Helping a Friend in Afghanistan

1. Introduction

The end of the Cold War represented a fundamental change in the political shape of the world, leaving a single superpower. The events of 11 September 2001 (iconically known as 9/11) represented another sea-change, in that the sole remaining superpower found itself under attack not from other powerful states but from non-state actors. The world watched in horror as airliners hijacked by members of al-Qaeda hit the Pentagon in Washington and World Trade Center in New York, bringing the twin towers crashing down, killing nearly 3,000 citizens.

The war on terrorism, starting in earnest with the military action in Afghanistan in October 2001, involved British troops acting alongside the United States against al-Qaeda and the Taliban on the basis of the right of self-defence, the same right that was invoked in the Falklands War. Was the British reliance on the right of self-defence controversial either domestically or internationally? Was the fact that the action seemed to have approval from the Security Council as well as NATO important? While the initial operation (Operation Enduring Freedom) was based upon article 51 of the UN Charter preserving the right of self-defence, once the Taliban had been removed and al-Qaeda routed, Britain led a Security Council authorized security presence in and around Kabul providing stability while a nascent Afghan government tried to assert authority over the country. Concern was expressed in parliament at ‘mission creep’ as the functions of the NATO force (ISAF) changed, and British troops faced a resurgent Taliban in Helmand province from 2006 onwards.

2. Pre-Emptive Self-Defence

In the period after the coalition’s victory against Iraq in 1991, the US and the UK, sometimes with other states, have placed incredible pressure on the legal framework governing the use of force contained in the UN Charter in a concerted effort to widen both exceptions to the ban on the threat or use of force in article 2(4), namely the right of self-defence contained in article 51, and military action taken under the authority of the Security Council derived from article 42.
While Operation Desert Storm conducted by a coalition of states against Iraq in 1991, under US command but with Security Council authority, was generally viewed as lawful, initially as an action in self-defence and then once Resolution 678 of November 1990 was secured as action under UN authority, the military action taken against Iraq commencing on 20 March 2003 was much more controversial. While the UK argued that it was justified under Security Council resolutions, the US always reserved the right to take action against Iraq in self-defence. The claim of self-defence in relation to Iraq in 2003 was wider than the claim made after 9/11, when the US and its allies argued that the terrorist attack against it justified a response in self-defence directed at al-Qaeda in Afghanistan along with the Taliban regime there. While discussion of Iraq will be left to chapter ten, the focus of this chapter will be on Afghanistan, which itself was by no means a straightforward application of the right of self-defence.

Before discussing the response to 9/11, we need to remind ourselves of the law relating to self-defence as outlined in the last chapter. Self-defence under the UN Charter has to be in response to an armed attack against a state. While some latitude may be given as to when an armed attack has started, there must be both imminence of attack and necessity of defence before a response is lawful. To strike too early is pre-emptive, while to strike too late is retaliatory and a reprisal.

In the aftermath of 9/11 the US attempted to shift the law to allow for pre-emptive strikes. The Bush Doctrine, or more formally ‘The National Security Strategy of the United States of America’, promulgated on 17 September 2002⁴ represented the latest in a long line of US Presidential doctrines going back to the Monroe Doctrine of 1823. Specifically on the issue of using force, and in response to the events of 9/11, the Bush Doctrine focused on the recent and continuing threat posed by ‘terrorist organizations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use weapons of mass destruction (WMD) or their precursors’. This meant that the US was committed to ‘identifying and destroying the threat before it reaches’ US borders, acting alone if necessary, ‘to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country’. Further, the US was prepared ‘to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and [its] allies and friends’. This sort of pre-emptive strike was viewed by the US as an adaptation of the doctrine of anticipatory self-defence, allowing nations ‘to defend themselves against forces that present an imminent danger of attack’. The adaptation signifies that the emphasis is no longer on the imminence of the attack but the magnitude of the threat. ‘The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking

anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack’. Deterrence, it is claimed, cannot be relied upon as the mechanism for securing peace; positive action is ‘the only path to peace and security’.²

Unlike the previous post-1945 Presidential doctrines that juxtaposed a statement of political intent against an acceptance of the narrower strictures of international law, the Bush Doctrine not only constituted a statement of political intent, it also constituted an exposition of the conditions under which the US viewed the use of force as acceptable under international law. Between the end of the Second World War and the announcement of the Bush Doctrine it was common for the political statement of the incumbent President on issues of power to be balanced by more legal statements of US representatives, for example in the Security Council. Consider, for example, the statement by President Johnson in 1965 that ‘the American nation cannot permit the establishment of another Communist dictatorship in the Western hemisphere’, given as a justification for the US intervention in the Dominican Republic.³ Contrast this with the statements of the US representative in the Security Council who argued that the legal basis for the intervention was to be found in the doctrine of protection of nationals and in the involvement of the OAS.⁴

International lawyers would concede that article 2(4) was not always adhered to during the Cold War since despite the legal protestations of the US and the USSR both direct hemispheric and indirect extra-hemispheric interventions regularly occurred that were clearly breaches of that norm. However, article 2(4) survived for, to paraphrase the words of the International Court of Justice in the Nicaragua case, all the relevant actors—the victim states and the intervening states—appealed to the rule and its exceptions, and the general attitude of the rest of the world was one of condemnation for breach of the rule.⁵ Law did not prevent superpower interventions but it did appear to be relevant in assessing that conduct. Debates and controversy centred around the applicability of the rules governing the use of force but the presence of the legal rules and principles signified that the ‘controversy [was] normative not [simply] empirical’.⁶

It is not the aim of this book to argue for the uncritical application of a strict interpretation of articles 2(4) and 51 of the UN Charter in the shape of a straightforward application of the formal rules embodied in the Charter to factual circumstances. This would ignore the dynamic built into both treaty law and customary law in the shape of (subsequent) practice which, if combined with an

² ‘National Security Strategy’, v, 6, 14, 15, 30.
⁴ SC 1196th mtg, 1965.
acceptance of the legality of that practice (opinio juris), may modify the treaty rules or create new customary law. States using force, or proposing to use force, normally attempt to justify their actions either as actually coming within the treaty framework, or they try and stretch that framework, or they claim a customary basis for their action, or sometimes they admit that their actions are exceptional and not precedential. Law is either confirmed or re-shaped by these claims and the responses of other states and actors to them. In effect, the legal rules claimed to be applicable in any given conflict or dispute are put into the international spotlight and either survive intact or are modified.

