterinsurgency, Local Militias, and State-building' (2014) United States Institute of Peace, 5-6, < <https://www.usip.org/sites/default/files/PW90-Counterinsurgency-Local-Militias-and-Statebuilding-in-Afghanistan.pdf> > accessed 30 March 2018. For a deeper discussion of the history and traditions surrounding *arbakai* see Mohammed Osman Tariq, 'Tribal Security System (Arbakai) in Southeast Afghanistan' (2008) Crisis States Research Centre, UK Department for International Development, *Crisis States Occasional Paper 7* <<http://www.lse.ac.uk/internationalDevelopment/research/crisisStates/download/op/OP7Tariq.pdf>> accessed November 7 2017.

established the Afghan Public Protection Program (AP3) in Wardak province. It was intended to be a 'bottom' up answer to local insecurity, with small groups of local forces linked to local elders filling gaps in the ANSF forces in Wardak.¹⁰ Simultaneously, other SOF in primarily southern Afghanistan (notably not in coordination with the Afghan government) experimented with a similar model of community defence forces under a programme they dubbed the Village Stability Operations (VSOs). According to the model, SOF would support communities that wanted to resist the Taliban, working with them to build and support local defence forces, also called Local Defence Initiatives (LDI) or Community Defence Initiatives (LDI/CDI).

Although the AP3 and the VSO groups had the most developed structures and models, and garnered more attention, other international military contingents experimented with similar models of local militias and defence forces in their areas of operations. This included the joint U.S.-supported Critical Infrastructure Protection Program (CIPP) in the ISAF north region (primarily covering north-east Afghanistan),¹¹ the U.S. Marine-supported Intermediate Security for Critical Infrastructure (ISCI) in Helmand province, and Community-Based Security Solutions (CBSS) in the east.

All of these different forces were eventually disbanded or absorbed into a large umbrella program for local, auxiliary forces inaugurated in mid-2010 that came to be known as the Afghan Local Police (ALP).¹² It was built around some of the same mechanisms and features tested in the AP3 and VSO programs, but with a much tighter nexus to Afghan government authorities, at the insistence of then-President Karzai. The ALP have since grown into a national level force, much closer to a local auxiliary force to the ANSF, with 22,000 to 29,000 forces. The ALP model proved to be so durable that there have been multiple copycat attempts by different Afghan and international actors since 2014, including a National

10. For a discussion of the inception of the ALP program, see generally, Mathieu LeFèvre, 'Local Defence in Afghanistan: A Review of Government Backed Initiatives' (2010) Afghanistan Analysts Network Thematic Report <https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/20100526MLefevre-LDI-exec_summary.pdf> accessed 30 March 2018; Goodhand and Hakimi (n9) 11–12.

11. Matthew Rosenberg and Alissa J Rubin, 'Afghanistan to Disband Irregular Police Force Set Up Under NATO' New York Times (New York, 26 December 2011)

12. President Karzai ordered the disbandment of the CIPP, ISPI, and CBSS, in December 2011, and most of the forces were integrated into the ALP, according to human rights monitors and researchers. Kate Clark, 'Illegal Armed Groups: Signs of Possible Afghan Government Action?' Afghanistan Analysts Network (Kabul, 22 February 2013) <<https://www.afghanistan-analysts.org/torture-illegal-armed-groups-signs-of-possible-afghan-government-action/>> accessed 7 November 2017; United Nations Assistance Mission in Afghanistan, Afghanistan: Annual Report 2012 (UNOHCHR 2013) 45–47.

Directorate of Security (NDS) version of the ALP known as “uprising groups”, a proposal for an ANA-affiliated version of the ALP, the Afghan Territorial Force (ATF) proposed in late 2017,¹³ and countless unofficial ALP - militias taking the name of ALP (and sometimes backed by those who also commanded ALP forces) but with no official government salary or position. This paper will primarily focus on the ALP because it is the largest and most long-standing example of deputized local forces, and so the accountability mechanisms, both formal and informal, have developed to a greater degree.

3. Legal Framework: From International Law to Informal Justice Mechanisms

Although a major critique of local armed groups, and ALP in particular, is the lack of accountability, there have been significant attempts (at least on paper) to extend a range of local, national and international legal regimes to these groups. First, because the ALP were developed within this larger élan toward bottom-up, grassroots initiatives, and alternatives to the state, some of the accountability mechanisms that were proposed for these forces mirrored the wider embrace of legal pluralism and community-based governance and justice mechanisms. Second, in addition to these community-based accountability mechanisms, there have been incremental efforts to increase Afghan government oversight over the ALP. Thirdly, due to the heavy U.S. (and specifically SOF) involvement, some foreign law oversight and control mechanisms have also applied to ALP. Given this heavy international involvement, and the weakness of domestic mechanisms to control local armed actors or enforce the law against them, other considerations of international liability and state responsibility must also be considered. This section will overview these three different types of accountability frameworks applicable to ALP, and their relative effectiveness: first the community-based mechanisms; then those under domestic law; and finally foreign or international accountability frameworks or mechanisms.

13. United Nations Assistance Mission in Afghanistan, Afghanistan: Annual Report 2015 (UNAMA and UNOHCHR 2016) 65–66; Kate Clark, ‘More Militias? Part 1: Déjà vu double plus with the proposed “Afghan Territorial Army”’ Afghanistan Analysts Network (Kabul, 21 September 2017) <<https://www.afghanistan-analysts.org/more-militias-part-1-deja-vu-double-plus-with-the-proposed-afghan-territorial-army/>> accessed 16 November 2017. The ATF program was in the process of development at the time of writing, and appeared likely to be piloted in several districts beginning in 2018.

3.1. Community Control Mechanisms

No specific efforts were made to link forces stood up in the early years of engagement in Afghanistan with local communities they were policing and securing. In fact, the opposite could be observed - the initial structure for the ANSF was based on centralizing authority and trying to break down local links. Recruitment was national, with ANSF deployed away from their home areas. There were no explicit or formal community links or controls of the early quasi-state militia forms, including the Afghan Guard Forces (AGF), Afghan Security Guard (ASG), and Afghan Security Forces (ASF) (however, notably, significant elements of these forces were captured by local commanders and so had a negative form of localized links).

Military analysts later engaged in developing community defence forces cited these groups' abusive behaviour and responsiveness only to their militia commanders (implicitly not to communities) as a key factor that turned communities away from the nascent Afghan government and helped drive a Taliban resurgence.¹⁴ With the proto-ALP models and the ALP itself, there was an explicit attempt to address this by developing forces that were linked to, and presumably more accountable to, local communities. In the AP3 project local community councils were supposed to help select the AP3 members and have some oversight role over them.¹⁵ U.S. Forces piloting the different VSO models (LDI/CDIs and other) also created different mechanisms for communities to take part in selection (at least on paper). Some of the VSOs vested responsibility for community vetting in district governors together with Community Development Councils or village *shuras*, while in other local force initiatives, SOF simply organized meetings of local elders, wherein members of the local VSO force would be selected.¹⁶ One early LDI model proposed making local aid contingent

14. See, generally, Derksen (n3); International Crisis Group, 'A Force in Fragments: Reconstituting the Afghan National Army' (2010) Asia Report N°190 < https://www.justice.gov/sites/default/files/eoir/legacy/2014/09/29/icg_05122010.pdf> accessed 30 March 2018.

