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Self-Defence and its Dangerous Variants: Afghanistan and International Law

RESEARCH

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ABSTRACT

The question as to whether Operation Enduring Freedom was justified under international law may seem one that has passed its practical use-by date. Yet, as may be disturbingly apparent from current global conflicts, justifications relied on by certain states in the past can influence their credible use by other states in the future and diminish opportunities to refute them. In this essay, the authors examine the international legal arguments used by the United States and its allies to justify the intervention in Afghanistan. They look at the impact these justifications had on the authority, purpose and expectations of Operation Enduring Freedom, as well as on relevant frameworks for cooperation and acceptable limits of collateral damage. The authors also look at the impact these justifications have had on interpretations of the law of self-defence in modern conflict more broadly.

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INTRODUCTION

> *'Let's just pause, just for a minute and think through the implications of our actions today, so that this does not spiral out of control…'*
>
> - US Representative Barbara Lee, 14 September 2001

The use of force is prohibited in international law. This simple but fundamental legal principle can be obscured in a geo-political context littered with conflict and threatened conflict where the exceptions are more often seen as the rule. Relatedly, there is a tendency to dismiss international law as a 'marginal enterprise' at moments of political crisis [1, p26]. This is why, in the immediate wake of the September 11 attacks, legalistic objections to the United States' use of force against the perpetrators (and enablers) of these attacks could not help but sound reedy and off-key. However, twenty years later, the world is confronted by images of Afghanistan tumbling back under Taliban control, this time against the tragic backdrop of a military operation that cost 175,000 military and civilian lives and more than 3.2 trillion US dollars. It may be thought at this point that international legal arguments come too late. Yet, for international law, 'hindsight is a necessary vice'.[1] The practice of states, even that forged in heated times of war and crisis, can harden into enduring legal principles unless objected to or criticized in its aftermath. In this short essay, we examine the legal justifications for the military intervention in Afghanistan and consider the potential dangers in allowing these justifications to endure as part of the legal framework governing the use of force in international relations.

Article 2(4) of the UN Charter, often described as the Charter's cornerstone, provides that 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations' [2, p.xii–xiii]. In the ordinary course of things, the use of force against a state to achieve regime change, such as seen in Afghanistan in 2001, would be a manifest violation of the Charter. It may even amount to an unlawful use of force warranting higher censure as an act of aggression.[2] Yet there are exceptions. First, the prohibition does not cover the situation where the government of a state consents to the use of force by another state within its territory [3]. Second, the Charter establishes a collective security framework, vesting 'primary responsibility' in the UN Security Council for the maintenance of international peace and security, and allowing the Council to authorize measures including the use of force where 'necessary to maintain or restore international peace and security'. Third, Article 51 of the Charter notes that nothing in the Charter impairs the right of a state to use force in individual or collective self-defence in the event of an armed attack until the Security Council is able to take necessary measures.

These three circumstances—consent, Security Council authorisation, or self-defence—are the only circumstances in which the use of force is not prohibited in international relations. Each of these justifications has its own elements and limitations. The US intervention in Afghanistan was justified on the basis of the doctrine of self-defence and, at least initially, faced few objections.[3] Yet despite (or perhaps because of) the initial wide support, US action in Afghanistan has indelibly affected contemporary understandings of the doctrine of self-defence, and generated a number of variants of the traditional doctrine. This has happened to the extent that it has become common to divide analysis of self-defence (and indeed *jus ad bellum* more broadly) into pre- and post-9/11.[4] Christine Gray's seminal volume on *International Law and the Use of Force* notes that that 'the US invasion of Afghanistan…led to a fundamental reappraisal of the law on self-defence' [4, p200]. Below, we analyse these variants and assess the extent to which they impacted the authority, purpose, expectations, cooperation with and acceptable collateral damage in the context of the Afghanistan intervention.

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1 Borrowing from Hilary Mantel's description of the historian's situation.

2 See definition in Rome Statute, Art 8 *bis*.

3 See reference to objections (on the basis of a preference for UN approval) by Cuba, Belarus and the Organization of the Islamic Conference of Foreign Ministers [3, p630–631].

4 See, for example, the three parts of *Use of Force in International Law* [4] divided between (I) The Cold War Era; (II) the Post-Cold War Era; and (III) the Post 9/11-Era.

