

## **The Fall of Kabul:**

### **International Protection in the context of the Armed Conflict and Violence in Afghanistan**

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#### **The Armed Conflict in Afghanistan and Forcible Displacement**

Afghanistan has been characterised by an [almost continuous situation of armed conflict](#) since 1978. More recently, the main actors involved in the conflict included the Afghan National Security Forces (ANSF), supported by the NATO-led International Security Assistance Force/Resolute Support Mission, fighting against the Taliban. However, in the last few months, the Taliban gained control of an [increasing number of provinces, including provincial capitals](#). Things moved fast. On 15 August 2021, President Ashraf Ghani fled Kabul leaving the Taliban to [take over the Presidential Palace](#) and announce the restoration of the Islamic Emirate of Afghanistan.

As a direct consequence of the violence that has characterised the conflict in Afghanistan for several decades, Afghans constitute the second largest [refugee population](#) in the world. In the European Union (EU), asylum seekers from Afghanistan have been in the top three countries of origin since 2015. Despite the prolonged conflict in Afghanistan, Governments of EU Member States have regularly returned or attempted to return Afghans. Even whilst the Taliban were overtaking a large amount of territory and only 10 days before they took over Kabul, Ministers from Austria, Belgium, Denmark, Germany, Greece and the Netherlands [wrote](#) to the European Commission to emphasise “the urgent need to perform returns, both voluntary and non-voluntary, to Afghanistan”.

The number of refugees fleeing Afghanistan is reflective of a larger trend worldwide whereby [most refugees](#) in the world are fleeing situations of protracted armed conflict. As the number of [forcibly displaced people](#) in the world continues to grow every year, adequately understanding the nature of violence in situations of armed conflict is essential for the effective protection of refugees.

#### **International Protection for persons fleeing Armed Conflicts in the European Union**

Although the principal legal instrument for the protection of refugees globally is the United Nations Refugee Convention, various regions such as the EU, have created separate protection statuses for persons fleeing ‘indiscriminate violence’ in situations of armed conflict. Article 15(c) of the [EU Qualification Directive](#) provides for subsidiary protection where there is a “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”. The Qualification Directive thus establishes different legal categories of international protection, creating a distinction between refugees and beneficiaries of subsidiary protection under Article 15(c) of the Qualification Directive whose rights and entitlements differ. The main differences relate to the length of residence permits, travel documents and social welfare. Most noteworthy is the length of the residence permit, which impacts on prospects of integration in the host country.

In order to understand whether the protection needs of persons fleeing armed conflicts are being met in the EU, I conducted a study between 2016 and 2019<sup>1</sup> investigating how the judiciary in various EU Member States (Belgium, Denmark, France, Spain, the Netherlands and the United Kingdom) determine the asylum appeals of persons fleeing Afghanistan, Iraq and Syria. I found that asylum judges understand situations of armed conflict, such as the war in Afghanistan, predominantly through the perspective of conventional warfare and a notion of territoriality. Broadly described, such a perspective defines armed conflicts as well-defined events during which fighting parties engage in combat along identifiable front lines in order to occupy territory.

A conventional warfare perspective driven by an emphasis on territoriality means that when judges decide asylum appeals, they tend to consider that factors regarding the location of traditional battlefronts, the number of armed confrontations between parties, such as the ANSF and the Taliban, and whether those parties physically occupy territory are determinative of whether a person is at risk on return to their home area in the country of origin.

This approach, however, ignores the wealth of theoretical and empirical knowledge about violence in armed conflicts. Prior to the fall of Kabul, the characteristics of the conflict in Afghanistan reflected that of other contemporary armed conflicts such as Iraq and Somalia. [Kaldor](#) argues that these features include the rise of non-state armed groups, the weakening of State institutions and the use of terror as a method of violence. Significantly, [Karp](#) points to non-state armed groups' relative control over the conduct of hostilities in these current types of conflict.

Consequently, a conventional warfare lens undermines asylum decision-making as it focuses solely or excessively on conventional fighting rather than on non-state armed groups' objectives, strategies, means and their relative power over the conduct of hostilities. Importantly, it also fails to account for how conflicts evolve over time as non-state armed groups constantly adapt and modify their tactics leading to protracted insecurity and increasingly severe human rights abuses.

### **How the Afghan Armed Conflict and Violence were (mis)understood**

So, what does the recent fall of Kabul to the Taliban tell us about interpreting refugee law in Afghan asylum cases specifically, but also in asylum claims from other contemporary armed conflicts? If anything, it is that asymmetrical conflicts – namely where non-state armed groups cannot match the conventional military power displayed by the State – are not indicative of weakness by non-State armed groups in conflict.