15. Initially it was proposed that councils established under the government-run Afghanistan Social Outreach Program (ASOP) should do the selecting and vetting but after objections from European countries, it was instead switched to simply community councils. Goodhand and Hakimi (n9) 20.

16. Initially, the model was supposed to be for U.S. Special Operations Forces to organize meetings of local elders in the target communities on an ad hoc basis, a role later formalized into village councils for the VSOs. LeFèvre (n10) 6. Anecdotal evidence suggests that in practice this manifested as SOF engaged in local clearing operations making contact with community elders, identifying those willing to work with them against the Taleban, and then allowing those commanders to recruit a team of men, in essence a more SOF-driven selection process, albeit in consultation with local actors. For example, among the first ALP-precursor units were established by U.S. forces in Kas Kunar, in Kunar province. U.S. forces identified and appointed the original commanders. Many of the commanders recruited at

on members of the community participating in the local defence forces, in order to incentivize community support and investment in the force, but this ultimately did not prove to be a sufficient recruitment tool and was dropped, according to LeFèvre and Moyer.¹⁷ Interestingly, those behind the original design of the ALP were more in favour of community control and oversight as opposed to control and oversight by Afghan government actors, preferring a model in which ALP were locally autonomous and reporting only to local *shuras* (and not to the Afghan government).¹⁸ However, the Afghan government ultimately refused to accept the ALP unless it was vested in Afghan state structures.¹⁹

As the ALP evolved, the three key mechanisms of community control established were:

1. ALP would only be created in communities that desired it.²⁰
2. ALP members would be nominated by the community, as represented by community elders.²¹ This would implicitly also build in a level of community vetting as to the character and past conduct of the members. For example, if a nominated ALP member successfully passes MoI criminal and intelligence background checks, but the local community presents evidence of local crimes or issues with that individual's character, then according to procedures, the community veto should prevail.²²

this original inception period in Kunar province were still in charge of ALP units at the time of writing, and enjoyed very high community support. Author interview with Shahmahmoud Miakhel, Kabul, Afghanistan, 14 November 2017. See also Fazl Muzhary, 'How to Replace a Bad ALP Commander: in Shajoy, Success and Now Calamity' Afghanistan Analysts Network (Kabul, 21 September 2016) <<https://www.afghanistan-analysts.org/how-to-replace-a-bad-alp-commander-in-shajoy-success-and-now-calamity/>> accessed 15 November 2017 (noting initial U.S. SOF selection of local ALP unit in Kas Uruzgan).

17. Final draft, Local Defence Initiative Strategy (March 2010), cited by LeFèvre (n10) 15. Mark Moyer, 'Village Stability Operations and the Afghan Local Police' (2014) JSOU Report 14-7, 29 <https://www.socom.mil/JSOU/JSOUPublications/JSOU14-7_Moyer_VSO_FINAL.pdf> accessed 10 November 2017.

18. See, e.g., Moyer (n17) 10, 13; Goodhand and Hakimi (n9) 14.

19. A former advisor to President Karzai who participated in the negotiations between President Karzai and international military representatives over the development and structure of the ALP noted that the Afghan government argued that the ALP had to be embedded in Afghan mechanisms, specifically MoI, but also argued against some of the more stringent vetting and selection requirements proposed by U.S. forces. Author interview with former Karzai Advisor, Washington, D.C., 27 August 2017.

20. Evidence of this community consent in the initial development of the ALP model are available in Final draft, Local Defence Initiative Strategy (March 2010) cited in LeFèvre (n10) 15. It is also established in the current ALP procedures. Kate Clark, 'Update on the Afghan Local Police: Making Sure they are Armed, Trained, Paid, and Exist' Afghanistan Analysts Network (Kabul, 5 July 2017) <<https://www.afghanistan-analysts.org/update-on-the-afghan-local-police-making-sure-they-are-armed-trained-paid-and-exist/>> accessed 7 November 2017; Author interview with Brigadier General Ghulam Sakhi Gharany, Kabul, Afghanistan, 13 November 2017.

21. Ibid.

22. Author interview with Brigadier General Ghulam Sakhi Gharany, Kabul, Afghanistan, 13 November 2017.

3. There was also an assumption that drawing locals from the community would activate “kinship and familial” ties (as one SOF commander framed it).²³ In theory, these would then continue to provide a form of oversight and restraint on ALP conduct.

The first two of these mechanisms are formally written into the ALP procedures that still regulate the force today;²⁴ the third is an overall presumption built into the model.

While these community controls and accountability measures have been core to the ALP model since the beginning, it is unclear how robustly they have been implemented, either in the initial phase or in its present, more state-regulated form. Early research and documentation of the ALP precursors and the first ALP units suggest that in practice, in very many cases, the community was not consulted about whether they wished to have a local force, and in quite a few cases ALP were stood up against and over the wishes of locals (negating the first control principle). For example, Goodhand and Hakimi and LeFè vre noted that the initial AP3 forces (later phased into the ALP) in Wardak were created expressly against the request of communities, who feared the long-term effects of militias and instead requested more Afghan National Police (ANP) forces to address local security.²⁵ Moyar notes that as ALP expanded, the sites were increasingly chosen based on strategic location, not based on popular desire or support, a factor he correlated with the ineffectiveness of many of the later ALP sites.²⁶

Community wishes, either to have an ALP or input on who would be in it, were also frequently disregarded in cases where local commanders and strongmen were tapped to form a force. These local strongmen were often selected by U.S. SOF or by Afghan authorities because they could organize forces and command loyalty to fight against the Taleban locally (or at least whomever they categorized as Taleban - a persistent issue has been that groups receiving foreign support would use their position to target local rivals in the name of counter-insurgency).

23. Author interview with Special Forces Commander involved in ALP oversight, Kabul, Afghanistan, 12 November 2017. The SOF commander was present at the initial inception stage, and observed several different Village Stability Operations (VSO) sites, and was also involved in ALP program oversight in 2017.

24. Author interview with Brigadier General Ghulam Sakhi Gharany, Kabul, Afghanistan, 13 November 2017 (stating community controls are still part of the ALP procedures, and insisting that any new ALP units or members should come first through nomination by community elders).

25. LeFè vre (n10); Goodhand and Hakimi (n9).

26. Moyar (n17) 17, 62-66.

However, many of these local strongmen had a reputation for abusive behaviour, and so were opposed by local communities. Many locals were no doubt aware that further empowering and militarizing them could escalate local conflict.