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I. RUSH TO UNILATERAL ACTION: THE 'FIRST OPTION' VARIANT

> *'Two opportunities stand above all others. First was the chance to convince the Taliban to hand over Osama bin Laden before the outbreak of war. Second was the opportunity to include the Taliban in the new political settlement. In both cases, the urgency of the moment overcame diplomacy'.*
>
> - Carter Malkasian, 2021

Prior to 9/11, it was 'self-evident and generally recognized' that self-defence was only available as an action of last resort [5]. This 'last resort' requirement is a component of the principle of necessity. The most famous articulation of this doctrine derives from the Caroline Affair in 1837. Following this incident on the Niagara River, which involved the United States, Great Britain, and the Canadian independence movement, correspondence between US Secretary of State Daniel Webster and UK Foreign Secretary Lord Ashburton recorded that a state must show 'a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation'.

The 'last resort' criteria, or the requirement to show 'no choice of means', is usually described in terms of an obligation to establish the non-availability of measures other than the use of force. However, the broader interpretation is that a state can only resort to self-defence when there are no other 'realistic' alternatives, including the non-availability of the other justifications for force, such as host state consent or Security Council authorisation. This interpretation suggests a hierarchy between the three available justifications for the use of force: first, state consent; second, Security Council authorisation; and third, self-defence.[5] This positioning of self-defence as an option of last resort is seemingly justified by Article 51's qualification that nothing shall impair the inherent right of self-defence 'until the Security Council has taken measures necessary to maintain international peace and security'.

A little-discussed aspect of the US response to 9/11 is that it seemingly upended this hierarchy. On 12 September 2001, the UN Security Council passed Resolution 1368, which seemed to immediately cede the ground to the United States, recognizing 'the inherent right of individual or collective self-defence in accordance with the Charter'. It has been suggested that this reflected a deliberate and strategic preference on the part of the US, which elected for unilateral over multilateral action despite clear Security Council 'readiness to take all necessary steps' in Security Council resolution 1368[6] [6, p.635–636, 7].

This suggestion does not rest upon a sufficiently nuanced assessment of the Council's reasoning. It is important to recall that in the moment, it was not only the Americans who were deeply shaken, but the international community as well. There had never been a terrorist attack of the magnitude, complexity and scope of 9/11, and even though the US and its allies had been closely tracking al Qaeda since the late 1980's, their militaries, intelligence services and law enforcement had all missed critical indicators and warnings [8].

Furthermore, the relationship between the Taliban and al Qaeda had been matters of Security Council concern since 1996 [9]. Following the 1998 embassy bombings in Nairobi and Dar es Salaam, the effort assumed global importance, and the Clinton administration worked aggressively through diplomatic, intelligence and law enforcement channels to find a way to bring Osama bin Laden to justice [9 p121–126,205–207]. Subsequently, the Security Council passed four resolutions between 1998 and 2001 that specifically cited the threat from al Qaeda and declared the supporting actions of the Taliban government in Afghanistan to be a threat to international peace and security [10–13]. These resolutions were the foundation for the diplomatic activity that immediately followed the 9/11 attacks, including Resolution 1368. They indicate that while willing to act unilaterally, the US was aware that the transnational nature of al Qaeda's networks and operations still demanded a multilateral approach.

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5 According to Bruno Simma's edited *Commentary on the UN* Charter, 'the right of self-defence embodied in Art. 51 is only meant to be of a subsidiary nature': 804. Adil Haque has gone so far as to describe self-defence as an 'exception' to Security Council authorisation: *https://www.justsecurity.org/70987/the-united-nations-charter-at-75-between-force-and-self-defense-part-two/*.

6 Criticism of the US decision not to follow a multilateral approach were made by Cuba, Belarus and the Organization of the Islamic Conference of Foreign Ministers: [6 p630–631]. See related criticism in Delbrück, 'The Fight Against Global Terrorism: Self-Defence or Collective Security as International Police Action' (2001) 44 German Yearbook of International Law 9; Fassbender, 'The UN Security Council and International Terrorism' in Bianchi, *Enforcing International Law Against Terrorists* (2004), at 83, 88–89.