This analysis focuses on the attempts by states, including the UK who was centrally involved alongside its ally the US in both Afghanistan and Iraq, to stretch the treaty exceptions to the ban on the use of force and, in the case of self-defence, to recognize or create wider customary rules. However, we must not be too ready to assume that the law has changed when we are faced with behaviour that appears to disregard laws even if that behaviour is claimed to be reflective of a new law. While it is true that in issues of high politics exemplified by the decision to threaten or use force in international relations, politics may (always) be in the ascendancy, laws, particularly fundamental ones, are not easily swept aside by the rise and fall of political tides.

The Bush Doctrine presents us with a new controversy because it is not predicated on the separation or indeed the dismissal of the relevance of law to the issue of ‘ultimate power’, it is an attempt to bring power and law together, to reshape international law. In effect this would take us back to the Monroe Doctrine which seemed to achieve acceptance in international law as exemplified by its preservation in the Covenant of the League of Nations. The Monroe Doctrine of 1823 was of course adopted against the background of a virtually unregulated right to use force in international relations, a situation in which self-defence, as discussed in the Caroline incident of 1837, was simply one of many justifications for the use of force. The League of Nations’ Covenant may have been an attempt to restrict a state’s sovereign right to go to war, but it was flawed in many ways, including the acceptance of the Monroe doctrine and other similar ‘regional understandings’, which was a reference to the so-called British Monroe Doctrine.

In the post-Cold War era it is once more the combination of the US and UK seeking to gain acceptance of their understandings of the international order. However, in contrast to the Monroe Doctrine, which was adopted against a background of lawlessness, the Bush Doctrine of 2002 is adopted against the background of a post-1945 order based on a ban on the use of force in article

8 Art 21 of the Covenant of the League of Nations, 1919.
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2(4), a norm that is generally accepted as *jus cogens*,¹⁰ and allowing of only two exceptions. The exceptions permitted in the Charter are actions in individual or collective self-defence in response to an ‘armed attack’ embodied in article 51, or military enforcement actions undertaken with Security Council authority under chapters VII and VIII of the UN Charter.

The Bush Doctrine represents the highpoint of a concerted effort by the US to both undermine and change this order. It is aimed at widening the right of self-defence as embodied in the Charter, or perhaps more accurately in recognizing a wider customary right of self-defence than the treaty right embodied in the Charter since it harks back to though it greatly widens the doctrine of anticipatory self-defence embodied in the *Caroline* incident of 1837. But this is only one part of a three-pronged assault on the order contained in the UN Charter. The other two prongs consist of first an effort to widen the circumstances in which it is deemed that the Security Council has sanctioned military action, and secondly the resurrection of other customary rights to use force, principally the doctrine of humanitarian intervention, reviewed in the next chapter.¹¹ The Bush Doctrine and the most recent post-Cold War military actions against Yugoslavia (as regards Kosovo) in 1999, Afghanistan in 2001 and Iraq in 2003 together seem to represent an assault on the order regulating the use of force contained in the UN Charter.

3. An Era of Anglo-American Military Expeditions

It is essential at this stage to put the Afghan conflict within the context of the growing use of military force by the US and the UK in the late twentieth century and into the new millennium. Since the end of the Gulf Conflict in 1991 there have been many instances of military action against Iraq, taken in the main by the US and the UK, culminating in the threat of overwhelming force if Iraq did not comply with Resolution 1441 of 8 November 2002, and the subsequent use of force against Iraq commencing on 20 March 2003 (reviewed in chapter ten). In between March and June 1999, NATO states, primarily the US with UK support, undertook the concerted bombing of the Federal Republic of Yugoslavia (FRY) in order to prevent crimes against humanity being committed by FRY (Serbian) forces against the ethnic Albanian majority in Kosovo (reviewed in chapter nine). In between October and December 2001 (although military action has continued thereafter) the United States with some British support and the significant involvement of the Afghan Northern Alliance undertook military

¹⁰ See for example B. Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 EJIL 14.
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action against the Taliban regime and their al-Qaeda allies in Afghanistan in response to the attacks on the United States of 11 September 2001. All of these military actions are problematic when considering the rules governing the use of force in the UN Charter. None were clearly authorized by the Security Council and none were clearly responses in self-defence, at least in Charter terms, though Operation Enduring Freedom against Afghanistan comes closest.¹² However, before concluding that they constituted violations of article 2(4) as illegal uses of force it is essential to evaluate the legal justifications put forward by those states using force and the responses of other states to those claims.

In all three military actions the states using force have put forward a three-pronged argument: that the action was justified under Security Council resolutions; as an act of self-defence; and as justifiable humanitarian intervention, but with varying degrees of emphasis. Violations of Security Council resolutions by Iraq were a constant refrain by those states threatening or using force against that country since April 1991. This has been the main justification though on occasions there have been references to the rights of humanitarian intervention and self-defence. Indeed, the latter seemed to increase in importance in the shape of pre-emptive self-defence enunciated in the Bush Doctrine as that country sought in 2002–3 to justify carrying out its latest threat to use force against Iraq. The justification for the use of force against the FRY was again breach of Security Council resolutions, though the impression was more that it was a clear expression of the right of humanitarian intervention. Self-defence played a minor role, though it has been invoked both by politicians¹³ and in the literature.¹⁴ In the case of Afghanistan, the facts led to an almost exclusive reliance on the right of self-defence with some reference to Security Council resolutions. Reference to humanitarian intervention in this case tended to take the form of criticism of the users of force for not invoking it as a basis of the action given the oppressive denial of human rights to at least half of the population (the women) of Afghanistan.

When considering the above military actions, there does seem to be significant practice by some states that lends credence to the idea that force can be taken in support of Security Council resolutions; especially (and probably only) those that have made a crucial finding of a threat to or breach of the peace under article 39 of the UN Charter, though they do not contain an express ‘authorization’ to take ‘necessary measures’ (the Security Council’s euphemism for military action). It is interesting that in the three main conflicts examined reliance on this ground


was strongest in two (Kosovo and Iraq), suggesting a preference for uses of force that can be justified under the UN collective security umbrella rather than customary rights that are exercised unilaterally. Indeed, in Afghanistan much is made of the fact that the Security Council apparently endorsed the exercise of the right of self-defence. The greater legitimacy that UN authority brings has created tremendous pressures within the Security Council and on its resolutions. Interestingly though neither of the resolutions adopted in the aftermath of 9/11 was clear-cut on the issue, with the primary purpose of 1368 being condemnation of the attack, while 1373 was concerned with the adoption of non-forcible measures by states against terrorist organizations. Although both resolutions affirmed the right of self-defence, neither determined that the terrorist atrocities of 11 September constituted an ‘armed attack’ or indeed a ‘breach of the peace’ or an ‘act of aggression’, preferring instead to find a ‘threat to the peace’. In the past the Security Council has been clear on when it believes that member states have the right of self-defence. For example in response to the invasion of Kuwait by Iraq in 1990 the Council affirmed the ‘inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the UN Charter’.

