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The views expressed in these articles are of the authors and may not necessarily represent the position of the Association.

**ISLAM: THE NEW ENEMY OF IMPERIALISM  
AFTER THE POLITICAL  
CAPITULATION OF THE  
FORMER USSR**  
**A study in the use of fascist  
propaganda for military intervention**

Niloufer Bhagwat\*

“ ..... the more modest.....the appeal of propaganda to reason, the more exclusive its appeal to the emotions ,the greater its success.....the power of reception of the masses is very small, their understanding limited , but their Power to forget enormous.....” (Hitler’s Mein Kampf 1927)

On 11<sup>th</sup> September 2001, before the implications of the diplomatic defeat at the Third United Nations Conference on Racism of the government of the United States supported by the European Community on critical issues, reached peoples and chanceries, the World Trade Center Towers were attacked and crumbled under the impact of direct hits by aircraft flown with precision. The Pentagon did not go unscathed; 3000 innocent Americans and others of diverse nationalities, races, and religious beliefs including Islam, lay buried under the rubble.

In an act unprecedented in the diplomatic history of the world, which has seen many empires, 60 countries were put

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on notice by the President of the United States of military intervention, for allegedly harbouring cells of the "Al Qaeda". Three countries were declared to be "Axis of Evil". The military budget of the United States was increased by 48 billion dollars, as corporations continued to collapse while many survived by announcing thousands of job losses. A "War Against Terror" was declared and a "global alliance against terror" was forged to capture Osama bin Laden, who was claimed to be responsible for the 9/11 attacks. He was wanted "dead or alive"; the goals of the "war" were to "smoke out" the "Al Qaeda"; to remove the Taliban government for its hospitality to bin Laden.

But that was not all, Capitol Hill and other buildings were vacated to deal with grotesque anthrax spore scares. In a bizarre document, seven countries were targeted for attack by the United States with small nuclear bombs; claims were made that Iraq, was producing dangerous chemical weapons for use against the United States and that Islamist terrorist groups had access to weapons of mass destruction.

In the weeks that followed, the Geneva Conventions on the conduct of war were ignored. Heads of governments, with few exceptions, as in the Gulf War, supported the bombing of the Afghan people already ravaged by a cruel undeclared terrorist war against "communism", conducted by the intelligence agencies of more than one country for the past 23 years, and devastated by famine.

Afghanistan had been made into a graveyard. From 1978 the Afghans continuously buried their dead, Thousands were affected by land mines; attacked and looted by terrorists; homes and schools destroyed; caught in the cross fire of warlords and drug lords. From 1999, millions fled. Hungry men, women and children laid down to die, too weak to move; children were sold for food. This was the "evil enemy", that the United States government bombed.

It was ironic that the tragedy of the death of 3000 innocent victims in New York, of many nationalities and religions,

including Islam, was being used to ignore the Durban agenda, and to continue the agony of billions in the world facing global fascism. Simultaneously, a hate campaign was orchestrated by imperialism and governments in close collaboration, against adherents of Islam in different parts of the world, in the most excruciating phase of Imperialism. To deflect the "people's victory" at Durban, won even though "US and European diplomats laboured strenuously to undermine the issues reducing it with condescension and a touch of contempt to a question of 'amount' that the professional beggars were claiming in damages....."

#### **Terrorism as State Policy**

The tragedy in New York, was not the first serious terrorist attack in the world, as projected by the US government, and echoed by powerful global media networks. Terrorism has been used as a matter of State policy, after the liberation of several countries from colonial rule, and since the Vietnam War, when the costs of direct deployment of troops in a declared war, were found to be financially and in terms of loss of human lives, no longer acceptable to public opinion. Countries unwilling to abandon their path of independent political and economic development, were primary targets of terrorism, used as an alternative means of warfare. The groundwork was laid by more than one Intelligence Agency, executed through various mercenary leaders and groups financed in many cases by the drug trade. The training of these mercenary terrorists and their deployment was criminal, in violation of International Law and the Charter of the United Nations. Civilians, state forces, heads of state, development projects, schools, hospitals were all targeted.

#### **The Significance of the Intelligence Failure of Powerful Intelligence Agencies**

The Intelligence failure in the United States, with its close

fraternal ties to other intelligence agencies has been unexplained. The sole military superpower, with high tech aerial surveillance systems, failed to protect its citizens; despite the continuous claims made by the United States administration commencing in 1992 that Islamist terrorists were targeting the United States and the World Trade Center, New York. In this period there were at least two bombing attempts in New York: one an actual attack on the World Trade Center on February 23, 1993. The other, also in 1993, was a sting operation by the FBI, in which alleged Islamist extremists from Africa, residents of New York, lured by an agent provocateur set up by the FBI into mixing what they thought was a bomb to be used against some buildings and tunnels in New York<sup>2</sup>

In these terrorist attacks, including the 1993 attack on the World Trade Center, and the attack in 1998 on the United States embassies in Tanzania and Kenya there was a direct connection with the terrorist centres on the Pakistan-Afghanistan border, established by the CIA, Inter Services Intelligence of Pakistan, Saudi Arabia, the UK and other countries; organized to train unemployed youth, including Afghan, Pakistani, Arab, London based Muslims and New York and western youth in search of easy money and adventure. Most of those involved in these attacks also held Pakistan passports including Ramzi Yusuf who is said to have masterminded the bombing of the World Trade Center in February 1993. He surfaced again in the attempted terrorist attack in the Philippines in the mid nineties; as did Muhammad al Ohwali, Muhammad Odeh, Fahd Mohammed Ali, Msaalem, Ahmed Khalfan Gailani, and 'Azzam" associated with the 1998 bombings on the United States embassies in Kenya and Tanzania<sup>3</sup>.

#### **India and the Fascist Agenda**

In India between 1984 and 1991, two Prime Ministers who took broadly anti- Imperialist stands were assassinated by

terrorist organizations. Thereafter, the "hate campaign" against Muslims in India commenced. In the same period, the United States complained that it was being targeted by Islamist extremists. The pogroms against minorities coincided with the United States and the World Bank's influence over the Indian government's efforts to establish a "free market", to privatize the Public sector, after the capitulation of Mikhail Gorbachev; to accept globalization of the transnationals; becoming a signatory to the World Trade Order and its implementation which was a death sentence for Indian manufacture and agriculture. A dispute was contrived relating to a place of religious worship. A fraudulent political movement led by a fascist alliance of parties closely linked to Imperialism throughout their history was established to divide the electorate. In Bombay a serious pogrom was organized in December 1992/ January 1993, followed by terrorist bomb attacks, by criminal elements which was allegedly to be a backlash by minorities in which citizens of all faiths died. A deliberate trail was left, which permitted the Inter Services Intelligence (ISI) of Pakistan, to incense majority opinion.

#### **The Misuse by Imperialism and Governments Allied to Imperialism of Islamist Nomenclatures and Concepts**

It is now accepted that in Bosnia and Kosovo, mercenary "Arab" fighters, trained in the terrorist camps on the Pakistan/ Afghan border by the CIA, ISI of Pakistan, and Saudi Arabia's Intelligence agencies, with support from British Intelligence in complicity with other Intelligence Agencies in Europe, were used to organize fierce criminal terrorist attacks in Yugoslavia, against Serb civilians and Serb forces, provoking a backlash leading to deliberately fostered ethnic warfare and a serious violation of the sovereignty of a member country of the UN.

It has been submitted by President Milosevic before the War Crimes Tribunal at the Hague, that terrorism was part of the NATO design to break up Yugoslavia. The so-called Kosovo

liberation Army supported by "Arab" fighters was financed from the sale of narcotics and white slave trade in women. Lt. General Nambiar of the Indian Army, then a commander of the UN peace keeping force, made public his differences with NATO forces on the break up of Yugoslavia and resigned.

Immediately after the events of 11<sup>th</sup> September, journalists of the "Times of India"<sup>4</sup> uncovered cases of openly coercive recruitment of poor Indian Muslims who seek employment in Saudi Arabia under threats of being deported back to India, in full view of government agencies in Saudi Arabia by Saudi Arabian and Pakistani agents. They were recruiting for and on behalf of "Al Qaeda", for dispatch to terrorist camps in Bosnia, Kosovo, Chechnaya, and other regions. These individuals escaped from these regions for their personal safety.

The "Al Qaeda" (Arabic for "base") for recruitment and training were the governments of Saudi Arabia and Pakistan, among others, all collaborating. They were the Al Qaeda or the "base" of the terrorist organizations, conceived by intelligence agencies, acting in furtherance of imperialist policy, distorting Islam, spreading disinformation to provoke attacks against Muslims and Islam phobia in pursuance of the Huntington thesis of "Clash of Civilizations", to justify global military intervention. President Musharraf was permitted to disown these organizations which had also played havoc with the life of the people of Pakistan, only when they became counterproductive for the Oil Company, UNOCAL. UNOCAL's gas pipelines went through Afghanistan. Pakistan's powerful truck transport lobby, was hungry for the overland trade route through Afghanistan to the former Asiatic Republics of the USSR.

The future of this policy is uncertain, after the killing in Karachi of Daniel Pearl, the Wall Street journalist who was based in India. For propaganda purposes, to deter American journalists and shock the American people, the Jewish background of the journalist and the family's past association

with Israel, (which his father objected to being disclosed by the Israeli government) was useful to Intelligence agencies, to prejudice Israelis citizens against Muslims at a critical stage, when Israeli reservists, retired military officials and former Intelligence personnel of Israel had taken a stand against Sharon's savage attacks in Palestinian territory.

The use of Islamic nomenclatures, by terrorist organizations was the work of Intelligence Agencies of those States which had declared themselves "Islamic" but were defiling Islam, and acting in concert with the CIA, to camouflage the criminal nature of terrorists, from the people of Islamic faith, amongst whom they operated as religion as an emotive force.

These same concepts and nomenclatures were useful to create Islam phobia against Islam and its adherents. It is a case study of horrific proportions of the alternative uses by imperialist governments and intelligence agencies, of mercenary terrorists operating in the name of Islam, sometimes as allies, as in Bosnia, Kosovo, Chechnaya, Algeria, Kashmir, Tajikistan; and when that purpose ceased, as the "Enemy". In all forms, the purpose was global economic strategic penetration of the world.

It is necessary to discuss the misuse by imperialism and fascist political parties of the Islamic concept of "Jihad", which denotes spiritual "striving" or a "moral struggle" in the Quran. Foremost, it concerns the struggle against the baser instincts of the self, only thereafter against injustice. This concept was distorted to revile Islam. The Quran prohibition of attacks on the unarmed was not discussed in the propaganda. It was also the first time in the history of Islam that "Jihad" was distorted and used to attack even people of Islamic faith as in Afghanistan and Kashmir.

Ironically, the two governments of Saudi Arabia and Pakistan, countries whose geo-political boundaries were created, like that of the State of Israel by the patronage of British Imperialism never displayed the same zeal for the national

liberation struggle of the Palestinians and a State of Palestine, despite UN resolutions. Neither have their terrorist "Arab" or "Afghan" fighters except for the belated initiative for Palestine by the government of Saudi Arabia for respectability. Their zeal was supposed to be directed against enemies of imperialism, the USSR and "Communism", although these systems did not harm Islam or the Muslim people; respecting their culture and way of life, in the union of the Republics of the Soviet Union. No attacks on people of Muslim religious faith or their places of worship took place in the USSR. There was no Islam phobia from 1917 until the demise of the USSR in 1991.

Republics of the former Asiatic Republics of the USSR Turkmenistan, Kyrgistan, Uzbekistan, Tajikistan, Kazakastan, and others largely peopled by adherents of the Islamic faith, found themselves pauperized after the USSR was disbanded against their consent. They became victims of the murderous politics of terrorist organizations, funded by Saudi Arabia, operating criminal organizations through Pakistan and Afghanistan, in the name of Islam, as part of the imperialist policy to promote instability and civil war, through organizations such as the Islamic Movement of Uzbekistan (IMU) and a more widespread movement, the Hizb ut-Tabrir al Islami (HT) party, of Islamic revolution)<sup>5</sup>.