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The question remains as to whether the 'last resort' threshold had been reached. It is clear that the law enforcement measures authorized in Resolutions 1267 [11] and 1333 [12] had not yet fully been exhausted. Both resolutions authorized the use of measures to halt the funding of Bin Laden's and al Qaeda's operations, but 'there was as yet no coordinated U.S. Government-wide strategy to track terrorist funding and close down their financial support networks' [8 p119]. More problematically, there is also a strong counterfactual if we consider the availability of diplomatic options. Although such alternatives appeared to have been exhausted, the urgency of the moment and unprecedented international unity following the 9/11 attacks may have created a new opening for negotiations with the Taliban. According to former Bush administration officials, even though his national security council had concluded that any attack on al Qaeda would have to take out the Taliban as well, President Bush was not initially ready to commit to a course of action that would lead to regime change [8 p315, 14]. Instead, Bush at first maintained his position that if the Taliban would agree to turn al Qaeda leaders over to the US, close all terrorist camps, free foreign prisoners, and comply with UN Security Council resolutions, the US would leave the regime in place [9 p332–333, 14]. By September 18, as Secretary of State Powell lined up support for an eventual invasion of Afghanistan, Pakistani interlocutors reported that Taliban leader Mullah Omar had considered the US proposal, and 'was not negative on all these points' [9 p333].

Bush did not expect the Taliban to acquiesce, but in that moment, it was not yet an unrealistic option. With patience and sustained strategic pressure, diplomacy may have worked. Historian Carter Malkasian, a US State Department official in Afghanistan who later served as political advisor to the commander of the NATO forces, exhaustively researched the Taliban's decision-making process in the early days following September 11. Malkasian concludes that while there may never be a definitive answer on whether a diplomatic solution could have been reached, there is strong evidence that–but for a combination of miscommunication, US political imperatives and the Bush administration's fear of further attacks—a negotiated solution would have been possible [15].

Events overtook such an opportunity. On the evening of September 11, Bush had privately declared that the US would punish not just the perpetrators of the attacks, but those who harboured them as well [9 p330]. Over the days and weeks that followed, his resolve hardened and expanded to encompass the broader aim of 'the elimination of terrorism as a threat to our way of life' [9 p331]. Meanwhile, communicating through the Pakistanis, Mullah Omar agreed that he would ask Bin Laden to leave Afghanistan and further indicated that he would be willing to surrender him to a third country other than the US [15]. With the American public clamouring for vengeance, however, this had become unacceptable for Bush. Within days, the window for an agreement that would avert unilateral action slammed shut and with the initiation of US airstrikes on Afghan targets on October 7, Taliban resistance to what they saw as Western interference had hardened as well. Separated by time and absent the emotion, one can argue that by prematurely abandoning diplomatic negotiations, the 'last resort' requirement as a prerequisite for self-defence may not have been met.

The further tragedy is that the pre-invasion refusal to negotiate with the Taliban carried over into the post-invasion Bonn Conference which charted Afghanistan's political future. Western representatives envisioned the Bonn Agreement as a power sharing arrangement that would form the basis for a modern democracy, but at the US's insistence, the Taliban, and by extension the percentage of Afghan society that sympathized with its national vision, were excluded. Many experts believe that the refusal to include the Taliban, or to acknowledge the interests it represented, set the conditions for the twenty years of violent conflict that followed [9 p455–466, 16, p877].

II. INVASION OF AFGHANISTAN: THE 'COMPLICITY' VARIANT

> *'Nothing did more for our ability to combat terrorism than the President's decision to send us into the terrorists' sanctuary. By going in massively, we were able to change the rules for the terrorists. Now they are the hunted. Now they have to spend most of their time worrying about their survival. Al-Qa'ida must never again acquire a sanctuary'.*
>
> — George Tenet, 2002

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Article 51 of the UN Charter provides that a state may use force in self-defence 'if an armed attack occurs against a Member of the United Nations'. In the wake of the 9/11 attacks, the idea that the US was entitled to use force in self-defence against Al Qaeda terrorist training camps seems to follow as a matter of legal logic. However, the legal position is not so simple. It is complicated by the fact that, unless terrorists are located on the high seas or otherwise outside the territory of a third state, the use of force against terrorist groups will necessarily implicate the use of force against the territorial integrity of the state in which they are located. Terrorist attacks do not in and of themselves justify a military response against the territory or government of a non-consenting state within whose borders members of the responsible terrorist group might be found.