Afghanistan, Iraq and the Bush Doctrine all exert pressure on the law of self-defence to allow for more flexibility in responding to terrorist attacks as well as threats from terrorism and weapons of mass destruction. Often a vengeful motive provoking a response to a terrorist attack is combined with a desire to prevent future attacks from occurring. Operation Enduring Freedom against Afghanistan was in part a response to the attacks of 9/11 and in part an anticipatory action based on the continuing threat of terrorist attacks emanating from that country. Some writers have analysed Enduring Freedom as purely anticipatory, while others have seen it as solely reactive to a specific armed attack.

Mary Ellen O’Connell argues that Operation Enduring Freedom against Afghanistan was justified under a narrow doctrine of anticipatory self-defence, where a ‘state need not wait to suffer the actual blow before defending itself, so long as it is certain that the blow is coming’. Citing terrorist strikes against the US going back to 1993 (World Trade Center), the 1998 embassy bombings in Africa, the attack on the USS Cole in 2000, and continuing with the attacks on 11 September 2001, O’Connell states that there was plenty of evidence of further imminent attacks on the US and the UK justifying anticipatory self-defence against al-Qaeda and their supporters (including the Taliban) in Afghanistan.

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However, she then argues that there has been no acceptance of a wider right of pre-emptive self-defence as embodied in the Bush Doctrine. In other words no state ‘has the right to use force to prevent possible, as distinct from actual, armed attacks’.¹⁸ The universal rejection of the legality of Israel’s 1981 strike against the Iraqi nuclear reactor at Osirik is clear evidence of this.¹⁹ Proponents of the doctrine of pre-emptive strikes rely primarily on the word ‘inherent’ in article 51 to suggest the preservation of a much wider right than that contained in the Charter, one that pre-existed in customary law. Ironically though the *Caroline* doctrine which is said to be the basis of the customary right can only really be read as justifying a very narrow doctrine of anticipatory self-defence, since the threat of attack has to be ‘instant, overwhelming, and leaving no choice of means, and no moment for deliberation’.²⁰ Indeed, ‘[e]ven if earlier custom allowed preemptive self-defense, arguing that it persisted after 1945 for UN members requires privileging the word “inherent” over the plain terms of article 2(4) and the words “armed attack” in article 51. Indeed, it requires privileging one word over the whole purpose and structure of the UN Charter’.²¹ Furthermore, O’Connell rightly points out that pre-emptive self-defence is ‘not a right that the United States wants others to have’. It can ‘hardly wish to see an anarchic regime in which every state is entitled to initiate the use of force against its adversaries in preemptive self-defense’.²² To claim that the US has this right but not other states,²³ not only goes against the whole nature of sovereign equality (at least in lawmaking) but simply will not work.²⁴ If the Bush Doctrine constitutes an offer to the rest of the world to agree to a wholly new view of self-defence that is inconsistent with previous understandings of the law, then it is problematic to assume that even if there is acceptance, it is acceptance to the effect that only the US has this right.

In contrast to O’Connell who argues that Operation Enduring Freedom was an acceptable extension of the right of self-defence to include anticipatory though not pre-emptive action, Michael Byers argues that it amounted to an acceptance of the Schultz Doctrine of 1986, namely the right to attack terrorists on the territory of other states as a response to terrorist attacks such as the 1986 Berlin bombing, or the response to 9/11. This is narrower than the Bush Doctrine which is not dependent upon there having been a previous attack.²⁵ Both Byers and O’Connell agree however that although it is an extension of

²⁰ 29 British and Foreign State Papers 1137–8; 30 British and Foreign State Papers 195–6.
²² O’Connell, ‘The Myth’, 15–16. O’Connell also points to the fact that pre-emptive strikes are very unlikely to be proportionate responses, 19.
²³ See Byers ‘The Shifting Foundations’.
the right of self-defence the Afghan precedent is much narrower than the Bush Doctrine of pre-emptive strikes. There certainly seems to have been an uncritical reaction by states to Operation Enduring Freedom in Afghanistan, but the question remains whether this amounted to an endorsement of the Schultz Doctrine that was rejected fifteen years earlier. While the *prima facie* case for the legality of responses like Operation Enduring Freedom looks promising, the signs are that the Bush Doctrine has received a negative reception, not least from most European states.²⁶ The Australian Prime Minister warned of Australian pre-emptive action against terrorists in the wake of the Bali bombings of 12 October 2002, though he more straightforwardly appealed for a change in international law governing self-defence to allow for such action to lawfully occur. It is worth noting that the claim to pre-emptive action was rejected by the states in the region.²⁷ Thus there appears to have been no acceptance of the Bush Doctrine. There is evidence that the majority of states are resistant to such a large-scale extension of the right of self-defence that allows a state to take military action based solely upon its perception of a threat.

We must also be wary of simply accepting the legality of military actions based on the precedent of Operation Enduring Freedom. This was not a straightforward application of article 51, or of the customary rules of immediacy and proportionality. In essence the armed attack of 11 September 2001 had ceased by the time the United States came to respond on 7 October. That there were good reasons for this delay is clear enough, but there no longer remained an aggression that had to be remedied as with the invasion of the Falkland Islands by Argentina in 1982. In essence then what was being claimed in the operation in Afghanistan was a wider right of self-defence, a right to respond to terrorist attacks within a reasonable period of time in the territory of other states where the government has harboured or possibly supported terrorists, the aim being to prevent future such attacks occurring. The Bush Doctrine goes even further since it does not require the occurrence of an armed attack; military force can be triggered by the perception of a threat.