#### **Collaboration of the Organization of Islamic Conference (OIC) with Imperialism**

At a critical period of contemporary history for adherents of the Islamic faith, the OIC, using the mantle of Islam failed to condemn the bombing of Afghanistan, (with some exceptions) despite the distortion of Quranic tenets, the unparalleled demonizing of adherents of Islam except for the propaganda which preceded the holocaust against the Jews in Europe. The OIC has been accused of acquiescing in the attacks to destroy the Palestinian nation by the Sharon government in Israel, supported by the United States administration, misusing

the Jewish soldiers and settlers. While Croatia and Bosnia, serving imperial interests of Europe, were recognized overnight by the Palestinian people bereft of a country by the colonial powers of Europe, and, the United States who have denied them statehood. The OIC has not reacted to the murder of thousands of Muslims in Gujarat and their segregation or attacks in Bangladesh against the minority adherents of Hinduism by organizations misusing Islam. In both countries governments have acquiesced, in collaboration with imperialism, a diversion from policy.

### **The Old Enemy and the New Enemy**

The old enemy of the United States of America, the "Evil Empire," which haunted the western democracies (including those who had traded in slaves for three hundred years) called on "workers of the world" to unite against exploitation. The old enemy against which Senator McCarthy raved and labeled American Marxists as subversive and "Un-American"; directing witch hunts at those who sought a scientific understanding of the evolution of economic systems and an historical analysis of Capitalism, inspiring restrictions on free speech and debate, while claiming that it was only communism which destroyed man's "freedom to think". This enemy has been signed away.

The USSR as a political system had its imperfections and distortions. But it was a pioneer that had been deliberately demonized by the public relations industry of the United States as "evil". A petition to the United States Congress in 1919, by citizens of the United States against the intervention of the United States military forces in Russia reveals some truths about this enemy and the USA. The Petitions reads as follows:

1. We, as citizens of the United States, call upon the Congress of the United States to take action.....to bring about the discontinuance of the blockade against the Russian Soviet Republic..... bringing death by starvation to hundreds of thousands every month.

2. We urge the immediate recall of all American troops in Russia.....That is no service for the soldiers of a democracy.
3. We do most earnestly protest against the conniving or collaborating of our government with any counter—revolutionary groups .....
4. We hold that the American government must do nothing that will hinder the Russian people from determining their own form of government in accordance with their own economic and political ideals.
5. In sum, we call upon Congress to exercise its constitutional functions for the purpose of creating a genuinely democratic foreign policy, consistent with the traditions of a nation which cherishes the honourable memories of the revolution by which it was founded and the civil war by which it was perpetuated.”

The United States had overlooked the genocide of millions of native Americans; the enslavement of millions of African Americans by European Americans, leaving a legacy of cruelty not yet recanted. The old enemy of the United States, the USSR had been signed away by the powerful undemocratic Politburo of the Communist Party of the Soviet Union against the wishes of the people. History may yet record that the demise of that enemy hastened the contradictions of the imperialist hearts.

#### **The Phraseology of the Crusades—the UNOCAL Company, Crusader in the “War against Terror”**

The President of the United States used the phraseology of the Crusades to describe the military campaign for the pacification of Afghanistan: “Operation Infinite Justice”, (subsequently altered to the cliché “Operation Freedom”) This initial phraseology was associated with the invasions by the crusaders to capture trade routes in Arab lands, camouflaged as holy wars to regain the holy places of Christianity, to gain

people's support. What could be more emotionally compelling than religion in medieval Europe. Harry Magdoff in his brilliant essay on "American Empire and the US Economy" explains the foreign policy camouflages of the USA:

"Obscuring economic and commercial interests by covering them up intermingling them with idealistic and religious motivations is hardly a new phenomenon. Wars have been fought to impose Christianity on heathen empires- wars which incidentally also opened up new trade routes or established new centres of commercial monopoly. Even such a crass commercial aggression as the Opium War in China was explained to the United States public by the American Board of Commissioners.....'as the result of a great design of Providence to make the wickedness of men subserve his purposes of mercy towards China.....'"

The mystery of Osama bin Laden, the new enemy who has withered away to the discomfiture of the Senate Intelligence Committee, leaving no trail after he served a purpose, remains to be resolved. Similarly the role of UNOCAL, the California based oil company prospecting for gas pipelines for the exploitation of Central Asian vast reserves of gas and Oil, another stage of the Afghan tragedy which began in 1993, is yet to conclude.

The phantom organization, the Al Qaeda, the new US enemy appears and disappears, in regions as far off as the United States, Australia, India, the Philippines, Yemen and other areas. The billionaire bin Laden however, is not famous for his devotion to Islam. Osama, with extensive financial interests in the United States and Saudi Arabia, a loyalist of the Saudi Arabian monarchy (Islam does not recognize monarchy) served the CIA, Saudi Intelligence, and the Inter services Intelligence throughout the nineteen eighties in the terrorist camps of the Pakistan Afghanistan border. He was an early recruit, the pivot of the "Arab" terrorists. He left this region at the resignation of the communist government of Afghanistan in 1992 under a UN

plan, three years after their supply lines were cut by Mr. Gorbachev, not because of any military defeat. They were to defeat the combined "Mujahideen" war lords at Jalalabad in 1992, with an Afghan army.

Legend would have us believe that Bin Laden resurfaced as an enemy of the United States and the Saudi monarchy, returning to the Pakistan-Afghan territory in 1996 as a rebel. This is hardly likely as the region in which the reestablished camp was in the control of the Inter Services Intelligence of Pakistan which shared geo-political interests in the region with the US.

Spokesmen for the US administration and Saudi Arabia have attempted to advance fictional reasons for bin Laden's transformation into an "enemy"; that he was aggrieved because US troops stationed in Saudi Arabia during the Gulf War had not been withdrawn; that he opposed the continued United States support of Israel against the Palestinian people.

The reasons advanced are not credible. United States military and Intelligence personnel had been stationed in Saudi Arabia for several decades, the Oil Company ARAMCO being an American enclave. The bin Laden family was close to the political hierarchy in the United States and economically had invested in small arms manufacture by their Carlyle Corporation and to the Saudi Arabian monarchy. The Bin Laden family fortunes were made after arrival from Yemen in construction contracts assigned by the monarchy. Bin Laden had worked closely with the CIA himself in an unholy cause against the sovereignty of the Afghan people.

Osama never lead any ground movement for the withdrawal of American forces in Saudi Arabia, or for the establishment of a State of Palestine; directing his energies to the war against communism in Afghanistan until 1992. He returned to Saudi Arabia and thereafter to Khartoum, to interact with diverse Islamist organizations being set up in the name of Islam, in the Horn of Africa by Intelligence Agencies assisting Imperialism. They distorted Islamic tenets to disrupt

nationalism in the Arab world, in the Horn of Africa. By supporting pan Islamic revival movements based on rigid external religious rituals and dress codes among Muslims, never required in the Quran, by concentrating on externals rather than substance, ignoring the history and sociology and the conditions under which Islam was practiced in the 7th century in Saudi Arabia, in the region of Mecca and Medina. These organizations and clergy were liberally funded. Their fanaticism was linked to funding, a source of livelihood.

The misuse of Islam by a section of the Ulema or Islamic clergy and political organizations must be prevented. Political Ulemas are knowledgeable only in those parts of the teaching of Islam which support their political view. Many distort Islam to legitimize their political creed "...Islam does not recognize an institutional clergy..."<sup>7</sup> Islamic believers are expected to rationally understand and interpret their own spiritual and social duties.

It was after 1996, that Osama bin Laden was to reinvent himself as the "enemy" of the United States, when the Taliban militia failed to subjugate and control all of Afghanistan. In 1994, Benazir Bhutto the former Prime Minister of Pakistan announced on the BBC, that the United States, U.K, and Pakistan, funded by Saudi Arabia were replacing the fractious Mujahideen warlords of President Rabbani's government waging internecine warfare.

The absence of a central controlling authority from Kabul for the entire territory of Afghanistan, obstructed the plans of the California based, US Oil Company, UNOCAL which was hungry for the immediate exploitation of the gas and oil of the Central Asian Republics, on the exit of the communist government. These reserves are estimated to be as large as in the Middle East. The Company had been negotiating, along with its partner DELTA the Saudi Oil and Gas Company, from 1993. The UNOCAL supported the Taliban (students of Islam) from 1994 to 1997 to replace the fractious warlords, and to

pacify Afghanistan. Their inhuman methods, included removal of women from Afghan civil society and girls from schooling, violated the Quran. This fanatical approach of the Taliban was supported by the Company and its supporters in Washington, hoping that the all Pashtun militia, would impose uniform autocratic control and create conditions for the establishment of the gas pipelines through Afghanistan into Pakistan.

By 1998 it was clear to UNOCAL, whose patience with the Taliban was running out, that the Taliban had failed to fulfil the objectives of the Company and that of the Truck Transport lobby in Pakistan to control the entire territory of Afghanistan for the establishment of an unobstructed overland route to the Central Asian Republics; they had been unable to defeat the Northern alliance, with ethnicity becoming an increasingly fractious issue between the Taliban and the Tajiks, Uzbeks, Hazaras and other groups, comprising the other half of Afghanistan who were being massacred by this militia. The gas pipelines of the UNOCAL remained a dream under these conditions.

The fate of the Taliban government was decided when it failed to control more than 60% of Afghan territory, with a support base among only a section of the Pashtun people, who comprise not more than 50% of the people of Afghanistan. The Central Asiatic Republics, the potential source of gas and oil coveted by UNOCAL, with cultural and ethnic ties to the Northern Alliance (regrouping of forces of the Rabbani government); apprehensive of terrorist groups infiltrating through Afghanistan, declined to deal commercially or diplomatically with the Taliban, seen as supporting terrorist extremist Islamic groups preaching fanaticism in the heart of Central Asia, creating insurgency and terrorism for these Republics of the former USSR not used to permitting misuse of religion for creating conditions of civil strife in society.

These conditions and the grim situation facing corporate America justified the intervention in Afghanistan. These

disclosures of failing economic interests were made gradually after September 11, although the failure of economic conditions of corporations was blamed entirely on the events of 9/11. The pretext to disperse the Taliban was found in the person of Osama bin Laden.

Evidence from 1998 that the US embassies in Kenya and Tanzania had been attacked by attackers holding Pakistan passports was used to argue that the conspiracy had been masterminded by Osama. The US fired missiles into Afghanistan although the Taliban did not exist when Osama bin Laden left Afghanistan in 1992, returning in 1996. The missiles fired into Afghanistan predictably did not hit Osama. He was the decoy, not the target.

It was the September 11 tragedy, along with video recordings of Osama bin Laden, justifying the attack on unarmed civilians, which has served as the justification for the fierce bombing of Afghanistan wholly indefensible under international law and for the stationing of NATO foreign legions. Russian troop assistance to an Afghan government facing terrorist attacks from three international borders was termed a "foreign occupation" despite a treaty. The continuing Islam-phobia being spread in the world, is a smokescreen for military intervention in this phase of global fascism. The strange video recording of Osama, the mode of recovery and the monologue seriously defamatory of Islam does not inspire much confidence and is tainted evidence.

In the interregnum, Ahmed Shah Masood, a serious player for leadership was murdered on the eve of the war and a government formed in Europe was installed in Kabul. Afghanistan's interim leader Hamid Karzai, earlier an employee of the California Oil giant UNOCAL, has now announced that the \$ 4.5 billion oil pipeline is under consideration.

### **The Future**

The tragedy of September 11, resulted in a short lived

reprieve for corporate America; Opinion in the United States is still divided on what was the defining moment for America; 9/11 or Enron. It may be both. On Capitol Hill a Republican Senator was heard reporting approvingly during the Enron hearings that Capitalism "has no conscience".