Prior to 9/11, the extraterritorial use of force by a state against terrorists within another state was considered a violation of Article 2(4) [17, p209, 213–214]. In the 1970s and 1980s, such claims to the right to use force (for example, by Israel, South Africa and the US in Libya) were systematically rejected by the international community [7 p377]. In order for self-defence claims to justify the use of force against non-state actors situated in another territory, it was necessary to establish a certain level of involvement on the part of the relevant state. The standard was established in the *Nicaragua* judgment, handed down by the International Court of Justice in 1986. Here, the ICJ determined that an 'armed attack' which sanctioned the right of self-defence included the 'sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein'. A right to self-defence against a state would therefore only arise where it could be established that the state had substantial involvement with the non-state actors launching the attack. In determining the meaning of 'substantial involvement', the ICJ considered that assistance to rebels in the form of provision of weapons or logistical support would not suffice.[7]

In Mullah Omar's retelling, though the Taliban refused to surrender Osama bin Laden, there was no suggestion that they had a substantial involvement in the 9/11 attacks or even that they explicitly endorsed them [18, 19]. Yet to suggest the Taliban was simply a passive provider of sanctuary and incidental support would underplay the extent of their involvement. While the relationship between Bin Laden and the Taliban leadership was sometimes tense, its foundation was deep and personal [9 p125]. By the 1990s, the Taliban were providing bodyguards for Bin Laden, and Afghanistan had become a sanctuary where al Qaeda 'created a terrorist army … with little interference' [8 p237].

There was also an often-overlooked symbiotic aspect to the relationship. In return for sanctuary, 'Bin Ladin invested vast amounts of money in Taliban projects and provided hundreds of well-trained fighters to help the Taliban to consolidate and expand their control of the country' [8 p237]. Thus, US Deputy Chief of Intelligence George Tenet concluded: 'While we often talk about two trends in terrorism—state supported and independent—in Bin Ladin's case with the Taliban, what we had was something completely new: a *terrorist* sponsoring a *state*' [8 p238].

This level of complicity was underplayed in official statements. The US justified the intervention on the basis that 'the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow parts of Afghanistan that it controls to be used by his organization as a base of operation' [20]. The UK explained that its military action was directed against 'Usama Bin Laden's Al-Qaeda terrorist organization and the Taliban regime that is supporting it' [21]. Articulating its support for the intervention, the European Council expressed its view that military action 'may also be directed against States abetting, supporting or harbouring terrorists' [22]. Implicit support was given to this position in Security Council resolution 1373, which imposed an obligation upon states to 'refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists'; 'to deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens'; and to 'prevent the movement

7 It is notable that this determination was the subject of dissent by Judge Jennings and Judge Schwebel, with Judge Jennings describing the Court's restrictive interpretation as 'neither realistic nor just in the world where power struggles are in every continent carried on by destabilization, interference in civil strife, comfort, aid, encouragement to rebels and the like': Jennings, 543–544. See also Schwebel, 349–350.

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of terrorists by effective border controls' (though notably it did not expressly authorize the use of force against states failing to comply with these obligations).

Broad support for the US and UK strikes against Afghanistan has led to suggestions that there has been a reinterpretation of 'armed attack' in the wake of 9/11, emphasizing the level of attribution required between non-state actors responsible for an armed attack and the targeted state. While there is a continuing practice to identify links between the targeted state and the terrorist organization responsible for the attacks, it has been noted that the link appears to have been moderated from 'substantial involvement' to 'complicity'. Christian Tams describes the need to establish that the targeted state 'is responsible for complicity in the activities of terrorists based on its territory—either because of its support below the level of direction and control or because it has provided a safe haven for terrorists' [7 p359,385]. In the Commentary to the United Nations Charter, Randelzhofer offers a reinterpretation of attribution in the wake of 9/11, which proposes that an attack will be

> 'attributable to a State if they have been committed by private persons and the state has encouraged these acts, has given its direct support to them, planned or prepared them at least partly within its territory, or was reluctant to impede these acts. The same is true, if a State gives shelter to terrorists after they have committed an act of terrorism within another State' [23].