Nevertheless, if Operation Enduring Freedom has been accepted as a precedent for a wider right of self-defence, then there may not be such a great leap between it and the Bush Doctrine.²⁸ Operation Enduring Freedom was only in part a response for the attack of 9/11. Its purpose was not simply to respond to those terrorists behind the attacks of 9/11, but it was an attempt to try and remove terrorists and their supporters from Afghanistan, which would probably be a source of a future attack. The imminence of such a future attack would determine whether the action was anticipatory in the sense of the *Caroline* incident, or

a pre-emptive strike in the sense of the Bush Doctrine. There has been debate on whether a further attack from Afghanistan was imminent, but that appears to have been of little importance in state practice that seems to have accepted the legality of Operation Enduring Freedom.

In this light an acceptance of Operation Enduring Freedom could amount to a recognition that the Israeli practice of reprisals, and the American retaliations against Libya in 1986 (in response to the Berlin bombing), Iraq in 1993 (in response to the attempted assassination of Bush Senior), and Sudan and Afghanistan in 1998 (in response to the embassy bombings), now constitute a line of practice that has finally been accepted as lawful with the uncritical reaction to the use of force in Afghanistan. While most of those responses were linked to past terrorist acts, the link was sometimes tenuous, and on other occasions (Libya and Sudan for instance) was shown not to exist. As with the response to 9/11 these military actions were both punitive in response to an attack and anticipatory or pre-emptive (sometimes called preventive) to prevent future attacks. Their general disproportionality can only be explained by the existence of an anticipatory or pre-emptive element. Operation Enduring Freedom was a disproportionate response to the attacks of 9/11 against the US but may be viewed as proportionate if the purpose is also seen as anticipatory or pre-emptive (depending on the imminence of the threat).

By their nature anticipatory strikes, and more so pre-emptive strikes, aim to eliminate not only perceived threats but also all possible sources of future threats and therefore tend to be overwhelming. Thus Enduring Freedom and those retaliatory acts that have gone before are not far removed from the Bush Doctrine, since even under that Doctrine there must be some evidence of terrorist activities or weapons of mass destruction. In fact the US itself linked its actions taken in self-defence against Afghanistan starting on 7 October 2001 with a wider and continuing right to defend itself against other threats. In a letter to the Security Council, the US stated ‘we may find that our self-defense requires further actions with respect to other organizations and states’. Thus Operation Enduring Freedom and the claimed right to take pre-emptive strikes are not seen as separate events by the US but as part of a defensive war against terrorism.

The dangers of anticipatory, and more significantly pre-emptive, self-defence are clear but international lawyers may have to accept them if they become part of state practice. Kirgis states that customary international law is not static: ‘it may be modified over time by new assertions of rights, if other states acquiesce

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30 Similarly, the pre-emptive strike against Iraq in 2003 appears to have been based on a misperception of the threat from weapons of mass destruction. See chapter ten.


in those assertions.³³ Further, Byers claims that ‘current evidence suggests that the customary process is in fact changing… weakening those aspects of the law that disfavour the powerful while maintaining and strengthening those aspects, such as the rules concerning acquiescence, that operate in their favour’.³⁴ While acquiescence does play a role in the formation of customary international law, one must not assume it. As Byers states, little publicity was given to the rejection of humanitarian intervention by the Non Aligned states in 2000 but their statement was a clear rejection of attempts to reinvent the doctrine in the Kosovo episode.³⁵

Is it the case in this area governing the use of force that custom can be formed by assertions of new rights that are acquiesced to by other states? Two question marks can be raised in the context of claimed new rights to use force in international relations. First: what if the assertions of new rights appear to violate a norm of *jus cogens*? Second: what if the silence of the majority is not indicative of assent to the proposed change? Gaining acquiescence by the use of pressure is an issue in the case of the war against terrorism following 11 September. There has not been a clear instance of collective rejection of the application of self-defence in Operation Enduring Freedom. It seems that in the absence of clear protestations, powerful states can properly take the opportunity to claim that there is acquiescence to and therefore acceptance of the asserted right to self-defence.³⁶ However, we must be careful in analysing the quality of that acceptance. We need to ask and answer the question of why would less developed and weak states accept the dismantling of the collective security structure that at least provides them with rules that purport to protect their vulnerability? In seeking an answer we must take account of the pressure being exerted on them not to criticize military action being taken against terrorist organizations or rogue states by powerful states. President Bush sounded a warning against such criticism on 6 November 2001, when he stated that those nations not ‘for’ the United States were ‘against us’.³⁷ While acquiescence can be viewed as acceptance, one must be careful not to assume this. As Ian Brownlie says: ‘the real problem is to determine the value of abstention from protest by a substantial number of states in face of a practice followed by some others. Silence may denote either tacit agreement or a simple lack of interest in the issue’.³⁸ Clearly the latter does not constitute acceptance, and if this is the case, acceptance cannot be presumed when the silence is a result of fear of the potential political and economic consequences of protest.

³³ F.L. Kirgis, ‘Pre-emptive Action to Forestall Terrorism’ (June 2002) ASIL Insights.
³⁴ Byers, ‘Shifting Foundations’, 36.
Retaliatory/anticipatory and pre-emptive strikes are all uses of force *prima facie* contrary to article 2(4). Although they may constitute attempts to widen the exceptions to that rule found in chapter VII of the UN Charter, this does not by itself absolve them of their violative character. When practice is apparently violative of a peremptory norm, it is not enough to have acquiescence in the face of a breach in order to establish a new or extended right. It is argued that there needs to be more positive acceptance of the claim, positive proof that states have accepted the modification of the peremptory norm, proof in other words of *opinio juris*. Arguments about acquiescence seem to assume the emergence of new rights in a legal vacuum, but that is not the case. Brownlie puts this clearly when he states that ‘the major distinguishing feature of such [peremptory] rules is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule to contrary effect.’


From the perspective of British troops in Afghanistan they seem to be in a similar position to their colleagues in Iraq—fighting extremist Muslim terrorists and insurgents to achieve security and stability in a country so that it can be built. However, they are arguably in a stronger position, not necessarily militarily but in terms of legality and legitimacy and this arguably also affects the sustainability of the operation. This is not to say that there are no problems with the legality and legitimacy of military operation in Afghanistan, it is merely that compared to Iraq there are more positives in this regard.