Systems in place are on the decline, but what of the future? These are painful times for humanity; and particularly for adherents of the Islamic faith, presently in the crucible, like other minorities and the disinherited of the world. However there is a challenge. In 1919 at the Oil city of Baku at the historic conference of the "Muslim Peoples of the East", covered by revolutionary American journalist and writer John Reed, an historical compact was made, by the adherents of the Islamic faith, the peoples of Central Asia, with the world's revolutionary vanguard, and with their co-religionists of other faiths, to build just societies, democracies for the toiling people; separating religion from politics and the public sphere. It is time to build such a front again.

In answer to the criminal propaganda unleashed, that Islam sanctions terrorism it is necessary in the discourse with the world to recall these words of the Quran.

"O you who believe! Indeed we have created you from a single male and female and we have made you into nations and tribes so that you know each other..... O people remember .....An Arab has no superiority over a non-Arab nor does the non-Arab have superiority over an Arab; also a black has no superiority over a white nor does a white have any superiority over black, except by virtue of piety. Indeed the best among you is the one with the best character."

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**CRIME AGAINST HUMANITY AND  
NOT WAR: MAKING US SAFER AT  
HOME AND STOPPING HUMAN  
CARNAGE ABROAD**

**THE DANGERS OF WAR**

Michael Ratner\*

A couple of weeks ago I got a notice from my child's school that said there would be a funeral for the Assistant Soccer Coach and that all of the children should wear their soccer uniforms. Another notice came from this school that a second grade kid's father had died in the World Trade Center. Another child was wearing her missing father's police jacket.

I thought about these children, and I thought about the fact that these children have lost their parents forever. Instead of making me want to go kill and bomb those who might be responsible I thought about other children and families who had parents and relatives. I thought about the killing of almost 1000 men, women and children murdered in the Sabra-Shatila

\* Michael Ratner, distinguished Human Rights Attorney with the Center for Constitutional Rights has been the lead attorney in many landmark cases in support of the US Constitution and International Human Rights Law. See [www.humanrightsnow.org](http://www.humanrightsnow.org) for some of Michael's many legal analyses of human rights violations by the United States Government, domestically and through foreign policy initiatives. This speech was first presented at a National Lawyers Guild meeting in New York on October 3, 2001 and was subsequently reprinted in *58 Guild Practitioner* 129 (Summer 2001). It is presented here in slightly edited form.

refugee camp, I thought about those killed in Israel or the occupied territories, those in Cambodia, Rwanda and Iraq. It brought home to me emotionally and directly what it means to lose loved ones, what it really means to use force and what it really means to kill people. I cannot imagine a more painful emotion.

It made me think about the war the US is planning and the people that will die. I don't want anymore children like those children at my kid's school to lose their parents or those children in the Sabra-Shatila refugee camps; I don't want more kids killed in Iraq; and I don't want to see more weeping in our world. So, rather than make me a hawk wanting to bomb the alleged culprits, the attacks of September 11 have actually committed me more to the fact that we cannot use military force; that we must find a way to avoid it and find a peaceful means to arrest, try and punish the guilty and prevent future attacks.

Throughout my legal career with the Center for Constitutional Rights and the National Lawyers Guild, working with my friend Jules Lobel<sup>1</sup>, I have litigated the legality of every single war that the US has fought.

I have never won a case.

During the last litigation challenging a war in which Jules and I were co-counsel, that is the Iraq war, Alexander Cockburn wrote a letter to me in *The Nation*; it said, "Michael, you know sometimes even leftists have to dial 911.

The question that I am always asked in this current warlike atmosphere, "is this one of those situations?" "Is force necessary?" "Are there alternatives; and if there are alternatives, what are they?" "Is not force the only alternative we can have right now?"

In one sense it is an unfair question because in the short term, to be very honest, there are not very many alternatives. We have all been put into a situation that has been created for 50, 100, maybe more years; and we are asked and expected in

an instant to solve it and make ourselves safer. We are asked to figure out how to both arrest, or in the case of the United States, kill the people who did it, or who they think did it. We are asked to eliminate a terrorist network which the US claims is out there, end future attacks on terrorism and make the whole world safe. Well, particularly in the short term, I don't have the answer to that, and the US government certainly doesn't have the answer to that.

In thinking about this, what I have come to realize is that the consequences of the military attack that the United States is planning right now are so horrendous that they outweigh employing a peaceful alternative, difficult as that might be. Not only are the consequences of war horrible, but there is no chance that war, bombings and killings are going to stop what happened at the World Trade Center. I want to talk about some of the reasons that war in this situation is a terrible alternative. First, I want to give people a little bit of what US and international law says about these two options: war or peace.

#### **The Legal Landscape: What about Congress, the UN and International Law**

Congress passed a Congressional Resolution on September 20th that was probably one of the broadest, worst resolutions authorizing military force that I have ever seen adopted by a US Congress. It essentially said to the President, "you can use military force to attack any country, organization, or person who, (and they use a number of different terms), "aided, assisted, harbored persons in the September 11th attacks, and you can use that military force not just for that attack, but to prevent any future attacks." The President can decide, without consulting Congress, which country, organizations and persons he wants to attack. He can start wars against all of the 37 countries where it is claimed that Bin Laden's people or the Al Qaeda network is present or against anyone else he suspects of any level of involvement in the attacks of September 11 or

any future attacks. He can do this without ever returning to Congress and without getting any approval from them even if he leads us into World War III. It is not what the framers of our constitution imagined; the US Constitution was drafted to avoid Presidential wars.

So it is legally and politically war by one person (the President), Congress has given up any authority over war at this time. There is no time limit. They even gave the President a fat 20 billion dollar check to help him along in this war. They even gave up fiscal control. And when you think about the war mongers in the administration—Rumsfeld and Wolfowitz you should be very worried. Unfortunately, it is not something I can litigate even though I promised to never litigate another of these cases.

The United States then went to the United Nations Security Council, but it did not request authority to use force as it did against Iraq under the UN Charter. A nation can use military force for self-defense, but only for self-defense. Once the United Nations Charter was ratified, as it was by the United States, force cannot be used to retaliate or to punish.

Today's New York Times editorial actually used the word "retaliate". But you can't do that. Under international law you can use force for self-defense but not for retribution. The United States is arguing that its use of force is self-defense; that there has been a series of attacks on the United States, including attacks on US people in the Saudi Arabia and the East African embassies. The US argues its self defense. People like me probably don't get very far saying they don't have some right to use self-defense. The argument can be made, but I think it is better as a policy argument than as a legal one.

On the other hand under Article 51, once you go to the Security Council, even in cases of self-defense, the Security Council can take over the so-called self-defense and the country can no longer use self-defense except as authorized by the Security Council. As I said, the US went to the Security Council,

but the US tried to ensure that any Security Council action did not prevent the US right of self-defense. While there is a technical argument that the entire matter is in the hands of the Council, it is just that, a technical argument among lawyers. The United States, has been very careful to ensure that in every UN resolution, the right of countries to use self-defense is reaffirmed.

So at this point the legal landscape is rather bleak. I am not saying I couldn't come up with arguments. We can always come up with arguments. That is what lawyers are trained to do. The President does have broad authority from our Congress and more or less from the United Nations; the US can pretty much do what it wants to do under currently existing law.

### **The Consequences of War Now**

I want to spell out some of the reasons why I think the military attacks that the United States is planning are really so horrendous and will make us less safe. The first is that dropping bombs on Afghanistan will cause more terrorism and it will be terrorism against us. I have little doubt about this. Even *The New York Times* and *The New Yorker* are writing about the "hate America" campaigns in Muslim countries.

Pakistan is a country that is really close to the Taliban. Their intelligence and military works hand in glove with the Taliban; its phone system even runs through Pakistan. Thousands, tens of thousands of people in Pakistan are in sympathy with the Taliban. You have the person, the religious cleric sent to Afghanistan to negotiate the surrender of Bin Laden, returning from the trip to his Mosque in Pakistan preaching that if America attacks Afghanistan, it is death to the Americans. In hundreds of Mosques throughout Pakistan, that is what is going on now. The minute we attack Afghanistan, we are not safer at all.

This is occurring in other countries throughout the world. In Indonesia you read about bands of people going through

the streets looking for Americans and wanting them out of the country. Young men want to enroll in the war in Afghanistan against the United States; they want to come from Indonesia, Egypt, Saudi Arabia and elsewhere. Then you have to ask yourself, have these kind of tactics of war ever worked before? Israel has been using military force for a long time against terror, particularly in the last few months. You know the answer. Do Israelis feel safer today than they did decades ago? The answer is obviously not. It hasn't worked in that particular case and it won't work in this case either.

Then you look at Libya by which the United States bombed supposedly because Libya had authorized the killing of some American soldiers in a discotheque in Germany. Libya's response, according to United States CIA officials, was to down the plane at Lockerbie: Pan Am 103. So we see what happens. There is a spiral of vengeance, a spiral of destruction that just continues. That is a primary reason for not using it. Only when the US went to the U.N. did that spiral of violence end; only then did Libya hand over the suspects. Remember as Reverend King said, "violence begets violence."

Another reason violence doesn't work, written about almost daily in *The Times* and elsewhere, is the destabilization of Pakistan, Saudi Arabia and Egypt. Now some might say this is a good thing. But unfortunately, because of US support for the repressive governments in those countries, there are no democrats, liberals or progressives to take over. We could wind up with more than one Taliban regime. And remember, Pakistan has nuclear weapons. There seems to me a fair possibility that Pakistan could fall. That may very well be what the people who did the attacks desired.

Third, assuming they really have evidence that Bin Laden was behind this with the Al Qaeda Network, it is very unlikely, in fact, probably impossible that they are going to eliminate the network by an attack on Afghanistan. If you believe what you read in our papers at all, 37 countries and 11,000 trained

people are involved, and we are attacking Afghanistan. That is not going to end the problem.

Next is something that is very important: the terrible tradeoffs to build this so-called coalition, which is really a coalition in name only. It has similarities with the bargains the US made with the devil to fight Communism. What the US said to countries was: if you are against Communism, we don't care whether you are a dictatorship, fascistic, repressive or genocidal; we do not care if you commit gross human rights violations; you are with us and therefore you can buy military equipment and commit atrocities against your people at home. This is already happening with our coalition "partners." Look at Indonesia, all of a sudden Indonesia is going to get hundreds of millions of dollars worth of arms; arms that had almost stopped because of its internal repression. We know where those arms will be used—against their people. That is going to happen throughout the region. Oman apparently will buy some two billion in arms including fighter planes. The wonderful military government of Pakistan. I assume, will be armed to the teeth. We don't care if we continue to support the worst dictatorships, if they are with us in this war. We are going to guarantee a miserable life and possibly death for their citizens. We are going to guarantee that someday those arms will be used against us as the Talliban is now doing.

A fifth factor is the lack of evidence and that is not a minor matter. Remember what happened when we bombed Sudan; the US claimed it was a chemical factory; it turned out to be a pharmaceutical factory in Sudan. The United States never has come up with any evidence about that and won't. Thousands in the Sudan died as a result of not having medicines. Under international law it is necessary to have clear and convincing evidence before you can launch an attack like that. The United States certainly hasn't provided it in this case. Powell admitted a few days ago that they did not come forth with the Powell White Paper essentially because they didn't have the evidence.

They don't have a case against Bin Laden and yet we are planning to bomb Afghanistan. Providing the evidence is also necessary to convince Muslims and Muslim countries that there is at least a basis for US actions. Bin Laden's martyrdom will be all the more likely without such evidence.

A sixth factor, is the worsening of an already desperate refugee crisis by US threats to bomb. Already tens of thousands of refugees in Afghanistan are fleeing and the borders to other countries are closed. If and when bombing and war begin it is estimated that another million and a half refugees will head into the mountains. Because of the closing of the border, food aid is not being delivered. Winter will arrive in the next three to five weeks we will see tens of thousands of deaths. This is simply unacceptable.