The events illustrate how asylum judges failed to adequately understand not only the conflict and violence in Afghanistan generally but also more specifically the relative power and strategic logic of the Taliban. By assessing the conflict in Afghanistan from a conventional warfare perspective, asylum decision makers made the assumption that because the Taliban did not have an air force or heavy weaponry such as that owned by the ANSF, they had less power and military advantage than the State forces. Relocation to Kabul was considered safe for most Afghans because asylum decision-makers failed to take into consideration and/or place sufficient weight on the non-conventional strategies and tactics adopted by the Taliban for years. Thus, many EU Member States considered that even if some Afghans originated from areas with heavy fighting or controlled by the Taliban, most could nonetheless safely relocate to Kabul. However, the capacity of the Taliban to overthrow the Afghan Government, illustrates their relative power in the conflict despite not being able to match the armed

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<sup>1</sup> Funded by the Arts and Humanities Research Council.

forces with conventional weaponry. The impact on civilians from the violence exercised by the Taliban was thus more severe than acknowledged.

Was it inconceivable that the Taliban would take over Kabul? The European Asylum Support Office's own Country of Origin Information report on [Anti-Government Elements](#) from August 2020, emphasised the conclusions of the United Nations Security Council according to which the group "appears well prepared for the 2020 fighting season and raising the tempo of its attacks on Afghan government targets while trying to avoid provoking the United States. Differences in interpretation of the agreement could lead to periodic crises in its implementation. Hard-line Taliban believe that they can and will still achieve their aims by force".

As events unfolded, many EU Member States eventually announced they would [halt returns](#) to Afghanistan. However, it is unclear whether international protection will be provided to Afghans already in Europe or those yet to arrive. There are also question marks regarding the type of protection they may be granted. Will they be given refugee status or the lesser status of subsidiary protection? In the United Kingdom (UK) for example, Home Office Presenting Officers who represent the Secretary of State for the Home Department before the Immigration and Asylum Chamber Tribunal appeared to be [seeking adjournments](#) of Afghan asylum appeals due to be heard by the Tribunal.

### **Is there still an Armed Conflict in Afghanistan?**

With the drastic changes in the geo-political situation of Afghanistan, questions concerning the continued relevance of subsidiary protection for Afghans in Europe are bound to arise. The Court of Justice of the European Union established in the case of [Diakité](#) that an internal armed conflict exists for the purpose of Article 15(c) of the Qualification Directive "if a State's armed forces confront one or more armed groups or if two or more armed groups confront each other". The definition is much less onerous than under International Humanitarian Law. It is too early to predict how the situation is likely to unfold and how different actors involved in the conflict will respond to recent developments. However, initial information suggests that confrontations between the Taliban (now the State) and armed groups are likely to unfold as reports of a [resistance movement](#) emerge. [Regional leaders](#) with local influence and fighters might also resist the Taliban's consolidation over the territory. There are also other armed groups such as the Haqqani network operating in Afghanistan. Further, [divisions](#) within the Taliban are being exacerbated by the process of appointments to the various Ministries and administrative institutions. Finally, the [attack on Kabul airport](#) by Islamic State Khorasan Province (ISKP) may indicate the re-emerge of actors in the conflict. The coming months and years therefore are likely to see the continuation of armed confrontations.

More specifically, the situation in Afghanistan might still be described as an asymmetrical conflict, whereby one side to the conflict maintains greater military technology than the other. In contrast with the situation before the fall of Kabul, that balance may shift in favour of the Taliban who have now acquired the conventional technology that belonged to the ANSF, including [combat aircrafts, helicopters, Humvees, guns and ammunition](#), against the [National Resistance Front](#) operating with more limited means from the North of the country, regional leaders or even break-away factions from within the Taliban movement. However, as explained above, this would not necessarily imply that they have a greater advantage and thus, the conflict is likely to persist.

What this indicates, in any event, is that the protracted conflict in Afghanistan is far from over and hence, it is essential that knowledge and understanding of contemporary armed conflicts start to permeate refugee status determination. The first step would be acknowledging that non-state armed

groups do not merely contribute to a breakdown in law and order but actively endorse and develop a [strategic culture](#) in order to achieve their aims and objectives. In everyday practice, it would require a greater engagement with knowledge from the field of security studies generally and in relation to Afghanistan in particular.

### **Current International Protection Needs of Afghan Nationals**

The United Nations High Commissioner for Refugees' view is that recent events have increased the [international protection needs](#) of Afghans. Its August 2021 Position on Returns to Afghanistan however is limited to supporting a moratorium on returns, including of Afghans whose asylum claim had already been rejected prior to the fall of Kabul, pending its assessment of Afghans' international protection needs.