The events of 9/11 provoked the invasion of Afghanistan on 7 October 2001. Al-Qaeda was responsible for the attacks and that terrorist group had bases in Afghanistan. Moreover, they had a close relationship with the unrecognized but effective government of Afghanistan—the Taliban. The US and the UK claimed that their military actions in Afghanistan against al-Qaeda and the Taliban were legitimate exercises of the right of self-defence. This was endorsed by the EU, NATO and significantly, though not unequivocally, the Security Council. Thus the action seemed to be in accordance with international law. However, the action in Afghanistan was not a straightforward application of the right of individual or collective self-defence in a number of ways. As has been pointed out in effect it appears to be an attempted development of the right of self-defence.

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39 Ibid., 488.
to allow states to respond to terrorist attacks, in particular to take action against states harbouring terrorists.⁴²

First, there was no on-going armed attack against the US.⁴³ The attacks were over, unless the vision of 9/11 as part of a wider war on terror is accepted. If the invasion of Afghanistan was a response to the armed attack of 9/11 it appeared more punitive than defensive—more akin to a reprisal. Secondly, if the invasion of Afghanistan was anticipatory self-defence, in other words it was designed to stop more imminent attacks, then this is more akin to the Caroline doctrine than the UN Charter rules which formally require the occurrence of an armed attack. Thirdly, self-defence should be both necessary, in other words leaving no choice, and proportionate. On the latter, although 9/11 was stated to be the equivalent of the Japanese attack on Pearl Harbor that brought the US into the Second World War thus justifying a war against the whole country from which the attack could be said to have originated,⁴⁴ it can be argued that this is overstating the case and that strikes against the terrorist bases would have been a more proportionate response. Fourthly, the response seemed to make the Taliban equally responsible with al-Qaeda for the 9/11 attacks—by harbouring terrorists and not giving them up. But according to ‘the test generally accepted by states’ ‘the use of force by individuals constituted an armed attack only when there has been a sending by . . . 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 an act of aggression’, thus justifying self-defence by the attacked state and its allies against the sending state.⁴⁵ The Taliban government did not send al-Qaeda terrorists to launch the attacks on 9/11.

Despite question marks about the targeting of the Taliban and the overall proportionality of the response, world opinion seemed either to endorse the view that the action against Afghanistan which resulted in the overthrow of the government and the rout of al-Qaeda from its strongholds, was justifiable self-defence, or was silent on that matter. Though not straightforward it seemed to be accepted as a lawful application of the right of self-defence.

Acceptance of this wider right by some world leaders was due to it being a just war prosecuted in response to the atrocious targeting of thousands of innocent civilians. In the aftermath of 9/11 the British Prime Minister Tony Blair

⁴³ This is not to say that an attack by a terrorist group cannot be an ‘armed attack’ within the meaning of article 51 of the UN Charter. But see the International Court’s advisory opinion in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, 2004 ICJ Rep. 136, where the Court stated: ‘Article 51 thus recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign state’ (para 138).
stated that 'the world should stand together against this outrage'. Further, 'our beliefs are opposite to theirs. We believe in reason, democracy and tolerance. These beliefs are the foundation of our civilised world. They are enduring, they have served us well, and as history has shown, we have been prepared to fight when necessary, to defend them'. It is noticeable how a much wider notion of defence—defence to protect beliefs is being used here—although reference is also made to the invocation of the defensive right by NATO. Such moral outrage was matched by Iain Duncan Smith, the Leader of the Opposition, who stated that politicians on both sides of the House were 'guardians of a set of values that are underpinned by ... democracy and the rule of law' and were united 'to defend civilised values against those who seek to bring them down by violence'. He congratulated NATO’s Secretary General, Lord Robertson, for invoking article 5 of the Treaty on the basis that 'an attack on one is an attack on all'.

On 4 October the Prime Minister was able to relate to the House the evidence gathered to determine who was responsible:

Our findings have been shared and co-ordinated with those of our allies and they are clear. They are: first, that it was Osama bin Laden and the al-Qaeda, the terrorist network which he heads, that planned and carried out the atrocities on 11 September; secondly, that Osama bin Laden and the al-Qaeda were able to commit these atrocities because of their close alliance with the Taliban regime in Afghanistan, which allows them to operate with impunity in pursuing their terrorist activity.

In the face of this evidence, our immediate objectives are clear. We must bring bin-Laden and other al-Qaeda leaders to justice and eliminate the terrorist threat that they pose, and we must ensure that Afghanistan ceases to harbour and sustain international terrorism. If the Taliban regime will not comply with that objective, we must bring about a change in that regime to ensure that Afghanistan’s links to international terrorism are broken.

The Foreign Secretary, Jack Straw, made it clear that the government was acting ‘entirely within the framework of international law’, namely article 51 of the UN Charter which permits states to act individually or collectively in self-defence when they come under armed attack. He also answered questions about the proportionality of the response by saying that ‘action must be proportionate, but we must bear in mind the proportion of the attack against the United States and the proportion of the threat still posed by the al-Qaeda organisation’. When asked whether direct authority from the Security Council should be sought Jack Straw indicated there was no need and placed reliance on the decision of NATO to invoke article 5 and the fact that ‘all 19 NATO allies have accepted the evidence of bin Laden’s and al-Qaeda’s guilt’. In a later statement before the Foreign Affairs

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47 Ibid., col 606. 48 Ibid., col 607.
50 Ibid., cols 690–2.
Committee, the Foreign Secretary avoided answering a question on whether a right of pre-emption exists, by stating that ‘if country X receives very good information that country Y or terrorist group Z is about to attack it, and takes action in self-defence to stop that attack, it is acting consistently with Article 51 of the UN Charter but the exact circumstances are going to vary’. The other political parties agreed that there was no need for any express Council authorization to use force, and also that self-defence was both a reaction to 9/11 and a necessary action to prevent further uses of force by al-Qaeda.

Thus the legal and moral ground was cleared for military action. Also, through two lengthy debates on the matter in the House of Commons between 9/11 and the launch of the military response, overwhelming political support in the House was established, though not by means of a formal vote. The Prime Minister returned to moral rhetoric in a statement to the House announcing the start of hostilities on 8 October when predominantly American forces launched bombing and missile strikes against military and terrorist targets in Afghanistan:

So this military action we are undertaking is not for a just cause alone, though this cause is just. It is to protect our country, our people, our economy, our way of life.

If attacked, we will respond. We will defend ourselves.

We will see this struggle through to the end and to the victory that would mark the victory not of revenge but of justice over the evil of terrorism.