Finally, and I am sure we can all come up with more dire consequences, is the killing of innocents. Much of the Muslim world is quite angry with the United States already. When a lot of Muslim civilians, die, whether as refugees or from bombings, the situation is going to be far worse than it is today. We will be killing innocents to avenge innocents. It is unlikely that with the few targets in Afghanistan that the US can avoid killing a lot of civilians.

We know war is bad and, not just bad, but dangerous for us and for the people of Afghanistan. It will also not do the job the US says it will. It will not wipe out terrorism, but will prolong it.

#### **The Short Term Alternative To War**

The problem is - what is the alternative to the military use of force? Is there a great and perfect alternative that will eliminate the threat in the short run? I wish I could say there was. No, we don't have a great alternative, but we have to put one forward that at least tries to steer us away from war; away from terrible consequences and no beneficial results.

The attack on September 11 should not have been called

and treated as an act of war by the US government. There is a legal argument that it is not an act of war, but more importantly there are political and policy arguments why labeling the attack as an act of war was a bad idea. It certainly makes it more difficult to form a coalition; now Pakistan will be at war with Afghanistan and so will other countries. It forces such countries into a choice that in some cases might be suicidal. It also makes myths of the criminals who carried out the act; they are seen as having made war on the United States instead of as criminals. Of course, (though this is not my topic tonight), calling this war permits the US government and others to argue for broader curtailment of our civil liberties in the United States.

There was and is another choice that could make us all safer. The attack was a criminal act, a crime against humanity under international law—the mass killing of a civilian population. It doesn't lessen its seriousness. Crimes against humanity are what we tried the Nazis for at Nuremberg. It is a very serious crime, but it is not an act of war. Treat it as a criminal act, go to the United Nations and request the Security Council to establish a court to try the perpetrators of September 11. That court should have the power to investigate, extradite and issue warrants of arrests. I know there are some political issues around the UN setting up ad-hoc courts, but it is so important to dissuade the US from war, that I think it is acceptable to do so.

Now people may say, wonderful idea, but how are we going to get them arrested? Of course this is a big question and is, again, debatable. It did work with regard to Libya and the bombing of Pan Am 103; Libya did turn over the suspects for trial. If UN persuasion through peaceful means failed, the UN could establish a police or military force to arrest people, but it must be a real UN force not a fig leaf for the United States. The fact that UN approved, for example, the use of force in Iraq, was a mere fig leaf for the US. A real UN force, under the control of the UN, would have the power to arrest people

against whom there is evidence and bring them to trial before the court. There may be some other alternatives, but it is probably the best one that we can support for that can steer this country right now away from war and toward peace.

#### **Examining the Root Causes of The Attacks**

As I said in the short run, there is not much to be done. Good police work is probably all we can hope for. Of course, in the long run it is another question. It means looking at the root causes and doing it now. This is not to condone the crimes of September 11. Whenever I speak to this, people in the audience say, "Oh Michael you are rationalizing it." I am not. What I am saying is that to not look at the root causes is basically immoral. It is saying you are not going to look at why this happened and you are practically guaranteeing it is going to happen again. So it is basically immoral not to examine the why. Root causes of resentment toward the US may include our tilt in the Palestinian-Israel conflict, the use of the Persian Gulf as a US base and support for corrupt, authoritarian regimes.

It is also necessary for the US to end its unilateralist stance in the world and its contempt for international institutions and agreements. This includes the International Criminal Court, our refusal to ratify the protocol to the Biological Weapons Convention, payment of our UN dues and a whole range of others. In deed, if we could, there are numerous long term issues to focus us that can make this a safer and more just world, not just for us but for all the people of the world.

In the short term, the best alternative is a peaceful alternative: use law and not war.

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## AFGHANISTAN AND SELF DEFENSE

John Quigley\*

In the world legal order that emerged after World War II and that was codified in the United Nations Charter, states are prohibited from committing aggression against other states.<sup>1</sup> If a state is subjected to an armed attack, must approach the United Nations Security Council, which must deal with the situation. Pending action by the Security Council, a state may use armed force if necessary in its defense.<sup>2</sup>

This right of defense is key to the United States' view of its armed force in Afghanistan. The right of defense lets a state act immediately, on the rationale that the time that may be required for the Security Council to act may let an aggressor prosecute its attack unchecked. A state using defensive armed force must immediately report to the Security Council so that the Security Council may act.<sup>3</sup>

Armed force used in claimed self-defense must be necessary for protecting the victim state, meaning that no alternative short of armed force would suffice. This proposition, as reflected in customary international law, was stated by the United States in an oft-cited exchange with Britain in 1842.<sup>4</sup> Additionally, only as much force as is necessary for self-protection may be employed, which means that a state using defensive armed force may not inflict harm beyond that needed for its defense.<sup>5</sup> Armed force used purportedly in self-defense, but which does not meet all the criteria for self-defense, constitutes aggression.

The United States as a member state of the United Nations is bound by this legal regime. The United State was the primary

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proponent of the Charter at the end of the end of World War II. It is one of only five states that occupies a permanent seat on the Security Council, a position that gives it power to veto draft resolutions and thus to prevent the Security Council from acting in ways it does not desire.

In its military action in Afghanistan, the United State purported to be acting within these constraints imposed by the United Nations Charter. On the day it initiated air strikes against Afghanistan, John Negroponte, US Ambassador to the UN, sent a letter to the President of the UN Security Council, reciting that the United States had initiated self-defensive armed action against Afghanistan.<sup>6</sup> By the act of sending this letter, the United States acknowledged that its armed action would be aggression against Afghanistan unless justified as self-defense.

The self-defense theory expressed in Negroponte's letter is that Afghanistan was harboring terrorists who had attacked the United States, and that military action was needed to deter further similar attacks. The letter, only one page in length, does not discuss all the necessary elements of a valid claim of self-defense. By stating a self-defense claim, however, it suffices to meet the United States obligation to report to the Security Council.

Whether the self-defense claim is valid is another matter. Before it can be concluded that the claim is valid, all the requisites of self-defense must be found to be present. The United States must have been experiencing an armed attack; Afghanistan must be the perpetrator of that armed attack; armed force must be the only way to protect against that armed attack; there must have been no time to resort to the UN Security Council before initiating the armed force; the armed force employed must be appropriately directed to protecting against the armed attack, and the armed force employed must not, in its scope, be out of proportion to the harm the US seeks to avert. Each of these six elements must be present for the US claim of self-defense to be valid.

### Armed Attack

As to whether the United States was being subjected to an armed attack as of October 7, 2001, the attacks of September 11, 2001, would be an element, but probably not sufficient. A state that has been the victim of an attack that is over and done cannot use force in self-defense. A state that does so is said to engage in a reprisal, rather than in self-defense. Although armed reprisals were permitted in customary international law prior to the time of the UN Charter, in the Charter era they are forbidden, since the Security Council is to deal with the situations with which states formerly dealt unilaterally by way of reprisal. Reprisals are not specifically addressed in the UN Charter, but the UN General Assembly, in a 1970 resolution construing the Charter, stated, "States have a duty to refrain from acts of reprisal involving the use of force."<sup>7</sup>

<sup>7</sup> The Negroponte letter reflects an awareness that reprisals are not permitted. The letter seeks to take the US action out of the reprisal category by referring to "the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization." The letter asserts that the aim of the US armed action is to "prevent and deter further attacks."

The US argument thus is that the US was acting in self-defense, but not against an attack then in progress. The argument was that the assertedly defensive force was against anticipated future armed attacks. Such a claim is not valid in international law. The UN Charter provides for a right of self-defense only "if an armed attack occurs" (Article 51). It is insufficient to allege an anticipated attack at an unspecified location by unspecified means.

Under the UN charter's self-defense provision (Article 51), the armed attack to which a state responds must be occurring or be so imminent as to be obvious to an observer. In 1986, US Secretary of State George Schultz developed a legal rationale for responding to state-sponsored terror attacks, whereby a state might use force in self-defense if it had reason to believe

that a state that has already used force is planning to do so in the near future. Under that rationale, the United States bombed Libya in 1986. The idea was that one can consider that an armed attack is occurring if some force has already been used and other force is anticipated. Schultz claimed he had information about specific future attacks being planned by Libya on specific US targets.

The Schultz rationale was not accepted, however, as an appropriate interpretation of the UN Charter. In reaction to the US bombing of Libya, the UN General Assembly passed a resolution condemning the United States.<sup>8</sup> In the Security Council, a draft resolution was tabled to condemn the United States for aggression, and nine of the Council's fifteen members voted in favor. The resolution failed only because it was vetoed by France, Great Britain, and the United States.<sup>9</sup>

If a state can lawfully base an attack on its assertion that the other state plans to attack it in the future, the path is open to contrived self-defense. In the US exchange with Britain in 1842, US Secretary of State Daniel Webster said that force may be used in self-defense only if the need is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."

In the Afghanistan situation, the US is not even asserting that it has information of specific attacks planned against it. To that extent, it is asserting a claim of self-defense even beyond the rejected claim it asserted in 1986. Rather, it suggests that such future attacks may occur because the Al-Qaeda group has already attacked and has said it may do so again.

#### **Afghanistan as Perpetrator**

A second element of the US self-defense claim is that the state against which it is using armed force is the aggressor. The fact that the United States might have been under attack by Al-Qaeda would not suffice. Afghanistan must be the perpetrator. Negroponte refers in his letter to "the decision of the Taliban

regime to allow the parts of Afghanistan that it controls to be used by [Al-Qaeda] as a base of operation." He does not assert that Afghanistan organized or encouraged the September 11 attacks, or that it was as of October 7 organizing or encouraging attacks by Al-Qaeda.

When the UN General Assembly wrote a definition of "aggression," as it did some years ago, it addressed the situation in which a state uses not its regular army, but irregulars, to attack another state. The General Assembly said that if a state sends irregulars who carry out an armed attack on another state, that would be aggression, as much as if it had sent its own armed forces.<sup>10</sup> The United States was not alleging, however, that Afghanistan did so. The claim of "harboring" falls short of a claim that Afghanistan was attacking the United States through the instrumentality of Al-Qaeda.

#### **Armed Force as the Only Possible Means**

The third element of a self-defense claim in this situation is that armed force was the only way the US could protect itself against Afghanistan. If means causing lesser harm are available, they must be used. Armed force may be used only if no other means will suffice. The United States sought to shut off financing to Al-Qaeda. It thereby acknowledges that there is at least this other means, although it claims that this means alone does not suffice.

Still another possible means was criminal prosecution of those responsible in Al-Qaeda. However, the United States did not make a credible demand on Afghanistan for the surrender of Al-Qaeda figures. Rather, it made only broad-brush demands that Afghanistan surrender those responsible for the September 11 attacks, but without providing a list of names and detailing its information about the involvement of such persons.

Through Pakistan, the United States demanded the surrender of Al-Qaeda figures. Both before and after the start of the bombing, Afghanistan indicated willingness to discuss a

surrender of bin Laden, but the US refused to talk to it. Afghanistan pressed for detailed evidence against particular individuals, but the United States declined to provide such evidence. No state can expect another to surrender persons suspected of criminal violations without providing detailed information about the involvement of such persons.

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#### **UN Security Council**

The fourth element of a valid self-defense claim would be that the United States had no time to ask the Security Council to deal with the situation. Only in that circumstance would its use of armed force be necessary. The United States has not, however, asserted that Afghanistan was about to attack as of October 7, 2001. There seemed to be no valid reason for the United States not to approach the Security Council, the more so because it enjoyed the sympathy of the UN membership over the September 11, 2001 attacks, as reflected in the resolution of condolence that the Security Council passed the day after the September 11 attacks.<sup>11</sup>

#### **Armed Force in Self-protection**

The fifth element is that the armed force used by the United States was geared to self-protection. Since armed force may be used in self-defense only if necessary, the force employed must

be calculated to result in self-protection. Armed force used in self-defense typically has a defined objective to reverse the armed attack, such as driving a foreign army back to a certain line.