Examples of bypassing community selection - and tapping local commanders opposed by locals - exist throughout documentation of the ALP program, from the earliest days up to the present. Moyer notes that the decision to make Nur al Haq an ALP commander in Baghlan and incorporating the men under his control was made without community consultation, and despite his record on rights abuses and predatory behaviour toward communities.²⁷ In the Associated Press examination of the initial ALP sites, Vogt described the recruitment of ALP in Shindand as driven by central authorities, with only cursory community consultation. One local community member quoted in the story said that police officials initially consulted them but then abandoned the process and simply made their own selection, while the local district police chief was quoted as saying, "The Interior Ministry just told me to sign them up, so I signed it. This has all been imposed."²⁸ In the early stages of AP3 in Wardak, LeFèvre and Goodhand and Human Rights Watch provide evidence that the AP3 was co-opted by former mujahedin and Taliban commander named Ghulam Muhammad, who pressured elders to select his men.²⁹ Goodhand and Hakimi suggest many pre-existing militias were integrated directly into the ALP forces with neither training nor vetting.

Although there is less documentation of how new ALP units have been selected in later years of the program, it appears that community engagement in selection and monitoring is still minimal or non-existent in many sites. New ALP units are still being created annually, although at a much slower rate than at their initial expansion in 2010 (to 10,000), or their increase from 2012 to 30,000.³⁰ In 2017, new forces tend to be recruited to address attrition,³¹ and new units to address a

27. Moyer (n17) 22.

28. Heidi Vogt, 'Afghans see Warlord Footprints in New Police Force' Associated Press (New York, 21 February 2011) <http://www.rawa.org/temp/runews/2011/02/21/afghans-see-warlord-footprints-in-new-police-force.html> accessed 7 November 2017

29. LeFèvre (n9) 9-11, 14-19; Human Rights Watch 'Just Don't Call It a Militia: Impunity, Militias, and the "Afghan Local Police"' (2011) 46-47 (describing elders' testimony that Ghulam Mohammad gave them a list of his men as candidates for AP3 and forced them to sign).

30. International Crisis Group, 'The Future of the Afghan Local Police' (2015) International Crisis Group Asia Report 268 < <https://www.crisisgroup.org/asia/south-asia/afghanistan/future-afghan-local-police> > 10 November 2017; Clark (n20).

31. ALP have the highest per capita casualty rate of the different ANSF forces, and also are only under a one-year contract. Author interview with Special Forces Commander involved in ALP oversight, Kabul, Afghanistan, 12 November 2017. Clark (n20).

perceived need for a greater number of forces in particular areas due to the security situation.³² The Commander of the ALP Directorate insisted in an interview that where new ALP units are created, the first step in the process is still that the local community nominates and selects.³³ However, since local selection was not significant even in the early years, when there were significant community-level outreach resources (notably, troops on the ground), it seems unlikely that the largely Kabul-based and under-staffed MoI and US SOF advisors overseeing program today would be able to conduct substantial community consultation. The ALP Directorate members interviewed were unable to provide any examples of recent community consultation processes, when asked.³⁴ A SOF advisor to the ALP Directorate noted that in many cases the recruitment of new units is challenged by the lack of ground presence (either by international forces or ALP directorate officials) to work with communities in identifying local members.³⁵ In part because of these limitations, where new units are created, he said, they tend to be driven by local powerbrokers who are on the ground, and often used to legitimize pre-existing armed groups - in contradiction to the procedures and the overall model of ALP.³⁶ In addition, the ALP Director also admitted that interference by powerbrokers in selection of ALP is an issue.³⁷

Breaking with these community controls at the initial phase, when ALP are created, can significantly undermine the third level of community accountability. ALP members not chosen by the community do not necessarily have the same 'familial and kinship ties' nor relationship of respect that creates informal levers of control and restraint. Where ALP units were created and selected at the behest of local powerbrokers or foreign actors and against the wishes of local communities, community actors would then feel powerless to make complaints.³⁸

32. This does not result in a change in the overall number, but a shift in where units are allocated. If there is a perceived need for more forces in a given province, the number of ALP forces allocated to another province will be decreased (effectively disbanding some number of forces in that province), and an equivalent number recruited locally in the target province/district. Author interview with Special Forces Commander involved in ALP oversight, Kabul, Afghanistan, 12 November.

33. Author interview with Brigadier General Ghulam Sakhi Gharany, Kabul, Afghanistan, 13 November 2017.

34. Author interview with Brigadier General Ghulam Sakhi Gharany and staff, Kabul, Afghanistan, 13 November 2017.

35. Author interview with Special Forces Commander involved in ALP oversight, Kabul, Afghanistan, 12 November 2017.

36. *ibid.*

37. Author interview with Brigadier General Ghulam Sakhi Gharany, Kabul, Afghanistan, 13 November 2017. He also noted that addressing this is one of the goals or hopes for future reform. *ibid.*

38. Some testimony and documentation of such complaints is available in Human Rights Watch (n29); Goodhand and Hakimi(n9) 22, 25

This is not to suggest that there are no examples of communities monitoring and attempting to check ALP behaviour, although they are not common. There are community complaints referred to the ALP directorate,³⁹ although a greater number of referrals and complaints comes from the UNAMA human rights unit or other actors. The Afghanistan Analysts Network's Fazl Muzhary documented one unusual example in Shajoy, Uruzgan, in which locals successfully pressured to replace an ALP commander, named Muhammadullah, who had been instituted without consultation with them initially, and used his position to extort illegal taxation and abuse the community.⁴⁰ Muzhary's reporting suggested that the initial ALP commander was chosen through heavy influence by U.S. SOF, and district and provincial officials, including the district and provincial police chiefs. After 2013, community petitioning and pressure with higher-level provincial and national authorities resulted in Muhammadullah being replaced with a well-respected elder, who turned the ALP unit (largely with the same forces who were under Muhammadullah) into an effective and respected local force, according to locals interviewed. However, this was possible only after U.S. SOF left the area in late 2013, and the provincial police chief was replaced.⁴¹

On a positive note, this example points to the potential effectiveness of this local force model where there is a well-respected local commander, who has the support of the community and who consults with local leaders. Where ALP works the best, it is often because it is embedded in local communities. In these communities, ALP often out-perform other ANSF forces in terms of providing security, and are preferred by locals. Thus where they are active and functioning, local community controls might work the best; the problem is that in most areas, these community controls were never implemented and are severely hampered.

The negative take-away from the above Uruzgan example is that the appointment of strong, well-liked local actors, and the turn-around in security and community safety, was only possible once the foreign and Afghan government actors who backed the problematic commander, Muhammadullah, left or were demoted. This points to a larger weakness with the premise of community controls - even if they have the potential to be an effective check on local forces, community wishes and controls are not strong enough to override state or foreign actors' interests, which

39. Author interview with Brigadier General Ghulam Sakhi Gharany, Kabul, Afghanistan, 13 November 2017.

40. Fazl Muzhary, 'How to Replace a Bad ALP Commander: in Shajoy, Success and Now Calamity,' Afghanistan Analysts Network (Kabul, September 21, 2016), <<https://www.afghanistan-analysts.org/how-to-replace-a-bad-alp-commander-in-shajoy-success-and-now-calamity/>> accessed 20 November 2017.