Yet it must also be recalled that the intervention against Afghanistan was not merely targeted against the relevant terrorist groups, but that it led to regime change in the targeted state. More obviously than the question of attribution, questions of necessity and proportionality are clearly in play. Indeed, a legal focus on the attribution of the 9/11 attacks to the Taliban seems artificial in a context where the more relevant focus is the Taliban's role in perpetuating the ongoing threat, necessitating actions in self-defence. The lawful purpose of self-defence is not punishment for past acts, but prevention of ongoing threats.[8] The legal question is arguably less a question of attributing the 9/11 attacks to the Taliban than a question as to whether the conduct of the Taliban rendered defensive force against that state's territory and government *necessary*. As Kimberley Trapp argues, complicity may provide evidence of necessity where a state's complicity its territory being used as a base for terrorist operations renders defensive force against terrorists in that state's territory necessary.

This interpretation is more consistent with the strategy that the US pursued during the entire 20-year war. It began with an assessment that, by giving al Qaeda sanctuary in Afghanistan, the Taliban had allowed Bin Laden and his operatives to meet, plan, train recruits, and ensure that they would remain out of the reach of international enforcement action. Afghanistan's diplomatic isolation meant that there were few opportunities for meaningful negotiation, and there was no credible outside presence that could monitor al Qaeda's activities or intent [8]. This was reinforced by the fact that between 1996 and 2001, the US had worked with 'dozens' of foreign governments to disrupt al Qaeda, and engaged in a concerted diplomatic effort to use UN mechanisms to force the Taliban to cooperate with efforts by the international community to bring Bin Laden to justice, to no avail [8]. By 1997, US intelligence officials had come to the conclusion that the road to stopping al Qaeda ran through the Taliban, which meant that any response to 9/11 would logically have to include the possibility of regime change [8]. During the later years of the war, as one administration after another contemplated leaving, the fear that Afghanistan would again become a safe haven became a major political stumbling block to withdrawal, yet arguably in circumstances of less legal justification for their continuing presence.

Looking back to its earliest decisions, it is important to realize that US operations *at that time* could have been justified by reference to the principle of necessity. That is not to say that every state providing safe haven to terrorists can lawfully be the subject of attack (or even regime change). However, as the next section seeks to demonstrate, this may be the legal consequence if the legal justification is based, not in necessity, but in a looser standard of attribution more generally.

8 Reprisals are prohibited in international law and self-defence must not entail retaliatory or punitive actions. [23 p 805, 24].

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III. INCURSIONS AGAINST PAKISTAN: THE 'UNWILLING OR UNABLE' VARIANT

> *'Now I prefer cloudy days when the drones don't fly. When the sky brightens and becomes blue, the drones return and so does the fear. Children don't play so often now and have stopped going to school. Education isn't possible as long as the drones circle overhead.'*
>
> - Zubair Rehman, 13 year-old Pakistani student, 29 October 2013

When considering the scope of US military operations following 9/11, the focus is generally on 'Operation Enduring Freedom' (OEF) in Afghanistan and 'Operation Iraqi Freedom' in Iraq.[9] However, the Bush administration's 'Global War on Terror' (GWOT) was truly global. In all, there were at least 14 named operations within the GWOT constellation, including in the Philippines, the Horn of Africa and the Sahel, as well as against the Islamic State in Syria and Iraq. During his administration, President Obama tried to shift to a more defensive narrative by directing use of the term 'Overseas Contingency Operations' (OCO) instead of GWOT, but the geographic breadth and lethal nature of the operations continued to expand, particularly through the increased use of small special operations teams and unmanned, standoff capabilities such as drone strikes [25].

The US continued to use OEF to describe many of the later operations, including those in Yemen and Somalia, in part to leverage the legality that OEF had ostensibly secured in Afghanistan to more tenuous claims, including a right of self-defence against terrorists operating from states 'unwilling or unable' to deal with them. The idea is that the right to self-defence extends to the right to use force against terrorists posing a threat of armed attack in states where those states are unwilling or unable to address the terrorist threat. Closely related to the 'complicity' variant, the 'unwilling or unable' variant represents a further expansion of the international law of self-defence. The extent to which it has been used to justify forceful interventions in third states is such that it merits separate consideration.