The fact that the British contribution to this initial phase of military action was limited, consisting of the firing of cruise missiles from Royal Navy submarines and reconnaissance and refuelling RAF sorties in support of the United States, does not diminish the significance of the wider support—both political and legal—that this represented. In these statements the Prime Minister envisages a much wider vision of defence. An atrocious attack on the United States is portrayed as an attack on the civilized world, and the response is a just one aimed at protecting our way of life against an ongoing evil. Though of course this mixture

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51 (2001) UKMIL, item 16/45, oral evidence to the Foreign Affairs Committee on 5 Dec. 2001. See further statements by the Foreign Secretary before the Foreign Affairs Committee during 2002 relating the doctrine of pre-emption to the doctrine propounded in the Caroline case: (2002) UKMIL, items 16/8–16/11. The government also responded to a Defence Committee report by stating that it might need ‘ultimately to act to destroy active terrorist cells with military action’: (2002) UKMIL item 16/19, HC 667, 5 March 2002. The Attorney General stated before the House of Lords that the ‘right of self-defence under international law includes the right to use force where an armed attack is imminent’ (Hansard HL vol 660, cols 369–72, 21 April 2004).

52 See for example Hansard HC vol 372, col 704, 4 Oct. 2001 (Menzies-Campbell).


54 Hansard HC vol 372, col 1131, 16 Oct. 2001 (Hoon). Other countries providing direct military support were Australia, Belgium, Canada, Denmark, France, Germany, Italy, Jordan, South Korea, the Netherlands, New Zealand, Portugal, Romania, Singapore, Spain, Turkey and Ukraine: vol 373, col 621, 29 Oct. 2001 (Hoon).
of political and moral rhetoric is not clear evidence of *opinio juris*, it could be said to provide the political platform on which legal arguments of a wider right of defence have been put forward and apparently accepted. The Prime Minister answered in the affirmative when he was asked again to reaffirm the legal base of the action and that the Law Officers’ advice was that the ‘action was in line with the provisions of the’ UN Charter. The Defence Secretary, Geoff Hoon, was pushed on the question whether the UK had formally notified the Security Council of its action in self-defence as required by article 51 of the UN Charter. He answered by saying that ‘this is a coalition operation and I have no doubt that for technical legal purposes, we are covered by the notification that the United States has given, but I will certainly investigate whether that legal advice is right and whether we need to make a formal notification ourselves as a country’.

It is clear from the legal statements in the House that article 51 was seen as the basis of the military operation against Afghanistan, though the understanding of the right of self-defence is broader than the orthodox interpretation given to that provision.

While the just war arguments over Kosovo produced a conclusion that the action was illegal but moral, the just war arguments over Afghanistan seemed to help create a widened notion of self-defence and thus both a lawful and just war. The question remains whether this widened right would be acceptable on future occasions without the moral outrage that followed the attacks of 9/11. For some states, however, acceptance of the wider right may have been more a question of unwillingness to criticize in the face of the ‘for us or against us’ rhetoric of President George W Bush. If that were the case it would be difficult to accept that there was a true consensus about the modification of fundamental rules of the international community governing the use of force.

While the action in Afghanistan might be stronger than that in Iraq in terms of legality and legitimacy, it is by no means a cast iron case. If we add in the problems already identified about the proportionality of the response and the incorrect imputation of responsibility to the Taliban as well as al-Qaeda, this again might be a case where the moral outrage of the atrocity allowed a military response to be mounted that would not normally have been acceptable to the international community. The fact that this was no ordinary defence of the UK or US is shown by the continued military operations in Afghanistan giving rise to a seemingly endless exercise of the right of self-defence. The reality is that this was an intervention to try to eliminate terrorism and a regime that supported

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55 Ibid., col 821 (Llwyd and Dalyell).
56 Ibid., col 832 (Salmond).
57 Ibid. See further col 851 (Short) who confirmed that the UK representative at the UN had informed the Security Council.
terrorists, but as one MP warned: ‘history suggests that Afghanistan is a place where countries get in easy and get out bloody’.⁵⁹

It might have been a shorter military campaign, and arguably a more proportionate one had the government taken the advice of another MP, Robert Marshall-Andrews, who accepted that the ‘United States and the international community have legitimacy to enter Afghanistan, if necessary by force—certainly by force—in order to arrest and apprehend Osama bin Laden’, but questioned whether the bombing campaign was a means of achieving it.⁶⁰ In a later debate the same MP pressed for the establishment of an international court to try bin Laden, but was rebuffed by the Foreign Secretary on the grounds that the Statute establishing the International Criminal Court of 1998 was not yet in force, besides which the Court’s jurisdiction when it came into force was prospective. On this basis Jack Straw stated that ‘no such tribunal exists, or is likely to exist to try bin Laden. The sooner . . . the few members that share his view, accept that we are not seeking to evade the clear choice that lies before us, the better’.⁶¹ As Mr Marshall-Andrews later pointed out, the Foreign Secretary had deliberately misunderstood his point,⁶² which was that an ad hoc international tribunal could be set up as at Nuremberg, or more recently for the Former Yugoslavia or Rwanda, but the Foreign Secretary’s dissembling was indicative of the decision by the two allies to adopt a military solution to 9/11 rather than one based on criminal justice.

In mid-November 2001, with the Taliban regime collapsing, the Prime Minister reported that British forces were involved in the airstrikes against Taliban and al-Qaeda forces, and ground forces had supported the Northern Alliance troops who had undertaken most of the fighting. He also stated that several thousand British troops were ready to be deployed, to provide some stability in the period between the end of the conflict and the reconstruction phase.⁶³ Although the remnants of al-Qaeda were to prove elusive, necessitating continuing action in ‘self-defence’, the British involvement was to become far more concentrated on the reconstruction of Afghanistan, necessitating a Security Council mandate.

5. The Battle for Helmand

In mid-December 2001 the Foreign Secretary, Jack Straw, informed the House of the ‘astonishing success’ of the agreement whereby all non-Taliban Afghan factions ‘sat down together in Bonn and thrashed out an agreement which puts Afghanistan back on the path to peace’, the first step being the creation of an

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⁶⁰ Ibid., col 834 (Marshall-Andrews).
⁶² Ibid., col 1079.
interim Afghan authority. He went on to say that ‘the House can be proud of this country’s role in the liberation of the Afghan people’, suggesting the war aims had become much wider, though there was still the need to remove the remnants of the Taliban and al-Qaeda with fighting continuing in the Tora Bora mountains. He further pointed to the necessity of a security force around Kabul to secure the foothold of the Interim Afghan Authority. Jack Straw expressed Britain’s willingness to play a lead role in the security force. The opposition expressed concern that such a force was being put together without the House being ‘told fully what is intended’:

What would be the limits to the time and extent of any involvement? What would be the remit of any such engagement? In the past, we have expressed reservations about being involved in what has been described as ‘nation building’, especially as we have been protagonists in the campaign so far.