41. *ibid.*

often clash with those of the community. Local actors prefer guarantees of their personal security while international or state actors preferring security advances against the Taliban, who may not be perceived by locals as a threat. In addition, because many local powerbrokers and warlords have links with state actors or foreign actors, they can leverage these relationships to overcome otherwise protective community checks. Interviews with officials at the ALP Directorate charged with monitoring ALP admitted that there were frequently attempts by powerbrokers to intervene and control the ALP.⁴² The ALP Director, Brig. Gen Gharany also said that it was difficult for central authorities to protect against such intervention because each unit was a small force, technically reporting within the MoI structure (to the district Chief of Police), but in practice quite isolated.⁴³ As a result, they were easier to dominate or manipulate by local powerbrokers.⁴⁴

3.2. Afghan State Oversight and Domestic Law

In addition to these informal community controls, ALP (and to a lesser degree their predecessor forces) have also been subject to formal state controls. Some form of state vetting and background checks were part of many of the early models of quasi-state paramilitary forces, albeit only cursorily implemented. As far back as the Afghan National Auxiliary Police (ANAP) in 2006, there was some experimentation with trying to regulate militia forces given a state remit. For the ANAP forces, each of the members was supposed to be vetted, primarily to prevent Taliban infiltration but also to break down pre-existing militia command networks. However, vetting did not include basic checks on candidates' criminal records or affiliation, and reports suggested the resulting force was replete with criminals and others who would not have passed the more rigorous ANP vetting process.⁴⁵

In part to counter critics who pointed to past failures like the ANAP, the ALP was designed with more robust state accountability mechanisms in mind. In addition to the community checks, nominated ALP members undergo a criminal background check (by MoI) and an intelligence vetting for evidence of Taliban sympathies.⁴⁶ In addition, ALP fall under ANSF command and control, which

42. Author interview with Brigadier General Ghulam Sakhi Gharany, Kabul, Afghanistan, 13 November 2017.

43. Author interview with Brigadier General Ghulam Sakhi Gharany, Kabul, Afghanistan, 13 November 2017.

44. Author interview with Brigadier General Ghulam Sakhi Gharany, Kabul, Afghanistan, 13 November 2017.

45. See LeFèvre (n10) 6–7; Human Rights Watch (n29).

46. Final draft, Local Defence Initiative Strategy (March 2010), cited in LeFèvre (n9) 15. See also International Crisis Group (n30) 9–11. These processes still exist for new ALP members. Author interview with Brigadier General Ghulam Sakhi Gharany, Kabul, Afghanistan, 13 November 2017.

are supposed to provide some form of monitoring. Each ALP unit is connected to the broader ANP national and regional (or zone) command and control, through the district Chief of Police.

However, at least in the early years, there was substantial evidence to suggest that these oversight and accountability mechanisms were weak to non-existent. The MoI lacked the manpower and comprehensive criminal record system to provide actual background checks.⁴⁷ ICG's case study of ALP in Kunduz found MoI and NDS local officials lacked the men and firepower to challenge local ALP units, making them "powerless to modify the behaviour" of ALP. Efforts to check the ALP were sometimes overruled by officials in Kabul who had ties to particular ALP commanders.⁴⁸

To some extent these critiques continue to the present, however, as the ALP have become more formalized, and regularized into the ANSF forces, formal control has increased, at least to the level of other ANSF forces (which themselves have their deficits). The ALP have always been linked to the MoI. However, in 2012, ALP were brought fully under the MoI, arguably bringing them to full state status. As such, ALP are subject to the full range of legal protections and responsibilities applicable to state forces, both under international and domestic law. Individual members would of course also be subject to Afghan domestic law (as would any armed group or individual), notably the Afghan penal code, which criminalizes murder, assault, and other acts that would pertain to reported abuses. They would also be responsible for abiding by any of Afghanistan's human rights and international obligations under both treaty and customary international law.⁴⁹

In terms of investigation, sanction, or prosecution, any allegations of abuse or misconduct by the ALP are investigated by officers within the ALP Directorate of the MoI. Where the allegations are credible and criminal in nature, they are forwarded to the Attorney General's office for possible prosecution.⁵⁰ The United Nations Assistance Mission to Afghanistan (UNAMA), which monitors the conduct of all warring parties, including the ALP, has noted that the number

47. LeFèvre (n9) 9.

48. International Crisis Group (n30) 16.

49. Article 7 of the Afghan Constitution provides that the state, and all its representatives, "shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed." As such, Afghan forces are responsible under the Geneva Conventions and Additional Protocols, Convention against Torture and membership of the International Criminal Court. A summary of these laws is available in: United Nations Assistance Mission in Afghanistan, *Afghanistan: Midyear Report 2017* (OHCHR 2017) 62–65.

50. United Nations Assistance Mission in Afghanistan, *Afghanistan: Midyear Report 2014* (OHCHR 2014) 41.

of investigations, arrests and prosecutions of ALP members accused of abuse tended to hover around 100 cases annually in the early years of the program.⁵¹ According to an ICG interview with the department overseeing ALP, 65 ALP officers had been imprisoned or convicted based on allegations of abuse as of January 2015.⁵² UNAMA's mid-year 2016 report noted that nearly 2000 ALP members had been dismissed in the first half of 2016, and suggested that at least some of these were removed due to problematic behavior.⁵³ UNAMA credited these reform measures with helping reduce the number of civilian casualties by ALP in the first half of 2016.⁵⁴ UNAMA reported that in the first half of 2017, 106 allegations of abuse by ALP had been investigated, and 15 referred onward for prosecution.⁵⁵

Interestingly, although no one would describe Afghan state control as strong, nor Afghan accountability mechanisms as robust, they do appear to have had some impact on improving accountability and control over ALP. Although most accounts of ALP in early studies were highly negative, more recent descriptions by reporting groups such as UNAMA have been somewhat more moderate, suggesting that as they became more formalized in the ANSF and MoI, their conduct may have improved. UNAMA statistics suggest relatively better behaviour by ALP than ANP, and their analysis suggests that MoI accountability mechanisms, while still far from perfect, have improved. Through longitudinal perception studies of ALP and other non-ALP militia forces in 40 districts in north-eastern Afghanistan, Jan Koehler and Kristóf Gosztónyi found that negative perceptions and fear of ALP, which they treated as a proxy for level of abuse, decreased as they were formalized into the ALP.⁵⁶

Nonetheless, the ALP Directorate is severely hindered by its lack of a provincial-level presence and reliance on MoI for field missions and the cooperation of local ANP to investigate allegations.⁵⁷ The ALP Directorate is primarily a policy unit,

51. Ibid.

52. International Crisis Group (n30) 11. When asked in November 2017, the ALP Directorate did not provide the number investigated and prosecuted since 2015, and declined to offer a range. Author interview with Brigadier General Ghulam Sakhi Gharany, Kabul, Afghanistan, 13 November 2017.