As explained above, whether Afghans could currently demonstrate a "serious and individual threat to [their] life or person by reason of indiscriminate violence in situations of international or internal armed conflict" to benefit from subsidiary protection in the EU may require some further clarity regarding the parties engaged in the evolving conflict, their interests, strategies and means. Still, there appears to be a number of actors still fighting for control with resulting levels of violence impacting on civilians.

One thing is certain, however. The Taliban are now in charge of the administration of the State they have reclaimed as the Islamic Emirate of Afghanistan. Although most recent reports of violence have emphasised the risks faced by former Government employees, former members of the national armed forces and those who worked with the international forces, living under Taliban rule entails its own risks for the general population. Asylum litigation in the past few years, in jurisdictions like the UK, centred on the reasonableness of internal relocation to Kabul precisely because it was accepted that some Afghans from areas controlled by the Taliban would be at risk if they returned home. The fall of Kabul means that a return to Afghanistan today is a return to living under Taliban rule, based on a [strict interpretation of Sharia law](#).

An analogy can be drawn with living under Al-Shabaab rule in certain parts of Somalia.<sup>2</sup> The European Court of Human Rights concluded in the case of [Sufi & Elmi](#) that the areas controlled by Al-Shabaab experienced the lowest levels of generalised violence but the worst human rights conditions (para. 272). Al-Shabaab's strict interpretation of Sharia law and its application to those living in areas under its control or who travel through those areas amount to "a repressive form of social control" (para. 273). The Court's summary of the evidence was that Al-Shabaab "are concerned with every little detail of daily life, including men's and women's style of dress, the length of men's beards, the style of music being listened to and the choice of mobile phone ringtone. Women appear to be particularly targeted. In addition to strict dress codes, women in al-Shabaab controlled areas are not permitted to go out in public with men, even with male relatives, and have been ordered to close their shops as commercial activity permitted them to 'mix with men'" (para. 273). The evidence considered by the Court demonstrates that punishments inflicted by Al-Shabaab for failing to comply with their rules include "stoning, amputation, flogging and corporal

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<sup>2</sup> With thanks to Stephanie Huber, co-founder and Director of Asylum Research Centre (ARC) Foundation, for highlighting this potential parallel during an informal discussion. Opinion her own and not necessarily that of ARC.

punishment”, treatment so severe as to amounting to torture, inhuman or degrading treatment or punishment prohibited under Article 3 of the European Convention on Human Rights (para. 276).

Reports regarding the types of rules and punishments imposed by the Taliban in areas they already controlled before the fall of Kabul are strikingly similar. Another of [EASO’s report](#) discusses the Taliban’s parallel justice system where punishments include execution, mutilation and stoning to death, including women being flogged for going out without a male guardian or for wearing a burqa without covering the face (p. 21). At the end of last year, the Washington Post reported on [governance under the Taliban](#) including routine public beatings and executions or imprisonment for minor infractions of rules concerning social life and the complete absence of women from public life. Human Rights Watch has documented the [everyday experiences of people living in Taliban-held districts](#).

Comparably to Al-Shabaab, Taliban governance and justice is focused on punishment for prohibited social behaviour. The consequences of flouting these social conduct rules would similarly amount to inhuman or degrading treatment or punishment prohibited under Article 3 of the European Convention on Human Rights, understood as serious harm in the context of refugee protection. Serious harm at the hands of the Taliban would amount to persecution because as the Taliban now govern Afghanistan, there is no longer any question of whether there is sufficiency of protection from their human rights abuses.

Finally, if one was to ask whether Afghans could avoid persecution by simply complying with these rules, or in other words ‘playing the game’, any such requirement would be contrary to the principle in refugee law that refugees should not be compelled to take avoiding action, such as being [discreet about their sexual orientation](#), [abstaining from their religious practices](#) or [pretend that they support the ruling party](#) to avoid persecution. Any Afghan who does not genuinely adhere to the Taliban’s interpretation of Sharia law will have a good claim to Refugee Convention protection. Those who have lived abroad for a longer period of time or have not recently lived under Taliban rule, for example if they resided in Kabul, may be particularly at risk of being seen to transgress these rules. Indeed, the European Asylum Support Office’s [Country Guidance report on Afghanistan](#) notes that “Afghans identifying with Western values may also be targeted by insurgent groups, since they can be perceived as un-Islamic” (p. 81). Thus, living under Taliban rule may create a risk of persecution for reasons of religion, likely to fulfil the requirements for refugee status.