The Defence Secretary did not give any specific answers to these prescient questions, but stressed the need to ‘convince every Afghan to have confidence in [the interim] authority and in the Bonn Agreement’. He later explained that the longer-term aim of Operation Enduring Freedom included securing ‘the reintegration of Afghanistan as a responsible member of the international community and to end its self-imposed isolation’, which was ‘vital if we are to ensure that the link between Afghanistan and international terrorism is broken’. While US forces continued to exercise the right of self-defence to try and defeat the remnants of al-Qaeda and the Taliban, the Security Council endorsed the creation of ISAF to provide security to the capital. Legally this put the basis of ISAF under the other exception to the ban on the use of force—military enforcement action under UN Security Council authority—thereby making it distinct from action taken in self-defence to the attacks of 9/11 and the continuing threat from al-Qaeda.

The history of ISAF’s involvement in Afghanistan shows all the hallmarks of the mission creep that the opposition was so concerned about, despite the government’s assurance that Britain was taking on leadership of the force ‘for a limited period of three months’. The initial British contingent consisted of 1,800 troops, about a third of the force. The Prime Minister also reassured the House by saying ‘I know that there has been some speculation that we would be sending thousands upon thousands of troops—we are not—or that they would be there for a very long time—they will not be’. The UK-led UN authorized security

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64 Hansard HC vol 376, cols 848–9, 12 Dec. 2001.
65 Ibid., cols 852–3 (Ancram).
force was established in and around Kabul to provide security to enable elections and further reconstruction. Turkey took over command of ISAF in June 2002, though Britain still contributed a reduced contingent of 400 to the force, but increased its contribution (at one point to 1,700 troops) to the continuing US-led efforts against the Taliban and al-Qaeda.⁷¹

NATO in fact provides the bulk of contributing nations to ISAF and in April 2003 (a month after the invasion of Iraq) NATO agreed to take over command of ISAF, which it did in August 2003. In October the Security Council authorized the expansion of security to be provided by ISAF beyond Kabul.⁷² Very little was said in parliament about the expanded role for ISAF, even though the UK still contributed to the force.⁷³ ISAF deployment in stages one and two in the Northern and Western Provinces was achieved by September 2005.

Stage three in the less secure Southern provinces (including Helmand and Kandahar) was agreed in December 2005, and ISAF took over from US troops and military/civilian Provincial Reconstruction Teams in July 2006 (this technique was adopted and adjusted by ISAF). The Defence Secretary, John Reid, announced the deployment of a 3,300 strong British force as part of ISAF in the lawless Helmand province on 26 January 2006, bringing British troops in Afghanistan to over 5,000. In explanation he stated that ‘all of this has but one aim—a secure, stable, prosperous and democratic Afghanistan, free from terrorism and terrorist domination’.⁷⁴ On 27 February 2006 John Reid, made clear the link between the actions of ISAF and 9/11.

We are in Afghanistan under a UN mandate with the support of the world community…to help the democratically elected government of Afghanistan extend their democratic authority and build their own security forces, and to assist them in their economic development. That is precisely why we go to the south…. It is more dangerous and difficult than the first two stages… but… we are there to prevent Afghanistan from being used as a training ground, a planning area and a launch platform for terrorist acts such as the one we saw in New York – the worst terrorist act in history.⁷⁵

The Defence Secretary made it clear that the ISAF deployment was separate from the continuing action against al-Qaeda. ‘Our troops are not there to seek out and destroy the terrorists, that is being done under Operation Enduring Freedom by an American-led multinational coalition’.⁷⁶ But the continuing link to 9/11 is crucial, for although the legal basis for ISAF is different from that of the initial US/UK operation in Afghanistan, ISAF’s presence builds on the

⁷¹ Hansard HC vol 384, col 649, 29 April 2002 (Hoon); vol 387, col 409, 20 June 2002 (Hoon).
⁷³ Hansard HC vol 411, col 588w, 22 Oct. 2003 (Ingram), who simply reported an increase in the UK-led Provincial Reconstruction Team pursuant to SC Resolution 1510.
⁷⁶ Ibid., col 12.
initial operation. One member of the House urged the Defence Secretary to ‘halt the dispatch of small contingents of our forces to south Afghanistan to undertake incompatible tasks that could not be successfully performed even by 100,000 troops…remember that in the 1980s the Russians sent 300,000 troops into Afghanistan, but that, several years later, they fled the country, leaving 10,000 dead behind’. During a short debate, John Reid defended the government’s decision in saying:

There is a difference on two grounds between this intervention and all previous ones. First, we are there at the behest and with the authority of the world community in the United Nations. Secondly, we are there at the invitation of the democratically elected Afghanistan Government.

In overthrowing the Taliban in the first operation, Western troops now faced them as opponents in the state-building phase, making such a job extremely difficult to achieve. Stage four in relation to the Eastern provinces commenced in October 2006 when NATO took over from US forces there.

The overall aim of the NATO-led ISAF operation is to achieve security in the whole of Afghanistan, which will allow for the reconstruction of the state and the strengthening of democracy. As the Defence Secretary, Des Browne, stated in June 2006: ‘the ISAF mission…is to help the Afghan Government to create a secure environment in which their authority can be extended across the entire country and reconstruction of the country can be taken forward’. He suggested the British troop contribution would increase in response to a statement by an MP that ‘that objective will not be secured with only 6,000 troops in the southern part of Afghanistan’. Des Browne announced an increase in British troops deployed to Helmand in response to the increasing violence there in July 2006—from 3,600 to 4,500. He also announced that thirty-six countries contributed a total of 10,000 troops to ISAF. A further increase in overall force levels in Afghanistan to 7,700 was announced in February 2007. The Defence Secretary managed to justify these increases while at the same time claiming progress was being made in facing down ‘the Taliban in their own back yard, delivering security and bringing the reach of the Afghan Government to places that have hardly seen it before’.