53. United Nations Assistance Mission in Afghanistan, Afghanistan: Midyear Report 2016 (OHCHR 2016) 90. Later investigations by Kate Clark suggest that many of the 2000 dismissed may have been ghost soldiers, or due to other non-conduct based, bureaucratic reforms. Clark (n20).

54. Ibid.

55. UNAMA, Midyear Report 2017.

56. Jan Koehler and Kristóf Gosztónyi, 'The International Intervention and its Impact on Security Governance in North-East Afghanistan' (2014) 21 (2) International Peacekeeping 231-50

57. United Nations Assistance Mission in Afghanistan, Afghanistan: Midyear Report 2012, (OHCHR 2012) 51-52

with no direct personnel below the regional (or “zone”, as Afghanistan is divided into zones in terms of military organization) level. Its staff will conduct routine monitoring, travelling to provinces and districts to engage with ALP units, but the staff available to do so is limited and so monitoring visits happen on an ad hoc basis.⁵⁸ Additionally, the command authorities are not synched in a way that might allow the MoI directorate to have total control and accountability. ALP units fall under the command of the local Chief of Police, and ultimately answer to the Provincial operational command (PCOP) and the Zone commander, who direct their day-to-day activities.⁵⁹ These provincial and zone commanders have daily operational command, which creates somewhat of a disconnect with the ALP Directorate in charge of accountability. Where there is a conflict between these operational authorities and ALP Directorate the zone commanders (which tend to be one-star generals) outrank the Brigadier General in the ALP Directorate.⁶⁰ A clash is more likely (one hopes) to arise in operational matters than over a violation of rights.⁶¹ Nonetheless, the fact that the ALP Directorate in charge of ensuring sound conduct and that ALP are following their rules and remit are outranked by the ground commander may have the potential to impair overall formal accountability.

In addition, while potentially better than nothing, the institutional structures in charge of ALP have not won robust praise for accountability. The Attorney General’s office has a long-standing reputation for poor performance and corruption, notably worse than other Afghan institutions. Since the Attorney General would be responsible for any criminal charges over ALP, this weakens ALP accountability. U.S. officials involved in monitoring ANSF forces for rights compliance said accountability has been stronger for forces under the command of the MoD than the MoI because of the issues in the Attorney General’s office.⁶²

58. Author interview with Special Forces Commander involved in ALP oversight, Kabul, Afghanistan, 12 November 2017; Author interview with Brigadier General Ghulam Sakhi Gharany, Kabul, Afghanistan, 13 November 2017. Two staff interviewed from the ALP Directorate had just returned from a field visit to forces in Kunar, and appeared to have a regular schedule of visiting ALP in the field, although given their limited numbers, there may be limited reach.

59. Author interview with Special Forces Commander involved in ALP oversight, Kabul, Afghanistan, 12 November 2017.

60. Author interview with Special Forces Commander involved in ALP oversight, Kabul, Afghanistan, 12 November 2017.

61. A more common example of a clash over operational orders is that Zone commanders and their subordinates have a tendency to use ALP as any other units within the area of operations and may use them to fill security gaps or address tactical needs even where it goes beyond the ALP defensive mandate, or would cause them to violate the rule of not operating beyond 1 kilometer outside their local village. *ibid.*

62. Author interview with staff at the Bureau of Democracy, Human Rights and Labor, U.S. Department of State, Washington, DC, 29 August 2016. Author interview with representative dealing with Afghanistan Leahy Law

UNAMA has documented repeated examples of impunity for serious human rights violations by ALP and noted that the Ministry of Interior “appears to show a tolerance... for human rights violations alleged to have been perpetrated or carried out by ALP.”⁶³ In its investigation of ALP, ICG found “an absence of effective mechanisms for registering and responding to complaints” in part because of intimidation by strongmen connected with ALP.⁶⁴ UNAMA and ICG both noted that direct threats to victims and witnesses left them afraid to testify.⁶⁵ Such findings suggest that while formal accountability has improved, and the overall institutionalization can improve the conduct of local forces in comparison to completely irregular militias, it is still a far cry from a robust accountability framework.

In late 2015, prompted by a critical report from the U.S. Special Inspector General for Afghanistan Reconstruction, the MoI embarked on a new reform program for the ALP.⁶⁶ The reforms had a largely administrative and force strengthening bent, but important for this paper, they did appear to result in the removal of some ALP units or commanders who had committed abuses in the past, and to generally tighten the oversight over the ALP.⁶⁷

3.3. International Law and Foreign Law Applicability

The final layer of accountability to discuss is that provided by international actors, under foreign or international law. This could happen in a number of forms, three of which will be considered in this section:

1. Extraterritorial application of foreign law, administrative or judicial (notably U.S. legal and regulatory mechanisms).
2. General obligations under international law, specifically under international humanitarian law (IHL), as applicable to foreign actors working with and supporting actors like the ALP (notably the U.S.).

issues at the U.S. Department of Defence, Washington, DC, 1 September 2016; Skype interview with former U.S. Department of Defence dealing with Afghanistan Leahy Law application, 19 February 2017.

63. UNAMA, Midyear Report 2016, 42

64. International Crisis Group (n30) 10

65. United Nations Assistance Mission in Afghanistan, Afghanistan: Midyear Report 2013 (OHCHR 2013) 51. See also International Crisis Group (n30) 10 (providing a gruesome account of a man who tried to complain about ALP who were engaged in theft and sexual abuse of young boys being captured by ALP, tied by his beard to a pickup and killed by dragging him through the streets).

66. For a more thorough examination of this reform agenda and its success, see Clark (n20).

67. *ibid.*

3. Application of international criminal law mechanisms, notably the ICC.

The legal obligations and accountability mechanisms applicable to U.S. engagement is particularly relevant in this case because U.S. SOF created the ALP model, and in the initial years, were the main ones providing support, direction, and any oversight. This role has decreased with the full integration of ALP into MoI, transition of security responsibility to the Afghan government in 2014, and the drawdown of numbers of SOF forces from 2014 onward. Nonetheless, the U.S. is still the sole funder of the ALP and has continued to keep some level of control and engagement with the ALP program through a SOF advisory role.⁶⁸

3.3.1. Foreign Law Application: U.S. Leahy Law and Other Mechanisms

In the early years, U.S. SOF were arguably the best positioned to provide any oversight or accountability for ALP units. The majority of ALP and proto-ALP units in the years 2009 to 2012 were developed and trained by U.S. SOF. Notwithstanding the model of community nomination and selection, in many cases, SOF selected the local partners as they entered an area to “clear” it. Although this became more difficult as the number of ALP expanded, the early model of ALP was for U.S. SOF to embed with ALP for a few months after their inception to continue providing mentoring and informal training and guidance.