Nowhere has recourse to the 'unwilling or unable' variant been more obviously problematic than in Pakistan. For international forces fighting in Afghanistan, the operational imperatives for intervention were admittedly compelling. Following the Soviet withdrawal in the late 1980s, Pakistan had viewed its relationship with Afghanistan and the Taliban as a means to expand its influence westward, deny territory to regional rivals such as Iran, and derail India's objectives in Kashmir [26, 27]. There were risks. The consolidation of Taliban leadership in Quetta and the presence of al Qaeda and other Islamic extremist organizations throughout Pakistan's Federally Administrated Tribal Areas guaranteed a significant degree of internal instability that would have to be carefully managed [27]. However, Pakistani military leaders believed that the Afghan Taliban could be manipulated to support Pakistan's political objectives at a reasonable cost, and many supported them out of ideological sympathy as well [27]. The net effect was that for successive US administrations threatened by Islamic extremism, some of which originated within Pakistani territory, Pakistan's accommodation represented an intractable security challenge. As one expert stated, 'Pakistan is the most dangerous country in the world today. All of the nightmares of the twenty-first century come together in Pakistan: nuclear proliferation, drug smuggling, military dictatorship, and above all, international terrorism' [28].

The Bush administration's initial post-9/11 approach was to use military and economic incentives to convince Pakistan's then-President Pervez Musharraf to withdraw official support to the Taliban and deny sanctuary to al Qaeda [27, 29]. This diplomatic victory was short-lived. Pakistan continued to maintain an open-door policy to fleeing Taliban, allowing them to evade American capture. Within months, the Taliban began to regroup and organize new operational hubs from Pakistan to launch its insurgency against Western forces on the Afghan side of the border [27, 29]. The West failed to respond to the growing threat, and the Karzai regime was unable to do so. From 2006 onward, Pakistan never stopped allowing safe haven, and Pakistan's Inter-Service Intelligence agency further provided Taliban insurgents with specialized training, logistics, intelligence and support [27]. At times, Pakistani security forces attacked US formations that were pursuing Taliban operatives along the border [27, 29].

9 According to US Chairman of the Joint Chiefs of Staff Manual 3150.29A, an operational nickname is a combination of two separate unclassified words used for 'administrative, morale, or public information purposes.'

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Pakistan continued to insist that it was still an ally in the war on terror, however, and at times made key arrests, shared critical intelligence with the US and its allies, and served as intermediary between the various insurgent factions and organizations. At the same time, it steadfastly refused to permit outside intervention, insisting that it would participate in GWOT on its own sovereign terms. Ultimately, the US assessed that it had no choice but to pursue a more aggressive posture [27]. While a military ground presence was never seriously considered, by 2008, US commanders in Afghanistan had authorized limited 'hot pursuits' over the Pakistani border, and occasional artillery and aerial drone strikes against verified Taliban positions on Pakistan territory had become a norm [27].

The nature of the legal justification for such cross-border incursions was foreshadowed in an August 2007 speech by then-presidential candidate Barack Obama. Obama asserted that, 'if we have actionable intelligence against bin Laden or other key al-Qaida officials…and Pakistan is unwilling or unable to strike them, we should'. Over the course of his administration, these words were put into action. The most famous example was Operation Neptune Spear, in which Navy Seal Team Six killed Osama bin Laden in Abbottabad in Pakistan, but less publicized, US-directed drone strikes have been far more lethal and persistent. The exact numbers will likely never be disclosed, but one credible watchdog organization has estimated that between 2004 and 2020, there were at least 430 confirmed strikes on Pakistani territory, killing 2,515–4,026 individuals, including several hundred civilians [30]. Although there have been occasional reports that it gave clandestine approval for some of the strikes, Pakistan's government has never publicly given consent for what it has labelled 'unauthorized unilateral action'. For their part, US officials have consistently implied that US actions were justified on the basis that Pakistan had shown itself to be 'unwilling or unable' to suppress the threat posed by Bin Laden.

The 'unwilling or unable' doctrine is a dangerous variant of the doctrine of self-defence that provides an unsatisfactory measure for future action. As articulated, it draws no distinction between the earnest though unsuccessful state seeking to root out threats, and the state that finds itself in the crosshairs because of its own double-dealing. This is not to deny the seriousness of the security challenge facing states threatened by the inability or unwillingness of host states to assist. In the case of Pakistan, for example, it is clear that the Taliban would not exist today without Pakistan's support, and Bin Laden and al Qaeda would not have been able to thrive without the safe havens it provided. As a practical matter, however, there is no limit on how far this expansion permitting unilateral incursions might go, and with the proliferation of drones and other standoff weapons technology, the 'unwilling or unable' doctrine threatens to upend the principles of sovereignty that underpin the *jus ad bellum* structure entirely.