In increasingly fierce fighting forty-eight British military personnel lost their lives in Afghanistan between 7 October 2001 and 30 April 2007. This figure increased to 102 by mid-June 2008 as battles against the Taliban intensified.
On 12 December 2007, the new Prime Minister, Gordon Brown, made it clear ‘at the outset that as part of a coalition we are winning the battle against the Taliban insurgency. We are isolating and eliminating the leadership of the Taliban; we are not negotiating with them’.\(^{86}\) The British contribution to ISAF was increased to over 8,000 by Spring 2009.\(^{87}\)

6. Conclusion

Rules governing the use of force in the UN Charter, and its subsequent interpretations in General Assembly resolutions and in the International Court, are premised on the need to prevent an escalation of conflict. Escalation will lead to further chaos and more devastating destruction. That is why both the threat and use of force are prohibited by article 2(4); that is why self-defence is only permitted in response to certain breaches of article 2(4); that is why the International Court and the Assembly have made it clear that article 2(4) should be interpreted to mean that force cannot be used against any of the sovereign rights of a state;\(^{88}\) and that is why the Court in the *Nicaragua* case did not permit the American arguments of counter-intervention even though they were offered as arguments of collective self-defence.\(^{89}\) Individual interpretations of the Charter and of Security Council resolutions, the occasional inconsistent resurrection of the right of humanitarian intervention, and ever-widening claims to a right to take preemptive military action will lead to an escalation of violence. To accept these claims and interpretations as lawful would remove the brakes on escalation. The world will descend into a remorseless and endless cycle of violence with blows followed by even more devastating counter-blows. Tom Farer anticipated this when commenting on the developing Bush Doctrine and the gradual victory of the unilateralists:

> Signalling their triumph would be preemptive and punitive acts or threats of force increasingly unrelated to the specific events of 9/11 and an endorsement of the unrestrained use of violence by client regimes themselves acting in the name of counterterrorism. Battered by these initiatives and the intense opposition they would induce, the basic force-regulating provisions of the UN Charter, the frame of international relations for the past half century, would break along with the restraints on the use of terror by states against their own populations...

Once the frame of order is broken, we can reasonably anticipate increasingly norm-less violence, pitiless blows followed by monstrous retaliation in a descending spiral of hardly

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\(^{86}\) *Hansard* HC vol 468, col 303, 12 Dec. 2007.

\(^{87}\) *Hansard* HC vol 477, col 676, 16 June 2008 (Browne).


imaginable depths. The Israeli experience could well prove a microcosmic anticipation of the global system’s future… ⁹⁰

Around the turn of the twenty-first century we are seeing liberal democratic countries willing to use force in circumstances that are not readily reconcilable with the rules contained in the UN Charter. This does not simply represent a continuation of the Cold War approach of the superpowers which tended to disingenuously state that they were operating within the bounds of international law, while at the same time putting power above the law. Rather it represents a concerted attempt by these countries to expand the recognized exceptions as well as to establish additional exceptions to the ban on the use of force. British governments though have something of a track record of attempting to develop the law in this area. On occasions its approach is viewed as a breach of international law as in the Corfu Channel incident in 1946 and ten years later in the disastrous Suez campaign, on others it is seen as a development of the law as with the idea that the Security Council can authorize volunteer states to undertake military action under its authority, as shown by the Korean War and the Beira Patrol.

However, the lessons of history drawn from earlier British practice show that there are a number of significant hurdles that have to be overcome to develop a legal doctrine that is not simply a clear application of the rules contained in the UN Charter. The first is legal and found in the nature of the rules themselves. As peremptory rules or *jus cogens* these rules reflect the basic values of the international system as created in 1945. The rule prohibiting the use of force has been fought for by leaders, politicians, states and many other interest groups and individuals over the centuries. Its embodiment in the UN Charter represented the climax of that struggle and it is something that will not be given up easily. For a start world opinion must come behind any attempted change to the rules.

Public opinion also constitutes a political obstacle to the legitimacy of military operations that have a controversial pedigree. British governments will struggle, as happened in the Suez Crisis of 1956, to maintain a military campaign unless it has support within parliament and within the country. While the government of the day might be able to win support in parliament in the short-term, the longer-term consequences for its credibility and its electability will be serious if it continues to prosecute an unpopular war. Admittedly there is no direct correlation between the illegality of a war and its unpopularity, but it is apparent that while politicians and the public will generally support a war that is in defence of the nation, or in furtherance of clearly stated universal values, wars that fall short of these requirements will usually be unpopular.

Thus while the Security Council endorsed the occupation of Iraq after an illegal invasion in 2003, the Council authorized ISAF after an invasion which generally had more support in the international community, even though it

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Democracy Goes to War

seemed to go further than the concept of self-defence as previously understood. The greater level of legitimacy achieved in the military actions in Afghanistan, by a combination of seemingly accepted arguments of an expanded right of self-defence and widespread moral outrage following the attacks of 9/11, may mean that the commitment from Western democracies to the military deployment is more sustainable and therefore likely to be more successful than that in Iraq, where grave doubts about the initial invasion have undermined the legitimacy of the subsequent actions (despite Security Council authorization), as well as undermining domestic support for the conflict in both Britain and the United States.

While its troops may face similar problems in Iraq and Afghanistan, Britain may be able to sustain its commitment in Afghanistan in the longer term because of the continuing belief in the legal and moral bases for the initial action. The initial military action in Afghanistan was not without its legal problems though they seemed to be swept away. In the longer term it may be that the disproportionate nature of the response, directed at the Taliban government as well as the terrorists, will serve to undermine the legitimacy of the current state-building enterprise. From being a war launched to deal with the threat from al-Qaeda, it is now a war mainly fought against the supporters of the former effective government of Afghanistan. Arguably one of the problems lies with the initial response to 9/11, which although taking the form of defensive action against al-Qaeda, was also directed more widely than appeared necessary by including the Taliban. While defensive action is still being undertaken against al-Qaeda in pockets of resistance, the main military action now focuses on Security Council authorized enforcement action being undertaken by ISAF throughout Afghanistan. By treating the Taliban as the enemy in 2001, British troops are now facing the problem of providing security and helping reconstruction in the face of continuing Taliban hostility. Though in practical military terms it might not have been possible to distinguish the Taliban from al-Qaeda in 2001, there can be no doubt that this has made the job of British troops in 2008–9 extremely difficult to achieve.