Anecdotally, the embedding of SOF mentors within ALP did provide a check on behaviour. Because they were working closely with these actors on the ground, they were in a position to see any abuses or misconduct that happened. A U.S. SOF survey of ALP mentors in 2011 found that 20 per cent of ALP mentees had committed “physical abuse/violence”, with additional, lessor reports of bribe-taking, fraud, rape, and drug trafficking.⁶⁹ There were very few formal reprimands that resulted during this period (or at least that have become public), so while it is possible that SOF were able to use their influence to stop such violations or enforce disciplinary measures, it is difficult to tell how much of a control or restraint this really created. Following the 2011 HRW report that documented numerous human rights abuses by ALP, Combined Forces Special Operations Component Command (CFSOCC-A) also issued a memorandum clarifying and solidifying requirements for reporting allegations of abuse by ALP and requiring

68. Ibid.

69. Radha Iyengar, Daniel Egel, Walt Perry, and Todd Helmus, ‘Assessment of Opinion Poll and Team Reporting for Village Stability Operations in Afghanistan: Wave 5’ (Briefing slides, February 2012), cited in International Crisis Group (n30) 8.

that where “probable cause” existed, CFSOCC–A units should cease contact with the alleged perpetrators.⁷⁰ However, there is no public evidence of whether or how frequently this happened.

One issue is that as the program expanded, SOF forces were spread thin, not enabling the original close mentorship and monitoring model to be carried out. Based on a 2010 research trip exploring ALP functioning, Felbab–Brown observed that in parts of Kunduz, SOF may only have visited the ALP once a week.⁷¹ This level of oversight further decreased over time. The high point of SOF oversight and “eyes on” the program was 2013, according to one SOF advisor.⁷² As of 2017, he said, we have no “touch points at the tactical level” so any level of oversight or reports about ALP behavior is more ad hoc and difficult to verify.⁷³

In addition to any informal oversight, the fact that the ALP were supported by U.S. funding also meant that they were subject to additional layers of vetting and censure by U.S. domestic regulatory mechanisms. A number of U.S. domestic regulations require some level of vetting or due diligence over those receiving U.S. funding and support, either to prevent potential connections to terrorists or those believed to have engaged in human rights abuses. The U.S. Leahy amendment or Leahy Law prohibits any assistance from the Department of Defence (DoD) or the U.S. Department of State (DoS) to any individual unit of foreign security forces where there is credible evidence of the commission of gross violations of human rights.⁷⁴ This includes “torture or cruel, inhuman or degrading treatment or punishment” and “flagrant denial of the right to life, liberty or the security of the person.”⁷⁵ There are parallel, but not identical

70. Memorandum for all Combined Forces Special Operations Component Command–Afghanistan (CFSOCC–A) Personnel, SUBJECT: CFSOCC–A Policy on reporting allegations of crimes and abuses committed by Afghan partner forces 27 September 2011. Cited in Lisa Saum–Manning, VSO/ALP: Comparing Past and Current Challenges to Afghan, (RAND Working Paper WR–936, 2012) FN 52.

71. Vanda Felbab–Brown, ‘Hurray for militias? Not so fast: Lessons from the Afghan Local Police experience’ (2010) 27(2) *Small Wars and Insurgencies* 258–281

72. Author interview with Special Forces Commander involved in ALP oversight, Kabul, Afghanistan, 12 November 2017.

73. *ibid.*

74. The State Department version of the Leahy Law is found in Section 620M (22 U.S.C. 2378d) of the Foreign Assistance Act of 1961, as amended, and affects funds under the Foreign Assistance Act and the Arms Export Control Act. The Defence Department version of the Leahy Law is a recurring provision attached to the annual Congressional appropriations bill for Department of Defence funding. Bringing the two different versions or interpretations of the Leahy Law into alignment has been a continuing process over the last decade. For a larger discussion of the differences and legislative efforts to reform both provisions, see Nina M. Serafino, June S. Beittel, Lauren Ploch Blanchard, and Liana Rosen, “Leahy Law”—Human Rights Provisions and Security Assistance’ (29 January 2014) Congressional Research Service Issue Overview.

75. The Foreign Assistance Act of 1961 (Pub L No 87–195, 75 Stat 424, 1961)

provisions of the Leahy amendment in the annual Foreign Appropriations Act and the Defence Appropriations Act, applicable to funding by the Departments of State (DoS) and Defence (DoD), respectively.⁷⁶ In 2010, the State department, which has responsibility for ensuring implementation of both the DoS and DoD versions of the law, created a database known as INVEST, to track credible allegations of human rights worldwide.⁷⁷ Where new assistance is proposed, the units or individuals who would receive the assistance must be vetted against the information in the INVEST database, to ensure there are no credible allegations of rights abuses against them. However, where assistance is provided on a force level, what is likely to be vetted is the unit as a whole, or the specific commander, not each individual member of the unit.⁷⁸ Even in the early years, when ALP forces were being created and so were undergoing *de novo* vetting, it is likely that only the commanders underwent even a cursory Leahy review; this type of vetting would likely not have extended to individual members.

In some ways, because of the deep and long U.S. engagement in Afghanistan, the Leahy law developed more detailed mechanisms, with more regular vetting and exclusion, in Afghanistan than anywhere else.⁷⁹ U.S. officials have had more resources on the ground to investigate complaints, and to observe and generate reports about other units.⁸⁰ In particular, beginning in 2014, the DoD rebooted the way it applies the Leahy law in Afghanistan, and created a more proactive system of monitoring intelligence, news reports, and staff or non-governmental referrals for evidence of Gross Violations of Human Rights (GVHR) and investigating them.⁸¹ Thus the structure was better positioned to increase accountability from

76. Foreign Operations, Export Financing and Related Programs Appropriations Acts of 2001 (Pub L No 106-429, 114 Stat 1900, 2000) 563; Department of Defence Appropriations Act of 2001 (Pub L No 106-259, 114 Stat 656, 2000) 8092(2). See also, Serafino et al. (n75).

77. State department guidance has noted that the standard of what is “credible” for Leahy vetting is not the same standard as would be required for evidence in a court of law. U.S. State Department, ‘Overview of the Leahy Vetting Process,’ <https://www.humanrights.gov/2013/07/09/an-overview-of-the-leahy-vetting-process/> accessed 1 March 2017.

78. Skype interview with former U.S. Department of Defence dealing with Afghanistan Leahy Law application, 19 February 2017; interview with representative dealing with Afghanistan Leahy Law issues at the U.S. Department of Defence, Washington, DC, 1 September 2016.

79. Erica Gaston, ‘The Leahy Law and Human Rights Accountability in Afghanistan: Too little, too late or a model for the future?’ Afghanistan Analysts Network (Kabul, 5 March 2017).

80. Skype interview with former U.S. Department of Defence dealing with Afghanistan Leahy Law application, 19 February 2017; interview with representative dealing with Afghanistan Leahy Law issues at the U.S. Department of Defence, Washington, DC, 1 September 2016.