IV. ENDURING COUNTER-INSURGENCY: THE 'PRE-EMPTION' VARIANT

> *'America lost? Lost How? By failing to convert Afghanistan into a well-governed, pro-Western state through elections and investment? That was…not America's purpose'.*
>
> - Michael Miklaucic, 20 July 2021

Operations in Afghanistan continued for twenty years. Long after the Taliban had been overthrown and al Qaeda had been expelled and organisationally decapitated, the initial invasion had morphed into a massive, multinational civil-military effort to transform Afghanistan into a stable democracy in which the Taliban would have no leadership role and al Qaeda and its clones could never regroup. Yet contrary to conventional thinking, neither President Bush nor his successors were fully committed to modernising the Afghan state. How then, did the war last so long, and why did the original legal justification of self-defence continue to apply?

The answer to these questions, as with everything else involving Afghanistan, is deeply complex. One common, simplistic response is that 'counterinsurgency' represented Western overreach—a delusion that a country with Afghanistan's history could ever become an independently-functioning democracy, and therefore, the post-9/11 nation building effort was ill-conceived and incompetently executed [31, 32]. More relevant to the question of self-defence as legal justification for the enduring counterinsurgency is the fundamental tension between two interrelated imperatives: the overthrow of the Taliban, and the need to establish and stabilize an alternative Afghan government. The operational debate came to the forefront

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when President Obama announced his counterinsurgency strategy in 2009. His stated goal was 'to disrupt, dismantle, and defeat al Qaeda in Pakistan and Afghanistan, and prevent their return to either country in the future' [33]. The practical question was whether this could be accomplished by continuing to target al Qaeda alone, or whether it was necessary to defeat the Taliban as a means of denying sanctuary to al Qaeda and its successors over the long term [34]. If the latter, then the nascent Karzai government in Afghanistan would have to be accepted and consolidated as a legitimate and effective alternative to the Taliban shadow government that by then, was operating with impunity throughout the country. In other words, without stabilization, the initial overthrow of the Taliban couldn't endure, and unless the Taliban were overthrown, it was believed, al Qaeda would never be defeated.

It is also important to recall that at the same time, the international community was heavily invested in the Afghan state, reflecting the commitments that had been made at the Bonn Conference in 2001, and the London Conference in 2006 [35–37]. Over the years, successive UN resolutions had codified five distinct missions—security, stabilization, counter-terrorism, counter-narcotics and security sector reform [36, 38–41]. The counterinsurgency campaign did not replace any of these. Instead, it was a US-led effort to consolidate the disaggregated resources, objectives and tactics into Obama's overarching strategic goal. 'Counterinsurgency' may have been the US terminology of choice, but it was essentially the same 'stabilization' mission that the international community had been conducting since 2002, and the 'comprehensive approach' that the ISAF mission had adopted to express 'the full range of civil-military activities required to stabilize Afghanistan' [42].

It is highly questionable whether self-defence can be used to justify such a long period of military action and occupation, but that became the dominant narrative on which the US relied. As Christine Gray recognizes, the longer OEF continued, 'the further it was detached from its initial basis in self-defence' [4 p232], but the perpetual reliance on self-defence didn't happen in a vacuum. Like the evolution of the three variants previously discussed, the events of 9/11 had led to the US government to dramatically rethink its approach to security, and a broader preventative dimension began to emerge and take legal form. While the text of Article 51 reflects that self-defence is only available 'if an armed attack occurs', the logic that the UN Charter should not be a suicide pact has led to acceptance in some quarters of a doctrine of anticipatory self-defence. Under this interpretation, self-defence is recognized as lawful in the event of an 'imminent' armed attack. This interpretation was taken still further in an innovation that has come to be known as the 'Bush doctrine' [19 p306]. This doctrine, promulgated in the US National Security Strategy 2002, declared an intention on the part of the US to 'act alone, if necessary, to exercise our right of self-defense by acting pre-emptively'. The reactive posture of the past was declared no longer appropriate. Rather, given 'the inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm', the US could no longer 'remain idle while dangers gather'. The Strategy declares the need to 'adapt the concept of imminent threat to the capabilities and objectives of today's adversaries', maintaining the option of pre-emptive actions 'even if uncertainty remains as to the time and place of the enemy's attack'.