The United States' objective appears to have been twofold: to eliminate Al-Qaeda in Afghanistan, and to remove the Taliban government from power in Afghanistan. However, the United States did not explain how these ends, even if achieved, would protect the United State. Even if Al-Qaeda was responsible for the September 11, 2001 attacks in the United States, it was not clear that capturing Al-Qaeda operatives in Afghanistan would prevent further attacks, given that Al-Qaeda recruits outside Afghanistan and apparently has cells elsewhere.

It remained unclear whether Afghanistan would be ruled by a single administration that might prevent Al-Qaeda from operating, or indeed whether Afghanistan will be under a single administration. The United States allied itself with a Tajik-minority dominated military grouping, the Northern Alliance, which had a history of brutality and little prospect of being accepted by the majority Pashtun populations of Afghanistan.

#### **Scope of Armed Force Used**

The sixth element is that the force employed must not be out of proportion to the ends. The United States bombed a country much of whose population already teetered on the edge of starvation. Even before October 7, 2001, Afghans began fleeing in expectation the US would bomb. NGOs and UN agencies pleaded for a bombing pause to allow the distribution of humanitarian aid to avert widespread starvation and other privation to the population. The US air strikes seriously disrupted the efforts of the UN and other agencies to distribute humanitarian relief needed to prevent widespread starvation.

#### **Validity of Self-defense Claim**

The Security Council took no action on the US letter of

October 7, either to organize UN activity to protect the United States against Afghanistan, or to tell the United States to stop armed action against Afghanistan. This inaction was taken by some observers to reflect Security Council condonation of the US action, and a vindication of its self-defense claim. However, the Security Council never expressed approval of the US military action. Security Council members knew that the United States would veto any draft resolution critical of its actions. It may have refrained from efforts at criticism because it understood the futility of such an approach. What the Security Council did was to move immediately to the humanitarian issues and to attempt to determine how effectively to distribute aid.

The United States suffered a devastating attack on September 11, 2001. However, its attack on Afghanistan was not a lawful response. To have a valid self-defense claim the United States would have to satisfy each of the elements indicated above. On none of them did it have a convincing argument.

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## **WHAT'S HAPPENING TO INTERNATIONAL LAW IN AFGHANISTAN?**

**Roland Weyl\***

The military operations against Afghanistan constitute an extremely serious disruption of the fundamental principles of international law embodied in the United Nations Charter which resulted from the tragic experiences of World War II. The tacit acceptance of the UN to these operations has itself placed the organization in opposition to the UN's own basic principles.

The Charter's fundamental philosophy is to substitute the imposition of power and domination of people through armed force by an agreement that mediation by nation States as their representatives constitutes a people's right to free choice without outside interference. Thus, the Charter prohibits the striking of blows at the integrity of the territory (including air space) of a State, except if necessary to "maintain or restore peace", and in self-defense.

It is clear that the US incursion into Afghanistan is not to maintain or restore peace. An intervention by a state can only be justified to maintain or restore peace. It must be noted that the use of the term "war" in reference to the US aggression in Afghanistan is also totally inappropriate, because "war" assumes that there is a confrontation between two or more

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states, whereas in this case the military operations are unilateral and are not against any resistance or armed response. As for self-defense, the Charter only permits it in the case of an attack by one or several States on another State.

The logical consequences of the Charter and UN proclamations on the sovereignty of peoples and on the competence of member States to serve as the people's delegates in international relations is to introduce the concept of a world police power to protect the sovereignty of each state.

It is clear that the United States began very early to ignore the UN Charter whenever what they called "their vital interests" were affected. It began in 1953, with the Caracas resolution. The US initiated the concept of "internal attacks" in support of their ideological intervention in Guatemala.<sup>1</sup> At that time the theory of "self-defense against the internal attacks of international communism", was introduced and subsequently was reintroduced by the US into Article 4 of the Treaty of the Northern Atlantic (NATO). It is under the same cloak of internal attack that the US operations against Afghanistan are justified. Since an "internal attack" is not a legal justification under the Charter because such an interpretation would permit any state to attack another under the same pretext as is happening in Afghanistan, a State that has not attacked anyone. The US assault on that country can only be defined as a lawless act of aggression. Other ideological supports to the necessity to this venture, specifically to "fight against terrorism" are also unacceptable under principles of international law.

First, the argument of necessity must be used very carefully: it is not sufficient to describe a situation as exceptional, as an excuse to ignore the law. Moreover, this argument cannot justify the systematic and continued bombing of Afghanistan as well as the infringement on the integrity of its territory by ground troops or commandos, whose vague objectives include the eradication of terrorism and the punishment of bin Laden.

Under recognized principles of international law, even

assuming that terrorism arises from a bin Laden source in Afghanistan, it would require a public network of terrorists in that country including the police and "secret service" to justify retaliation in accordance with the Convention against terrorism. Under no circumstances would principles of international law authorize this attack on the entire society.

Furthermore, military action against Afghanistan cannot be legally justified on the grounds of punishment, retaliation, or even revenge. Although it is obvious that revenge is playing a big part in the actions of the United States government which pretends to only seek to punish the unpunished crime. But under well recognized principles of law, and especially of criminal law, state power cannot be used to exact revenge.

What should the response to these crimes have been from the State in whose territory a crime had been committed? It should have asked for the extradition of the guilty parties, and, if they were not available, to judge them in absentia.

Such extradition could be refused, under the law of extradition established by international treaties. The United States could ask for bin Laden's extradition, and Afghanistan could refuse, but even such a refusal would not authorize war.

So, what is the responsibility of the State of Afghanistan? It might be considered liable under criminal or civil law. But in this case, the notion of criminal liability must be excluded because 1) as discussed above, the Charter does not permit punitive or retaliatory wars and; 2) criminal liability is personal in that one can only be punished for acts that one has personally committed (One cannot punish an entire nation for the acts of individuals). So it is that States cannot be attacked as collectively guilty under a notion of collective liability for other peoples crimes. The State of Afghanistan cannot be found guilty of the infringement of a state's rights or collusion to infringe upon the rights of another state to justify the US incursion. The alleged act of hosting a presumed guilty person cannot constitute criminal guilt.

As for civil liability which consists of holding a party financially liable for compensation for the damage caused by its conduct, the seizing of assets by the International Tribunal of the Hague would be possible if that court determined such a decision was justified, but, even so, it could never justify the bombing of a country.

It is important to note that the attacks on Afghanistan are not legally justified. The US is relying on the low level of information and the molding of public opinion, by sentimental and moralist pronouncements on "good law". They take pride in deposing the Taliban government whose practices did not bother the US until they needed a pretext, using the objective of getting bin Laden wherever he was thought to be, operating in the state of Afghanistan as if it were not on an internationally acknowledged State.

Such pretexts cannot be justified. The law only makes sense when it has universal value, equal and indivisible. From now on, every State and every people have to fear that they take the chance of being bombed to death if there is a target on their territory that the United States (or any other State) claims they have a right to capture.

International law, which grew from the grievances of World War II, constituted a great step in world civilization. There is a universal responsibility not to give it up for any reason.

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## **BOMBING OF AFGHANISTAN IS ILLEGAL AND MUST BE STOPPED**

Marjorie Cohn\*

In a patently illegal use of armed force, United States and British bombs are falling on the people of Afghanistan. There are already reports of thousands of dead and wounded civilians from the same kind of American "smart bombs" used in Vietnam and Yugoslavia, with the promise of myriad casualties from unexploded cluster bombs.<sup>1</sup> Yet while the media bombards us with details about the tragic but few deaths from anthrax, we are shielded from photographs of the dead and injured in Afghanistan.

Jan Ziegler, Special Rapporteur on the Right to Food to the United Nations High Commissioner for Human Rights, warned on October 15, that "The bombing has to stop right now. There is a humanitarian emergency." Relief agencies left Afghanistan in the wake of the bombing. The arrival of winter is imminent, when up to 7.5 million Afghans internally displaced by the bombing will be beyond the reach of humanitarian aid.<sup>2</sup> Routing chief suspect Osama bin Laden from his cave with bombs is like finding a needle in a haystack, while mass starvation is inevitable.

The media has created a tidal wave of support in the United States for attacking the country that harbors bin Laden. In a

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recent Gallup/CNN/USA Today poll, 45 percent of Americans said they were willing to "torture known terrorists if they knew details about future terrorist attacks in the United States,"<sup>3</sup> notwithstanding the United States' ratification and implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>4</sup>, and the fact that the prohibition against torture is considered to be *jus cogens*, a preemptory or inviolable norm of international law.<sup>5</sup>

Yet in spite of nearly universal global condemnation of the September 11 attacks, the bombardment of Afghanistan does not sit well in the Arab world, which is faced with pictures of wounded Afghan children and Israeli tanks rolling into Palestinian villages. *Akhbar el Yom*, one of the biggest newspapers in Egypt, featured a photograph of an Afghan child orphaned by the bombs. It sported the caption, "Is this baby a Taliban fighter?"<sup>6</sup> And the recent killings of rebel Northern Alliance supporters by misguided American bombs, has backfired and helped build support for the Taliban. European countries are also beginning to question the wisdom of the sustained bombing campaign, which is killing civilians and failing to accomplish its goal of making the world a safer place.<sup>7</sup>

Although the horror of the mass tragedy inflicted on September 11 is indisputable, the bombings of Afghanistan by the United States and the United Kingdom are illegal. This bombardment violates both international law and United States law, set forth in the United Nations Charter,<sup>8</sup> a treaty ratified by the U.S. and therefore part of the supreme law of the land under the U.S. Constitution.<sup>9</sup>

The U.N. Charter provides that all member states must settle their international disputes by peaceful means<sup>10</sup>, and no nation can use military force except in self-defense.<sup>11</sup>

The Security Council, made up of representatives from 15 countries from each region of the world<sup>12</sup>, is the only body that can authorize the use of force.<sup>13</sup> Only the Security Council

can decide what action can be taken to maintain or restore international peace and security.<sup>14</sup>

The Security Council has a series of options under the U.N. Charter: (1) it can suggest that the United States sue Afghanistan in the International Court of Justice (World Court), for harboring Osama bin Laden and others, if the evidence supports their involvement in these attacks, and seek their immediate arrests;<sup>15</sup> (2) it can order interruption of economic relations, rail, sea, air, postal, telegraphic, radio communications and the severance of diplomatic relations<sup>16</sup>; (3) it can establish an international tribunal to try those suspected of perpetrating the September 11<sup>th</sup> attack; (4) it can establish a U.N. force to make arrests, prevent attacks or counter aggression;<sup>17</sup> and (5) as a last resort, it can authorize the application of armed force with the Military Staff Committee.<sup>18</sup>

The United States has gone to the Security Council twice since the September 11 attack. The Security Council passed two resolutions, neither of which authorize the use of force. Resolutions 1368<sup>19</sup> and 1373<sup>20</sup> condemn the September 11 attacks, and order the freezing of assets; the criminalizing of terrorist activity; the prevention of the commission of and support for terrorist attacks; the taking of necessary steps to prevent the commission of terrorist activity, including the sharing of information; and urging the ratification and enforcement of the international conventions against terrorism (which the U.S. has not ratified).

Although the United States has reported its bombing to the Security Council as required by article 51 of the U.N. Charter, the Security Council has not authorized and could not authorize the use of unilateral military force by the United States and the United Kingdom, or NATO, which is not a U.N. body.

The bombing of Afghanistan is not legitimate self-defense under article 51<sup>21</sup> of the Charter because: 1) the attacks in New York and Washington D.C. were criminal attacks, not "armed

attacks” by another state, and 2) there was not an imminent threat of an armed attack on the U.S. after September 11, or the U.S. would not have waited three weeks before initiating its bombing campaign. The necessity for self-defense must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>22</sup> This classic principle of self-defense in international law has been affirmed by the Nuremberg Tribunal and the U.N. General Assembly.