81. Skype interview with former U.S. Department of Defence dealing with Afghanistan Leahy Law application, 19 February 2017. The language of the Leahy law would suggest that it only has to be applied to other states’ forces, so it arguably would not have had to be applied in the initial years when there was a less formal integration of ALP into

2014 onward - both because the threat of funding cut-offs might potentially create deterrents against misconduct (assuming ALP leaders were aware of this stick) and pressure the Afghan government to apply its own accountability mechanisms. Particularly from 2014 onward, several prominent units have been blocked from U.S. support due to the Leahy law, although reporting on which units is not public and many of the units or commanders were later remediated.⁸²

However, the strengthening of the Leahy law's top-level framework coincided with the withdrawal of many of the ground resources who might have tipped off or investigated allegations of rights violations, including the pullback of most SOF forces from a tactical level of engagement with ALP. This would significantly counter-balance the structural improvements, especially over the forces operating in remote, rural districts, and with the weakest institutional constraints like the ALP. In addition, while interviews suggested that the Leahy law's mechanisms were strengthened in Afghanistan, there is also substantial evidence that in many cases the DoD did not apply it as regularly or rigorously as the mechanisms might suggest. A 2017 U.S. DoD Inspector General's report into allegations of child sexual abuse by ANSF found that DoD was not applying the Leahy law "in a timely manner" and that loose definitions and mixed messages to subordinates created a risk that personnel would not consistently catch gross violations of human rights committed by Afghan forces receiving U.S. funding.⁸³

3.3.2. International Humanitarian Law & Due Diligence

Although the larger bulk of this article is focused on accountability for local

MoI. U.S. officials have long said that regardless of this policy they have applied it to the ALP as a policy matter, although this may not have been true in the very earliest period. However, there are exceptions to whether the Leahy law must be applied, with particular waivers in Afghanistan. For a broader discussion, see Gaston (n80).

82. Author interview with Deputy Assistant Secretary of State Dafna Rand and colleagues, U.S. Department of State, Washington, DC, 29 August 2016 (author interview available upon request. According to State department and department of defence sources, the highest rates of 'remediation' (the process by which funding can be restored when some form of judicial or administrative measures are taken to address the violation) were at the time in Afghanistan. *ibid*. Author interview with representative dealing with Afghanistan Leahy Law issues at the U.S. Department of Defence, Washington, DC, 1 September 2016; Skype interview with former U.S. Department of Defence dealing with Afghanistan Leahy Law application, 19 February 2017.

83. United States Department of Defence, Inspector General, 'Implementation of the DoD Leahy Law Regarding Allegations of Child Sexual Abuse by Members of the Afghan National Defence and Security Forces' (Washington, DC, 16 November 2017) <https://media.defence.gov/2017/Nov/15/2001843802/-1/-1/1/DODIG-2018-018_CHILD_SEXUAL_ABU.S.E_V2_508_R_REDACTED.PDF> accessed 25 November 2017. For the background on what prompted this investigation and a parallel SIGAR investigation, see Paul Mcleary, 'After Congress Pushes, Pentagon Expands Look at Alleged Afghan Child Abuse' Foreign Policy (Washington, DC, 22 February 2016) <http://foreignpolicy.com/2016/02/22/after-congress-pushes-pentagon-expands-look-at-alleged-afghan-child-abuse/> accessed 25 November 2017.

forces, given the heavy U.S. engagement in supporting these forces, it is worth considering any U.S. liability for their actions, given that U.S. forces were responsible for standing up and supporting actors who then engaged in substantial abuses. The U.S. practice of establishing some level of vetting and training mechanisms was without doubt more motivated by U.S. domestic regulations (as with the Leahy law) and efforts to win greater support for supporting the ALP on a policy basis, rather than a concern for international legal liability. Nonetheless, it is also interesting to consider to what degree such efforts might be obligated by international law.

Under the International Law Commission's Draft Articles on State Responsibility, states may be held responsible for the conduct of persons or groups that are not agents or subunits of that state "if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."⁸⁴ However this rule, has been interpreted extremely narrowly in international jurisprudence. Under the International Court of Justice decision in the *Nicaragua* case (1986), acts would only be attributable where the state has "effective control of the military and paramilitary operations in the course of which the alleged violations were committed."⁸⁵ The court went on to clarify that "effective control" was an extremely high bar. In the immediate *Nicaragua* case, the U.S.' "financing, organizing, training, supplying and equipping" the local armed groups in Nicaragua, and even "selection of its military or paramilitary targets, and the planning of the whole of its operation" was found to be "insufficient" to attribute responsibility.⁸⁶ Similar to the groups discussed in the *Nicaragua* case, at least the early iterations of ALP the U.S. engaged (in coordination with the Afghan government) in selection, training, supplying, equipping, and directing ALP units; however, according to the *Nicaragua* standard such actions would be insufficient to trigger U.S. responsibility for the acts of individual ALP units. In fact, because the *Nicaragua* threshold is so high, even the acts of the campaign forces, the shadowy militias stood up and accompanying U.S. SOF and covert missions, would likely not be attributable to the U.S. Though the U.S. might have trained, equipped and directed the whole of their operations, this still might be found to be "insufficient" under the *Nicaragua* bar unless it could be proven that

84. International Law Commission (ILC), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001, Yearbook of the International Law Commission 26, art. 8) http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf accessed 9 November 2017.

85. International Court of Justice, *Military and Paramilitary Activities (Nicaragua v U.S.)*, 1986, §115.

86. International Court of Justice, *Military and Paramilitary Activities (Nicaragua v U.S.)*, 1986, §115.

U.S. forces explicitly ordered the acts that gave rise to international law violations. The *Nicaragua* decision has received a fair amount of criticism, and scholars and international criminal jurisprudence have proposed alternate standards. In *Prosecutor vs. Tadic* (1999), the ICTY Appeals Chamber rejected the *Nicaragua* “effective control” standard and established a standard of “overall control beyond mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.”⁸⁷ Although how this would be extended is also debatable, it arguably creates a level of responsibility closer to what might capture U.S. engagement with ALP. Nonetheless, the ICJ standard is arguably considered the more authoritative, and under this standard, the U.S. likely bears no direct responsibility for the conduct of ALP or other militia groups. In addition to state responsibility, the U.S. may also owe some obligation to regulate militias it supports under international humanitarian law (IHL), the *lex specialis* in times of conflict. Within IHL there is a basic principle of due diligence for ensuring respect for IHL, which stems from Common Article 1 of the Four Geneva Conventions and Additional Protocol I. Common Article 1 obliges all state parties “to respect and ensure respect for the [Conventions] in all circumstances.” This provision is also considered to be part of customary international law. While likely relevant, but the exact interpretation and level of obligation imposed by this due diligence principle is unclear and disputed. The ICJ in *Nicaragua* interpreted it as an obligation for states to avoid actions that might assist IHL violations.⁸⁸ The jurisprudence so far has not gone so far as to impose a strong affirmative duty to prevent violations.⁸⁹ However, many have argued that state practice has implied a more affirmative obligation, or that at a minimum, this provision requires a basic level of due diligence, such that where states are in a position to do so, they should use their influence to prevent violations.⁹⁰ This would seem to imply a greater obligation in situations in which

87. *Tadic* §145.