Perceptions of the magnitude of the terrorist threat connected with an arc of post-Cold War optimism about state-building, which saw the answer to foreign policy challenges in 'creating capable states with representative governance based on the rule of law, with widely available economic opportunity, social safety nets, protection of fundamental human rights, and robust civil societies' [43]. In Afghanistan, as it had earlier in Iraq, this informed the debate over whether it was possible to eliminate the threat from al Qaeda without successful democratization in Afghanistan. The decision, in the near term, was that it was not.

The attempted democratisation of Afghanistan cannot be justified under the doctrine of self-defence or indeed under *jus ad bellum* more broadly. The problem lies in the conclusion that removal of the terrorist threat was assumed to be necessarily connected to Afghanistan's democratisation. Yet democratic state-building only served to escalate the US intervention and fed into the Taliban narrative of a puppet government installed by foreign infidels [15]. The result in legal terms was that the intervention in Afghanistan ended up being an 'unstable hybrid' of justifications, blurring lines of purpose, authority, cooperation and expectation [44]. The uncomfortable legal reality is that a defensive operation limiting itself to what was necessary and proportionate may have justified (or even required) US withdrawal at a point where the Afghan state was in a position of humanitarian and governmental disarray.

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The irony is that a more principled legal framework did exist. Authority for Afghan state-building could be undertaken under Afghan authority with assistance at the level of the international community, justified if necessary by Security Council resolutions. And in fact, the authority for the 19 years' worth of military operations that followed the Bonn Agreement could be found in the requests by the Afghan government in the form of multilateral commitments and bilateral military technical and status of forces agreements.[10] The civil-military stabilization operations were authorized by more than two decades of Security Council resolutions and UN Mandates. The dominant narrative, however, was that continued engagement by foreign (and particularly US) military forces in Afghanistan was made necessary by the need to ensure that the Taliban could never allow Afghanistan to become a terrorist safe haven again. Unfortunately, rationalizing democratization of Afghanistan in the name of US self-defence connects it with an outmoded Cold War narrative rather than any acceptable interpretation of international law.

V. CONCLUSIONS AND TENSIONS

'Well, it was a just war in the beginning'.

- Michael Walzer, 3 December 2009

Over the course of a 20-year campaign, Operation Enduring Freedom 'clearly overstretched the boundaries of even the broadest understanding of self-defence' [7 p390, 45]. Michael Byers argues that continuing US reliance on self-defence evaded opposition due to the fact the operation had alternative legal bases in Security Council resolutions and the consent of the Afghan Transitional Authority. Yet Byers acknowledges that the US never relied on these alternative bases explicitly [6]. Instead, the US maintained a firm line that military action over the course of two decades was justified on the basis of self-defence. In keeping to this firm line, the effect was to work distortions into understandings of the authority, purpose and expectations of Operation Enduring Freedom, together with relevant frameworks for cooperation and acceptable limits of collateral damage.

Operation Enduring Freedom, and its successor Operation Resolute Support, threatens to cast a long political and legal shadow. Military operations such as those in Afghanistan raise fundamental questions about the legitimacy, purpose and limits of power and the use of military might [46]. They expose unresolved tensions in approaches to international law and international relations, including tensions between exceptionalism and multilateralism; punishment and defence; imperialism and self-determination; gradated sovereignty and sovereign equality. Careful reflection and critique are essential, if only so unresolved politics do not mutate into law.

COMPETING INTERESTS

The authors have no competing interests to declare.

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10 See, for example, the Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan (Interim Administration), 4 January 2002. Important bilateral agreements included: "Diplomatic Note No.202," Embassy of the United States of America, Kabul, Afghanistan, September 26, 2002; "Note, Document No.791," Transitional Islamic State of Afghanistan, Ministry of Foreign Affairs, Fifth Political Department, December 12, 2002; "Note, Document No.93," Transitional Islamic State of Afghanistan, Ministry of Foreign Affairs, American and Canada Political Affairs Department, May 28, 2003.

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