Even if the U.S. was authorized on September 11 to use military force under article 51, that license ended once the Security Council became “seized” of the matter, which indeed it did on September 12, by passing Resolution 1368, and reaffirming in Resolution 1373 on September 28 that it “remains seized” of the matter. By bombing Afghanistan, the United States and the United Kingdom are committing acts of aggression, which is prohibited by the U.N. Charter.

The universal desire is to feel safe and secure. The only path to safety and security is through international law, not vengeance and retaliation. George W. Bush and the U.S. Congress must take the following steps: (1) immediately stop the bombing of Afghanistan and Iraq, remove all ground forces, and refrain from illegally bombing or invading any other country; (2) contribute money and people power to the U.N. peacekeeping forces; (3) refuse to further eviscerate the U.S. Bill of Rights, in the name of national security;<sup>23</sup> (4) not repeat the actions of the U.S. government when it interned Japanese-Americans during World War II, and targeted suspected communists during the McCarthy era; (5) refuse to allow the racial profiling, and INS and FBI intimidation, of Arabs, Muslims and South Asians;<sup>24</sup> and (6) submit this matter to appropriate international bodies, including the United Nations and the World Court.

Since no state has executed an armed attack against the United States, this is a criminal matter that can be prosecuted in a number of possible venues. First, the United States could

bring criminal prosecutions in its domestic courts for crimes against humanity and for violations for international conventions<sup>25</sup> under the principle of *universal jurisdiction*, as Israel did when it prosecuted Adolph Eichmann for his role in the Holocaust.

Second, the Security Council could establish a special criminal tribunal for the September 11 attacks, as it did in Yugoslavia and Rwanda. The Montreal Sabotage Convention, which criminalizes the destruction of civilian aircraft while in service, is directly on point and should be used here.<sup>26</sup> It was invoked during the resolution of the dispute between the United States, the United Kingdom and Libya over the handling of the Libyan suspects in the Lockerbie bombing cases. Both the United States and Afghanistan are parties to that convention.

The International Criminal Court would not be an available forum, because 1) it has not yet come into force, as it has not yet received the 60 requisite ratifications; 2) its jurisdiction is limited to crimes occurring after it comes into force; and 3) the United States refuses to ratify the ICC statute, because it is afraid its leaders may become defendants in war crimes prosecutions.<sup>27</sup>

Former Soviet President Mikhail S. Gorbachev wrote in a recent op-ed in *The New York Times*, "it is now the responsibility of the world community to transform the coalition against terrorism into a coalition for a peaceful world order." He advocates leadership by the Security Council to take concrete steps such as accelerated nuclear and chemical disarmament, and urges United States ratification of the verification protocol of the convention banning biological weapons, as well as the treaty to prohibit all nuclear testing. Gorbachev also opposes the use of the battle against terrorism "to establish control over countries or regions," which, he maintains, would not only discredit the coalition; it would prevent its potential for building a peaceful world<sup>28</sup>.

On September 29, the day originally set for anti-

globalization protests, thousands marched in the streets demanding peace. Students on campuses across the country are mobilizing to oppose the bombing. Our anti-terrorism coalition must be true to its name, and aim its energy not at the innocent people of Afghanistan, but at building global peace.

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## **THE UNITED STATES-AFGHANISTAN CONFLICT AND THE DECLINE OF INTERNATIONAL LAW**

Robert Charvin\*

The armed conflict between the United States and Afghanistan<sup>1</sup>, ostensibly justified by the September 11 attacks on New York and Washington, is another stage in the process of the decline of international law and in the deepening of the coma at the UN.

When international society was bi-polar, international law benefited from the fact that each pole was a vigilant guardian of the other's behavior. Each great power, fearing the other's reprisals, limited its responses against the other, if not in its area of influence but at least towards the other's conduct. The illegal exercise of armed force, as defined in the United Nations Charter, was relatively limited. A complex system of counterweights and balances eventually resulted in the greatest benefit to the fundamental principles of international law. Breaches of the law, especially unilateral armed interventions were committed "in the name of the law". Most certainly they were abusive distortions, but they were not built upon a rejection of the law itself. These practices constituting an attack upon legality, did not reject the idea of the necessity of international legal regulation. These breaches of the law left

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the possibility of review under international law. This time is past.

The norms and principles whose structures placed pressure on the State who violated them has given way to the assertion of "soft law better adapted to the process of internationalization". It establishes a precedent that is close to an outright denial of the law. Now there are "moral imperatives", unilaterally proclaimed, which justify the use of armed force and are justified by regressive concepts like the conflict between Good and Evil, similar to concepts of "just wars" in previous periods.

The complex game that is international terrorism and the imperial policy of the United States accelerates and accentuates the process of dissolution of every legal principle previously useful to the US Empire's leadership (in particular over its "allies" who are also its rivals) but also to the internationalization that is mainly profitable to great private transnational powers.

The dramatic force of the terrorist spectacle on September 11<sup>th</sup> 2001, compared to the various attacks, massacres and slow deaths which people experience without the media watching helped draw attention at least temporarily to controversies that have never been resolved: the issue of terrorism in conflict with the United States and European foreign policies and State terrorism, the Israel problem, and the problem of the legality of the use of armed struggle to assert the right to self-determination and independence<sup>2</sup>.

The self imposed mission of the United States is to make its' domestic law universal, its' "way of life" and its' own "moral values" as models that rise above every obstacle. As the American Albert Parry said in 1976: "There is no difference between terrorism and revolution, between terrorism and war, between civil war and international war"<sup>3</sup>. According to this approach, any dispute arising from the alliance of Europe and the United States or the United States and any developing

country, becomes "treason". In this way, Israeli security ideology is elevated to a worldwide principle<sup>4</sup>.

This analysis of the law makes distinctions insignificant. The lack of evidence of direct links between the terrorist act and the possible responsible State is not a bar to its elimination<sup>5</sup>. The principle requiring measured responses to inflicted assaults, disappears. What used to be the accusation against the USSR<sup>6</sup> has become the indictment against the "terrorist countries" or "gutter-countries", when defined by the US Congress, based on its political needs and circumstances, and makes any response by them permissible outside any legal framework.

In this way, long-standing principles of international law have been swept away. So that "Self-defense", (disrespected for a long time by Israel, inventor of "preventive self-defense") once a commonly recognized legal principle has become meaningless. Nobody, including the United Nations has dared to challenge the indefinite extension of the concept of "self-defense" made by the United States. Professor Ruzie has even declared that it was "useless" and even "indecent" to question whether or not the United States was really in a situation of self-defense following the September 11<sup>th</sup> attacks<sup>7</sup>, after the deafening silence of legal jurisprudence in France which has mainly acted like a US satellite country<sup>8</sup>.

Article 51 of the United Nations Charter converts traditional notions of self-defense to a "safety valve", that can result when the collective security system established by the Charter fails that limits a State's capacity to be at war. This definition of self-defense makes it permissible only when the Security Council fails to act and can only be used until the problem is resolved by the Security Council itself, which, also will review the measures taken by the State that proclaims itself to be in a self-defense situation. This review is intended to prevent the assaulted State from unilaterally deciding who is the aggressor without providing any supportive evidence to the United Nations<sup>9</sup>. The Security Council is to decide the State

“to punish” for its strategy<sup>10</sup> as well as the conditions of punishment.

The US cannot complain about the United Nations’ weaknesses since they are mainly responsible for them: “One cannot blame anybody else for one’s own mistake”. Moreover in resolution 1368; the Security Council “declares itself ready to take any necessary measure to respond to terrorist attacks... And to fight against any kind of terrorism... in pursuit of its responsibilities according to the Charter.” However, the United States blatantly ignored not only the UN but NATO itself, proclaiming by its conduct that it is the only nation able to discern the “good” of humanity and how to promote it.

Resolution 3314 (XXIX) of December 14<sup>th</sup> 1974 of the United Nations General Assembly defines attack to be the act of a state, or, as the International Court of Justice added, the act of an armed force sent by a State. However, the Taliban are responsible only for acting as the host to and not the instigator of the supposed terrorists, which is not the same as an attack on a state.

The September 11<sup>th</sup> attack has been used by the United States to justify unilateral self-defense. This interpretation leaves the State considering itself assaulted, free of any constraint, in respect to the nature, kind and extent of the “response”. There is confusion between acts of self-defense and savage reprisals without proof, unregulated by international law. The United States attempted to annihilate the terrorists’ networks by massive bombings of an entire population, contrary to the fundamental provisions of humanitarian law. Neither the United States nor the United Nations have tried to implement the provisions of the Charter that make negotiations in search of reconciliation, the fundamental and preliminary condition of any coercive action. The systematic and continued bombings of Afghanistan by the US air-force are out of proportion with the illegal act for which they are responding and are degenerating into a war, beyond legal regulation, as if American

victims are endowed with a humanity superior to all the other victims of international relations.

This decline of international law, is mainly due to the unilateralism of the only worldwide Super Power, combined with the setting aside of international organizations. (The UN is ignored and the Security Council is turned into a simple registry office of US positions). The absence of any conformity with the UN Charter or the Security Council decisions permits the United States to indulge political opportunity without consideration of the law. NATO which has the capacity to restrain the United States has been set aside. As far as the International Criminal Court is concerned, although the terrorist attack qualifies as a crime against humanity and the court is competent to judge the people accused of terrorism if they are arrested, it has no potential application to the United States since they refused to ratify the Rome statute. The United States obviously aspires to imperial unilateralism, supported by States willing to provide their allegiance<sup>11</sup>.

One must be very optimistic to believe, as Professor A. Pellet does, that: "The great advances in the law are always the fruits of major crises. And the poignant collapse of the Twins Towers could offer the opportunity, dramatically, to start to build the international law of the 21<sup>st</sup> century"<sup>12</sup> (in English in the text). Professor Marysol Touraine, Socialist Deputy, had already predicted after the collapse of the USSR that there is a compelling need for international law.

Each recent serious international crisis enables dominant private and public powers to move towards a globalization that only benefits a very few. This is one of the serious "collateral effects" of the United States-Afghanistan conflict.

The unsupported notion that is gaining jurisprudential dominance that a super power can decide what is legally right, makes clear that the Super Power's foreign policy has escaped from legal frameworks. The example of the United States is obvious as it openly refuses any international legal constraints,

dragging the international community towards indifference if not contempt towards international legal regulation. However, the US is not the guardian of international law, although it threatens its existence, criticized by only a few NGOs.

In any case, unless one surrenders international legal regulation to transnational firms and their auxiliaries, globalization for the common good must demonstrate concern for the common good and its protection.

The September 11<sup>th</sup> crisis does not move the world forward towards a condition in which international law is respected or towards a civil society which protects the observance of international law. The leaders of the Super Powers are very careful to preserve the rights of private property in questions affecting international relations, even using them at the right moment to promote holy alliances or to invent remedies for their economic difficulties by "calling for help" from a State, previously denigrated).

Can we rely on jurists and legal precedent to prevent these perversions of law?

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10. In case the military operation in Afghanistan fails, the "need for victory" of the United States may very well lead to new military operations against other nations like Iraq, for instance.
11. The United States makes some of their allies (like Saudi Arabia) pay for the cost of their military operations.
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## **INTERNATIONAL LAW: THE ILLEGALITY OF THE WAR ON AFGHANISTAN**

Gail Davidson\*

**“We the peoples of the United Nations determined to save succeeding generations from the scourge of war...”**

The war against Afghanistan is illegal. The US, assisted by Canada and Britain is bombing Afghanistan and will perhaps use additional force with ground troops for the stated purpose of capturing or killing Osama bin Laden and others associated with his organization and of toppling the Taliban government.