88. See for example *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.)* (1986) I.C.J. 14, §220.

89. *Id.* For an article arguing for a more affirmative obligation, see Knut D rmann & Jose Serralvo, ‘Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations’ (2015) *International Review of the Red Cross* 1, 5 - 6. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (2004) I.C.J. §131.

90. For a larger discussion, see Bruce Oswald, *Civil Defence Groups: Developing Accountability* (United States Institute of Peace Special Report, August 2014) https://www.usip.org/sites/default/files/SR350_Civil_Defence_Groups_Developing_Accountability.pdf accessed 9 November 2017; Knut D rmann and Jose Serralvo, ‘Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations’ (2015) *International Review of the Red Cross* 5, 6.

a state is in a position to influence and prevent potential violations, for example, because it has an active support relationship with an actor who might engage in such violations.

These standards suggest that despite the close support and relationship between the U.S. and the ALP, among other groups, it would have no direct responsibility for any ALP violations. Under Common Article 1, it would have an obligation not to encourage violations by ALP and some amorphous obligation to use its influence to prevent and deter violations. While some might argue it had not done all that it might, the U.S. has arguably met a basic level of due diligence through its encouragement of vetting and monitoring, and provision of basic training, including insisting on some level of basic training and awareness on laws of war and human rights.⁹¹

3.3.3. International Criminal Law - the ICC Investigation

Afghanistan became a state party to the Rome Statute of the International Criminal Court (ICC) in 2003. Under Article 17, where a state party is not willing or able to prosecute international crimes committed on its territory (those crimes defined in the Rome Statute), the ICC may exercise its jurisdiction.⁹² In November 2016, the chief prosecutor of the ICC submitted a request to a pre-trial chamber of judges to open an investigation into war crimes in Afghanistan.⁹³ If this request were approved, it would be the first step toward a formal ICL inquiry and potential exercise of international criminal law jurisdiction over crimes committed in Afghanistan. The chief prosecutor's request (non-public) likely included allegations against a range of Afghan authorities, anti-government actors, and international actors, in particular U.S. actors.⁹⁴ Although the scope of the request, and which parts of it might go forward, is not clear, some of the allegations reportedly involved ALP units and so may provide an additional

91. Many observers and human rights advocates have been justifiably sceptical of whether such training achieves even basic compliance and awareness.

92. For a summary of the applicable crimes, as applied to the most prevalent allegations in Afghanistan, see UNAMA, Midyear Report 2017, 62–65.

93. Kate Clark & Ehsan Qaane, 'One Step Closer to War Crimes Trials (2): ICC Prosecutor requests authorisation to investigate,' Afghanistan Analysts Network (Kabul, 5 November 2017) <<https://www.afghanistan-analysts.org/one-step-closer-to-war-crimes-trials-2-icc-prosecutor-requests-authorisation-to-investigate/>> accessed 25 November 2017.

94. "In the 2016 Preliminary Examination Report, the OTP named the Afghan intelligence agency, the National Directorate of Security (NDS), the Afghan National Police, Afghan National Army, Afghan National Border Police and the Afghan Local Police as alleged perpetrators and said it estimated that 35 to 50 per cent of all conflict-related detainees "may be subjected to torture," carried out in a "state of total impunity." *ibid*.

accountability framework in the future.

4. Conclusions

ALP are often derided for being unaccountable militias in uniform, but as the forgoing sections have suggested they have at least technically been subject to multiple, overlapping accountability and oversight mechanisms, arguably more than other Afghan state actors. However, all three accountability approaches struggled to overcome the basic hurdle of enforcing accountability in areas where both state control and rule of law are weakest. In many cases, lack of political will appeared to be an issue. International and Afghan forces needed security partners and were willing to de-prioritize accountability issues for those who could command forces and hold off Taleban (or claim to). However, there have also been practical hurdles that provide important lessons for designing similar pluralistic accountability frameworks. For both the Afghan government and the international forces, there have not been sufficient ground resources to assert authority over these actors. ALP were stood up in precisely the areas where there were gaps in other security personnel. Even in the early years, SOF were spread thin and would not have been able to provide full oversight over the number of forces stood up. Without ground resources, connecting these local forces up with Kabul-based or internationally-based (in the case of U.S. extraterritorial regulatory mechanisms) mechanisms and institutions was difficult.

Community actors, who were on the ground and thus did not face these issues, were designed to partially fill this gap, and also to address the broader community legitimacy issues. This was in part because international forces sought to create ALP (and their predecessor local force models) in contested areas, and in these areas community structures also tended to be weakest.⁹⁵ Decades of conflict, socio-economic structures, and Taleban targeting had weakened tribal and community structures, while contributing to an environment that favoured

95. This was a problem across all efforts to create bottom-up, grassroots structures, whether in security, governance, or rule of law. Discussing the parallel efforts to stand up community dispute resolution structures, Gaston and Jensen argue that the bottom-up strategy failed in part because in the areas where donors sought to use community actors as a stand-in for the weak or failing state, community mechanisms were also frail and not up to the challenge. "[C]ommunity mechanisms tended to also be weaker in areas that the state was weak, for the same reasons" - namely the repeated cycles of conflict, political upheaval, and direct Taliban targeting. Gaston and Jensen (n5) 74. See also Noah Coburn and John Dempsey, 'Informal Dispute Resolution in Afghanistan' (August 2010) United States Institute of Peace Special Report, 3 <https://www.usip.org/sites/default/files/resources/sr247_0.pdf> accessed 15 November 2017; Erica Gaston, Akbar Sarwari and Arne Strand, 'Lessons Learned on Traditional Dispute Resolution in Afghanistan' (April 2013) United States Institute of Peace, <https://www.files.ethz.ch/isn/166048/Traditional_Dispute_Resolution_April2013.pdf> accessed 15 November 2017.

militias, and 'rule by the gun.' The risk of community actors being too weak to constrain ALP actors was not only due to the locations chosen but by derogations from the model for selection and vetting. Security or other interests repeatedly trumped community interests and vetoes throughout the lifespan of the project, empowering local actors whom communities could not control. In such conditions, community elders were no match to restrain powerful, predatory, and self-interested local commanders.

What this overall analysis suggests is that while there may be a desire to make up for the shortfalls in weak or problematic state structures by increasing accountability through alternate 'informal' frameworks or through international accountability, these alternate frameworks may face as many or more issues than the state mechanisms. This is not to discourage further development of international accountability mechanisms or recognition of the existence of legal pluralism and the community mechanisms that do exist. Greater international accountability or accountability mechanisms by a foreign state may be appropriate where that state does have substantial responsibility for actors' conduct. Further, as the experience in the early years in Afghanistan demonstrated, failure to recognize and consider the contributions of local, customary and alternative frameworks, and their contribution to rule of law, proved to be a mistake. In addition, if some of the implementation issues were partially addressed, it could be that the international and community accountability frameworks might have contributed an additional layer of accountability. However, what the experience of the ALP accountability efforts suggests is that there may be structural reasons that they would be less well positioned to provide accountability than even fledgling state mechanisms, and that these cannot fully substitute for state accountability and control.