No international or national law or policy legalizes these attacks on Afghanistan. No resolutions of the United Nations' Security Council or the North Atlantic Treaty Organization could provide a legal justification for these attacks and none do.

The war against Afghanistan violates international law including the Charter of the United Nations (The Charter), the Geneva Conventions and the relevant provisions of the eleven International agreements dealing with the suppression and control of terrorism. The attacks by bombing and the use of other military force are war crimes pursuant to the Rome Statute.

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## THE CHARTER OF THE UNITED NATIONS (THE CHARTER)

The Charter prohibits the use and the threatened use of any force in their international relations. The Charter specifically prohibits the use of force to topple foreign governments. It goes without saying that all national and International laws forbid the killing of non-combatants (i.e. arguably all Afghans) the bombing and other use of force in Afghanistan will inevitably kill and injure large numbers of non-combatants. The October 11 edition of the *Vancouver Sun* reports 200 people in Afghanistan killed in US bombing raids including 4 United Nations employees. October 13, 2001 reports indicate a residential area hit by a missile. Mass killing of non-combatants is considered by the world community to be the most egregious of crimes.

The Preamble to the Rome Statute, in reference to such crimes states, "Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock that conscience of Humanity."

The United States, United Kingdom, Canada and Afghanistan are all Member States of the United Nations. The Charter of the United Nations imposes on members the binding obligation to settle disputes in a manner that ensures the maintenance of peace and justice. Article 2 of the Charter prohibits the use or threatened use of force against another state. [See below] The Article 2 prohibition applies to all force and is a rule of customary international law. As such the Article 2 prohibition is universally binding even on the few states not members of the United Nations.<sup>1</sup>

The Article 2 prohibition has been reiterated in numerous resolutions of the UN General Assembly. For example on 17 December 1984 the UN General Assembly passed a resolution affirming the inadmissibility of the policy of State terrorism including actions by States aimed at undermining the socio-political systems in other sovereign states. This resolution

specifically prohibits the use of military action and contains the demand:

“...that all States take no actions aimed at military intervention and occupation, forcible change in or undermining of the socio-political system of States, destabilization and overthrow of the their Governments and, in particular, initiate no military action to that end under any pretext whatsoever and cease forthwith any such action already in progress.”

The fact that the attacks on Afghanistan are in response to horrific crimes believed to have been committed by people believed to be hiding in Afghanistan does not provide any legal justification whatsoever. “The Charter is based on the belief that international law should not be enforced at the expense of international peace.” Neither can international law be enforced by the commission of more crimes.<sup>2</sup>

The Preamble to the Charter states the purpose of the United Nations is “to save succeeding generations from the scourge of war”.<sup>3</sup>

#### SECURITY COUNCIL RESOLUTIONS

The United Nations Security Council, (Security Council), the body with primary responsibility for the maintenance of international peace and security, passed two resolutions regarding the September 11 attacks: resolution 1268 on 12 September 2001 and Resolution 1373 on 28 September 2001. Neither resolution authorizes the use of force.

Resolution 1373 (2001) adopted by the Security Council at its 4385<sup>th</sup> meeting on 28 September 2001 (incorporating the earlier resolution of 12 September) affirms the responsibility of Member States to take only those measures that are:

“in compliance with national and international law including international human rights standards’ to prevent and suppress terrorist attacks and to take action against the perpetrators of such acts.

Security Council resolution 1373 specifically restricts member states to actions that are authorized by law and in accordance with the Charter of the United Nations.

Canada is already largely in compliance with the directives contained in Resolution 1373 and has promulgated regulations under Canada's United Nations Act to implement provision of the resolution, including prohibiting financing and fundraising and for freezing the assets of terrorist organizations.

Article 51 of the Charter defines Member States' right of self-defence. This article neither authorizes bombing and armed force as self-defence nor bestows legal authority for the US to wage war. Article 51 gives Member States the narrow power to defend themselves against a continuing armed assault until such time as the Security Council intervenes to maintain and restore peace and security. Article 51 of the Charter does not create any right to make retaliatory attacks or to engage in the use of force to repel anticipated armed attacks. The right to self-defense in Article 51 is restricted to actions that are necessary to repel and proportionate to an ongoing armed attack and only exists until the Security Council takes measures to restore peace and security. The right to self defense is restricted to self defense action and is further restricted to those actions necessary to maintain "international peace and security" and must be carried out in accordance with the Charter.

The entire Charter is based on the premise that Member States must maintain international peace, security and justice and may not use force to settle international disputes or to remove foreign governments. Article 51 does not displace the obligation imposed on States by Article 2.<sup>4</sup>

#### **NORTH ATLANTIC TREATY ORGANIZATION RESOLUTIONS**

Media coverage also infers that some legal authority for the use of armed force against Afghanistan or the Taliban was created by the resolutions of the North Atlantic Treaty

Organization (NATO). That assumption is entirely false as is made clear from its' resolution below.

NATO, a regional organization with the goal of restoring and maintaining the security of the North Atlantic area, resolved on September 12 2001 that the September 11 attacks were covered by Article 5 of the Washington Treaty and therefore all NATO members will consider the September 11 attacks as an armed attack against all NATO members.

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such actions as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measure taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to respect and maintain international peace and security. Article 5, *The Washington Treaty*.

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3. Article 2 prohibits the use of force: Article 2. 3 All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. Article 2. 4 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.

4. Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore International peace and security. **Charter of the United Nations, Right to Self Defence, Article 51.**

# **IS THE U.S. BOMBING OF AFGHANISTAN JUSTIFIED AS SELF-DEFENSE UNDER INTERNATIONAL LAW?**

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[T]he right of self-defence “exists within and not outside or above the law.”<sup>1</sup>

## **Introduction**

On October 7, 2001, the U.S. began its bombing campaign in Afghanistan. That same day, the U.S. representative to the U.N., John Negroponte, informed the Security Council that the U.S. was invoking article 51 of the U.N. Charter:

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated action in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.<sup>2</sup>

Thus the U.S. set forth its formal justification for the massive bombing of Afghanistan as legally supportable self-defense under international law. But was it? This article will explore the meaning of “self-defense” and how it should be applied to the actions in Afghanistan.

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The Caroline case has been recognized by scholars as stating the modern rule of customary international law on self-defense.<sup>3</sup> The case arose in 1837, when the British suspected that The Caroline, an American ship docked in New York, was transporting arms to Canadian rebels. On British orders, The Caroline was boarded and destroyed, and two men were killed. The British ambassador to the U.S. justified the attack on the ground of self-defense. U.S. Secretary of State Daniel Webster responded that self-defense justifies an attack only when the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>4</sup>

The U.S. bombing of Afghanistan does not meet this standard. The need for defense was not instant; indeed the bombing did not begin until three weeks after September 11—leaving more than a moment for deliberation. As many have argued, there was a choice of means, in particular, the resort to international criminal process and investigation, as well as peaceful negotiation for the surrender of those responsible.<sup>5</sup>

The Caroline rule was later incorporated into article 51 of the UN Charter.<sup>6</sup> Article 51 provides, in relevant part:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.<sup>7</sup>

Any evaluation of the requirements of article 51 must be looked at in the context of the prohibition on the use of force, embodied in article 2(4) of the Charter.<sup>8</sup> This part of the Charter has been described by the International Law Commission as “a conspicuous example of a rule in international law having the character of *jus cogens*”<sup>9</sup>—a view which has been accepted by the U.S.<sup>10</sup> Article 51 is an exception to the prohibition on the use of force. Ultimately, if a state’s use of force cannot be legally justified as self-defense, then that state has violated the Charter. Article 2(4) must be seen as paramount. If the concept

of self-defense is not carefully reigned in and if countries claiming to exercise it are not carefully scrutinized, then the exception will usurp the rule.

In its 1986 judgment in *Nicaragua v. United States*, the International Court of Justice (ICJ) concluded that the U.S. had breached its obligation under customary law not to use force against another state.<sup>11</sup> The court rejected the U.S. claim of collective self-defense for, among other things, mining Nicaragua's harbors and attacking its oil installations.<sup>12</sup> The decision includes an extensive discussion of the law governing claims of self-defense.

According to the ICJ, in order for the use of force in self-defense to be legal under international law, the defending state must be responding to an armed attack. This response must also comply with the principles of necessity and proportionality.<sup>13</sup> The ongoing attacks on Afghanistan do not meet this test.

#### **Armed Attack**

Article 51 states explicitly that an armed attack is required before the right of self-defense is invoked. The ICJ has described this requirement as the "condition sine qua non" of lawful self-defense.<sup>14</sup>

In the *Nicaragua* case, the U.S. alleged that Nicaragua had supplied weapons to rebel groups in other countries. The U.S. claimed that the acts of which it was accused were justified by its right of collective self-defense against an armed attack by Nicaragua on El Salvador, Honduras or Costa Rica.<sup>15</sup> The ICJ found that an armed attack was not established by the provision of arms by one state to the opposition in another State, even though such conduct might still be unlawful.<sup>16</sup>

In the case of the current bombing of Afghanistan, the analysis is complicated because a non-state actor initiated the attack. Therefore, we must examine what level of assistance must be given by a State in order for the armed attack to be imputed to the state.

According to both the ICJ and the International Law Commission, "the right of self-defense does not apply with full force" in cases involving terrorists operating from a third country.<sup>17</sup> Moreover,

[a]s with the case of attacks against nationals abroad, there is a risk in broadening the right of self-defense to justify the use of force against non-state-sponsored terrorism. Toleration of such action increases the potential for abuse of the right of self-defense and for the indiscriminate violation of state sovereignty.<sup>18</sup>

As international law professor and current ICJ member Rosalyn Higgins has pointed out, states sometimes assert self-defense in cases "that really bear the characteristics of reprisals or retaliation,"<sup>19</sup> which are not permitted under the U.N. Charter. For example, the U.S. described its 1986 bombing of Libya, in response to perceived terrorism against nationals, as "designed to 'disrupt Libya's ability to carry out terrorist acts and to deter future terrorist acts by Libya.'" The former is the language of retaliation, the latter of reprisals. Neither is really the language of self-defense.<sup>20</sup>

When one examines the meager evidence publicly available on October 7, it is difficult to conclude that the attacks of September 11 qualify as "armed attacks" by the state of Afghanistan. Indeed, the statements made by U.S. officials at the start of the military campaign are insufficient to support a claim of self-defense. For example, in his letter to the Security Council, John Negroponte wrote:

Since 11 September, my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks. There is still much we do not know. Our inquiry is in its early stages. We may find that our self-defense requires further actions with respect to other organizations and other States.<sup>21</sup>

Negroponte stated further that Al-Qaeda posed an "ongoing threat" to the U.S. that had been "made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation." The U.S. had, therefore, mobilized armed forces to "prevent and deter" additional attacks.<sup>22</sup> It is doubtful that Rosalyn Higgins would describe this as the language of self-defense.

U.S. Secretary of Defense Donald Rumsfeld used similar language, stating that terrorists had "chosen Afghanistan from which to organize their activities," that the Taliban "continues to tolerate" their presence, and that "harboring terrorists is unacceptable and carries a price."<sup>23</sup> The Security Council has condemned the Taliban "for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Quaida network" and "for providing safe haven" to Osama bin Laden.<sup>24</sup> None of these statements describe sufficient involvement by the state of Afghanistan to hold it responsible for an armed attack under the law governing self-defense.

Furthermore, as Professor Thomas Franck recently noted, "any principled decision" whether something less than a clear state to state attack has occurred must be based on "a credible assessment of the facts" of the particular case.<sup>25</sup> What "facts" were provided on October 7? At the time the bombing started, there was no evidence presented, although there was apparently secret evidence shared with certain allies. Indeed, Negroponte admits that the U.S. did not have a great deal of information. The U.S. government refused to share any evidence it did have with the public, the press, or the government of Afghanistan, despite requests to do so.

Even if, for the purpose of argument, the September 11 attack could be construed to be an armed attack by the state of Afghanistan, the subsequent bombing by the U.S. would still have to meet the tests of necessity and proportionality in order to qualify as self-defense under international law.

### **Necessity and Proportionality**

The large number of Afghani civilian deaths, which now exceeds the number of deaths caused by the September 11 attack, the destruction of Afghanistan's infrastructure, the exacerbation of the refugee crisis, and the exacerbation of the unexploded ordnance problem go well beyond what may be considered necessary and proportional.

The ICJ has emphasized, more than once, that under customary international law a claim of self-defense must meet the requirements of necessity and proportionality. Indeed, in the Nicaragua case, the U.S. agreed "that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence."<sup>26</sup>

Some scholars have suggested that when a non-state actor is involved, "the victim state should have to meet a heavier burden of necessity and proportionality than when the initial attack was state-sponsored," even when the third party state has been shown to support the initial attack.<sup>27</sup>

### **Necessity**

Where, as here, the armed attack has ended, the state relying on self-defense "has a heavy burden" to show that its response was necessary and that it does not "amount to retaliation."<sup>28</sup>

The requirement of necessity provides that the use of force must be the only available means of self-defense and no other peaceful means of redress would be effective. Oscar Schachter, a distinguished international law professor and advisor in the preparation of the Restatement, distinguishes between cases where an armed attack is occurring, and those where an armed attack has already occurred, but additional attacks are expected. In the former case, the use of force always meets the requirement of necessity, but in the latter case the issue is not as clear. However, as an example of when preemptive self-defense is valid, Schachter proposes the case of an armed

action to rescue hostages, where captured persons are in imminent danger.<sup>29</sup>

The time between the armed attack and the response is a relevant consideration. For example, in 1993, the U.S. launched missile strikes on Baghdad two months after an assassination attempt on President Bush. Many in the international community complained that the strikes were not necessary and proportional because of the delay and because the strikes did nothing to prevent an armed attack.<sup>30</sup>

The U.S. bombing of Afghanistan is of questionable necessity. The attack of September 11 was over three weeks before the U.S. military strikes began. While the U.S. feared further attacks, they were not imminent. The threats were vague and the bombing was not specifically targeted at the source of the threat. Thus the ongoing bombing campaign appears to be closer to retaliation than self-defense.

### Proportionality

Now, the word “proportion”—“proportionate” is interesting. And I don’t know that it’s appropriate. And I don’t know that I could define it . . . It’s a — your question’s too tough for me. I don’t know what “proportionate” would be. . .

I just don’t know. I mean, you simply can’t have outside inquiries on every single thing that goes on in the world . . . I mean, this is a messy place. There’s a war going on.

U.S. Secretary of Defense Donald Rumsfeld, November 30, 2001<sup>31</sup>

The principle of proportionality is measured by evaluating the military importance of a particular operation compared to the impacts on civilians and civilian objects. Thus it is important to identify which objects of attack are legitimate: “ If there is any doubt whether an object normally devoted to civilian use, such as a church, school or museum, is being used for its proper purpose or being put to military use, they must be given the

benefit of the doubt and not subjected to attack."<sup>32</sup>

When force is used in self-defense, it must be proportionate to the force defended against; it cannot be excessive. Military strikes that indiscriminately target civilians are an example of excessive force.<sup>33</sup>

The numerous reports of civilian deaths and damage to civilian infrastructure in Afghanistan demonstrate that the force used by the U.S. is excessive and does not meet the requirement of proportionality.<sup>34</sup> For example, just four days after the U.S. began bombing, Reuters reported that already 76 civilians had been killed and 100 injured.<sup>35</sup> By October 30 there was no electricity and no running water in Kandahar.<sup>36</sup> Twice U.S. bombs hit clearly marked facilities of the International Committee of the Red Cross, which contained humanitarian supplies. Several world leaders have criticized the high rate of civilian casualties.<sup>37</sup>

Professor Marc Herold, an economist at the University of New Hampshire, has released a well-documented report indicating that the U.S. bombing campaign killed 3,767 civilians between October 7 and December 10. This figure, which exceeds the latest death toll from September 11, does not include deaths caused by landmines, starvation, or disease. Herold gathered the information from numerous sources, including the mainstream press in Europe and first-hand accounts.<sup>38</sup>

Perhaps the most dramatic evidence of the lack of proportionality in the U.S. military campaign can be found by looking at the nature of the weapons being used.

The use by the U.S. Air Force of weapons of enormous destructive capability—including fuel air bombs, B-52 carpet bombing, BLU-82s, and CBU-87 cluster bombs [shown to be so effective at killing and maiming civilians who happen to come upon the unexploded 'bomblets']—reveals the emptiness in the claim that the U.S. has been trying to avoid Afghan civilian casualties.<sup>39</sup>

Cluster bombs are particularly devastating. Each one breaks

up into more than 200 "bomblets" which are designed to detonate when they hit the ground, but which often do not. They remain buried, "as deadly as unexploded mines," and are sometimes mistaken for humanitarian food packages. Several hundred of these weapons have rained down on the population of Afghanistan since the U.S. began using them in October.<sup>40</sup> Amnesty International has asked the U.S. to stop using cluster bombs as they "present a high risk of violating the prohibition of indiscriminate attack."<sup>41</sup>

The military campaign has also interfered with the delivery of much needed food supplies to civilians already at risk of starvation and has caused a massive refugee crisis. In early December, the Office of the U.N. High Commissioner for Refugees reported that the usual daily number of refugees fleeing southern Afghanistan had risen from 400 to 1200.<sup>42</sup> Afghani widows in Kabul have reported that the meager humanitarian aid that they had been receiving suddenly stopped at the end of November.<sup>43</sup>

In addition, the country's infrastructure has been targeted:

On October 15<sup>th</sup>, U.S bombs destroyed Kabul's main telephone exchange, killing 12. In late October, U.S warplanes bombed the electrical grid in Kandahar knocking out all power, but the Taliban were able to divert some electricity to the city from a generating plant in another province, Helmand, but that generation plant [at Kajakai dam] was then bombed. On October 31<sup>st</sup>, it launched seven air strikes against Afghanistan's largest hydro-electric power station adjacent to the huge Kajakai dam, 90 kilometers northwest of Kandahar, raising fears about the dam breaking. On November 12<sup>th</sup>, a guided bomb scored a direct hit on the Kabul office of the Al Jazeera news agency, which had been reporting from Afghanistan in a manner deemed hostile by Washington. On November 18<sup>th</sup>, U.S warplanes bombed religious schools [Madrasas] in the Khost and Shamshad areas.<sup>44</sup>

As of January 4, 2002, U.S. bombs continue to kill Afghani civilians,<sup>45</sup> even though the Taliban government has been ousted and the whereabouts of Osama bin-Laden are unknown.<sup>46</sup> This military campaign is not proportionate under international law.<sup>47</sup>

### Conclusion

The U.S. military strikes against Afghanistan cannot be justified as self-defense under the U.N. Charter or customary international law. There is insufficient evidence of an armed attack by the state of Afghanistan and the strikes have been neither necessary nor proportional.

Some commentators have raised the issue of the ineffectiveness of article 51 to deal with the present day realities of armed conflict and the uncertainties of terrorism, arguing that the law should adapt and the concept of self-defense be broadened to include the current U.S. campaign.<sup>48</sup> In fact, the realities of terrorism support the opposite conclusion. Less force is better. If the current bombing can be justified as legitimate self-defense, we are surely on a slippery slope that does not bode well for the rule of law or for the guiding principles of the U.N. Charter.

If self-defense justifies the actions of the U.S. and its allies, then when does that justification end? Can a country say that the threat of terrorism is ongoing and continue to bomb any country anywhere in the world where it suspects that the state is "harboring" members of a terrorist organization? What evidence, if any, will the defending country be required to produce? U.S. officials have indicated that the next front in the war on terrorism could include the Philippines, Somalia, Yemen, Tajikistan, and Uzbekistan.<sup>49</sup> Indeed, there are reports of al Quaida related cells throughout Europe. Will the U.S. be dropping cluster bombs there as well?

Even more disturbing is the possibility that the U.S. has set a new standard for combating terrorism that may be adopted by other countries—giving them "permission" to go after

groups with military force rather than negotiation or criminal process.<sup>50</sup> Former U.S. national security adviser Zbigniew Brzezinski recently warned that:

By declaring war against an undifferentiated, undefined and fundamentally vague phenomenon like global terrorism, or terrorism with global reach, we in a sense opened the gates to a lot of countries to leap into this exercise on our backs. They are all declaring whoever their enemy is to be a terrorist, and then claiming moral justification for doing whatever they decide to do.<sup>51</sup>

No matter how horrible the events of September 11 and how real the desire of the U.S. to protect its residents, seeking refuge in the concept of self-defense is both misplaced and dangerous. The bombing of Afghanistan is illegal and it will not make anyone safer.<sup>52</sup>

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2. Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/2001/946, 7 October 2001; available at <http://www.un.int/usa/s-2001-946.htm>.
3. See, e.g., Rosalyn Higgins, *PROBLEMS & PROCESS, INTERNATIONAL LAW AND HOW WE USE IT*, 243 (1994). Higgins finds Webster's formula from *Caroline* to be "very useful in providing the required balance between allowing a state to be obliterated and encouraging abusive claims of self-defence. It still has great operational relevance and is an appropriate guide to conduct."
4. Leah M. Campbell, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 *Tul. L. Rev.* 1067, 1076-1077 (February 2000). See also, Moore's *Digest of International Law*, II, 412. The *Caroline* Case was

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5. See, e.g., Marjorie Cohn, Rise Above It: Fight Terror Legally, the National Law Journal, October 1, 2001; Michael Ratner and Jules Lobel, An Alternative to the U.S. Employment of Military Force, September 26, 2001, available at <http://www.humanrightsnow.org>; Ramkesh Thakur and Hans van Ginkel, An International Perspective on Global Terrorism, United Nations Chronicle, Number 3, 2001, available at <http://www.un.org/Pubs/chronicle/2001/issue3/0103p71.html>. Thakur and van Ginkel point out that, "The global coalition to combat threats to international security, of any type, is already in place. We call it the United Nations."
6. Article 51 "was intended to encompass customary international practice concerning self-defense." Campbell, *supra* at 1079.
7. U.N. Charter, article 51, states further: "Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." There have been a number of issues raised about the role and effectiveness of the Security Council, including disagreements over the meaning of its resolutions and whether it has tacitly authorized the use of force. Such issues, though important, are beyond the scope of this article. See S/RES/1368 (12 September 2001), S/RES/1373 (28 September 2001), S/RES/1378 (14 November 2001). For a discussion of these issues see, e.g., Frederick L. Kirgis, ASIL Insights on the Terrorist Attacks of Sept. 11, available at [www.asil.org](http://www.asil.org); Jules Lobel and Michael Ratner, Bypassing the Security Council: Ambiguous Authorizations To Use Force, Cease-Fires and the Iraqi Inspection Regime, 93 A.J.I.L. 124 (January 1999).
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43. Lynda Gorov, It's every widow for herself in Afghanistan, Boston Globe, December 11, 2001.
44. Herold, supra, at 10-11, citations omitted.
45. See Beth Daley and Colin Nickerson, U.S. Afghans Step up Efforts to Eliminate Taliban, al Qaeda, Boston Globe, January 4, 2002.
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48. But see Franck, supra, at 62: "A white-knuckled insistence on the letter of the law embodied in Article 51 will lead to ever-greater disrespect for an obsolete principle. On the other hand, relaxation of Article 51's absolutism would be very dangerous to world peace unless new principles are not only agreed upon, but a process is instituted for these principles to be applied credibly."
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50. See, e.g., Jonathan Schell, Letter from Ground Zero, The Wars on Terrorism, The Nation, January 7/14, 2002, p. 7.
51. Serge Schmemmann, Caution: This Weapon May Backfire, New York Times, December 30, 2001, p. 7.
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