

## DANGEROUS PRECEDENT: AMERICA'S ILLEGAL WAR IN AFGHANISTAN

BY RYAN T. WILLIAMS\*

### ABSTRACT

Osama bin Laden's death has led many to question the efficacy of America's continued fighting in Afghanistan. Too often dismissed is any meaningful discussion of the legality of the war on terror in Afghanistan, where the United States has promised to keep fighting until at least 2014. The use of force in international law is generally forbidden, except under three circumstances: in self-defense, pursuant to a United Nations Security Council resolution, or with consent from the leader of an invaded state. After a careful examination of all three, it is apparent that America's continued fighting in Afghanistan, more than a decade after 9/11, does not fall under any category. By continuing to fight this illegal war, America loses a significant amount of moral high ground and tangible international leverage. Worse still, by relying on an illegitimate leader's consent as justification for the war, America unwittingly establishes a precarious blueprint for future states to follow. Whatever sound (or unsound) reasons America has for continuing the war, its illegality foreshadows a more dangerous future.

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\* Assistant Professor, Western State University College of Law. I am grateful for all of those who provided incisive and invaluable comments along the way, including William J. Aceves, John E. Noyes, Leslie P. Wallace, and my dearest Neale B. Gold.

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*"The post-Cold War era . . . began with the collapse of one structure, the Berlin Wall on November 9, 1989, and ended with the collapse of another, the World Trade Center's twin towers on September 11, 2001."*<sup>1</sup>

## 1. INTRODUCTION

On September 11, 2001 the United States was attacked when terrorists hijacked planes and flew them into the World Trade Center and the Pentagon. Nearly 3,000 Americans died, most of

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<sup>1</sup> John Lewis Gaddis, *And Now This: Lessons from the Old Era for the New One*, in *THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11*, at 1, 3 (Strobe Talbott & Nayan Chanda, eds., 2001).

whom were civilians.<sup>2</sup> Although members of the terrorist group al Qaeda claimed responsibility for the attacks and the United States believed them,<sup>3</sup> the brutality and suddenness of the attacks left the United States scrambling.

A month later, the United States launched Operation Enduring Freedom (OEF), which was designed to destroy the presence of al Qaeda in Afghanistan. At that time, the Taliban—a group of unrecognized, illegitimate drug lords—was the de facto ruler of Afghanistan. Thus, the initial question was whether the United States could also fight and kill the Taliban for harboring or aiding al Qaeda. In the ensuing decade, America waged war in Afghanistan against the Taliban, long after al Qaeda had left the region. The question has subsequently changed. Can America legally continue fighting the Taliban in Afghanistan, more than ten years after al Qaeda attacked America? This Article will not debate the merits of remaining in Afghanistan, or the downsides of a troop withdrawal, both of which are many. Instead, it will focus on the more overlooked question: this conflict's legality. "The existing law does not address when a state may take pre-emptive or anticipatory action against a *non-state* actor, and thus does not provide an actionable guideline for modern-day armed conflict."<sup>4</sup> This Article will show that even if America's *initial* involvement in Afghanistan arguably comported with international law, its continued military activity more than a decade later does not comport with any existing international law regarding the use of force.

Over the past decade, numerous events have contributed to this new reality. The most recent event occurred on April 30, 2011, when American forces, without knowledge or permission from the Pakistani government, infiltrated the Pakistani border and killed al

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<sup>2</sup> See Stephen M. Walt, *Why They Hate Us (II): How Many Muslims Has the U.S. Killed in the Past 30 Years?*, FOREIGN POL'Y, Nov. 30, 2009, [http://walt.foreignpolicy.com/posts/2009/11/30/why\\_they\\_hate\\_us\\_ii\\_how\\_many\\_muslims\\_has\\_the\\_us\\_killed\\_in\\_the\\_past\\_30\\_years](http://walt.foreignpolicy.com/posts/2009/11/30/why_they_hate_us_ii_how_many_muslims_has_the_us_killed_in_the_past_30_years) (providing an overview of the deaths attributable to United States/Muslim conflict).

<sup>3</sup> See Tony Karon, *Eight Years After 9/11: Why Osama bin Laden Failed*, TIME, Sept. 11, 2009, <http://www.time.com/time/nation/article/0,8599,1921758,00.html> (noting that Osama bin Laden of al Qaeda claimed responsibility for the attacks).

<sup>4</sup> Amos N. Guiora, *Anticipatory Self-Defence and International Law—a Re-Evaluation*, 13 J. CONFLICT & SECURITY L. 3, 15 (2008).

Qaeda leader Osama bin Laden.<sup>5</sup> In the wake of bin Laden's death, President Obama announced that the United States would begin withdrawing troops from Afghanistan.<sup>6</sup>

The plan calls for approximately 30,000 troops to return to the United States by the end of 2012.<sup>7</sup> The President announced this great troop reduction as a direct result of bin Laden's death. Apparently, since al Qaeda's leader was killed in Pakistan, the United States could reduce its fighting of the Taliban in Afghanistan. This nonsensical logic and decision making highlights one of the fundamental problems with the legality of America's continued war in Afghanistan.

Since 1949, the United Nations Charter has provided the legal guidelines governing the use of force in international law. Under Article 2(4) of the U.N. Charter, member states are prohibited from any use of force that threatens the territorial integrity of political independence of any state. This broad threshold against the use of force has three main exceptions: A state may resort to force (1) in self-defense, (2) pursuant to a U.N. Security Council resolution, or (3) with the consent from the leader of the host state. At various times throughout the war, America has claimed that its use of force in Afghanistan falls under all three exceptions, and as such, all three will be examined in this Article.

The most relatable justification to the general public appears to be self-defense. There is little doubt America was attacked on 9/11

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<sup>5</sup> See Scott Wilson et al., *Osama bin Laden Killed in U.S. Raid, Buried at Sea*, WASH. POST, May 2, 2011, [http://www.washingtonpost.com/national/osama-bin-laden-killed-in-us-raid-buried-at-sea/2011/05/02/AFx0yAZF\\_story.html](http://www.washingtonpost.com/national/osama-bin-laden-killed-in-us-raid-buried-at-sea/2011/05/02/AFx0yAZF_story.html) (detailing the U.S. raid which led to bin Laden's killing).

<sup>6</sup> See Jim Sciutto et al., *Obama Orders Start to US Troop Withdrawal From Afghanistan*, ABC NEWS (June 22, 2011), <http://abcnews.go.com/Politics/president-obama-orders-start-us-troop-withdrawal-afghanistan/story?id=13908291> (noting President Obama's pledge to withdraw 10,000 U.S. troops by the end of 2011, and 23,000 by the summer of 2012).

<sup>7</sup> *Id.* The withdrawal plan was celebrated as America leaving Afghanistan. In actuality though, the 2012 withdrawal does not eliminate the American presence in Afghanistan. Indeed, President Obama has more than tripled the number of troops in Afghanistan since he took office. *Id.* The 2012 withdrawal actually only manages to bring the total number of troops to around 70,000, which is still about double the number of troops that were present when President Obama took office in 2009. See Press Release, President Barack Obama, Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan (Dec. 1, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan> (announcing the deployment of 30,000 troops to Afghanistan).

and the perpetrators were members of al Qaeda. But, bin Laden's death and the subsequent troop withdrawal raise some concerns about the viability of self-defense as a legal justification for the war in Afghanistan. If America begins withdrawing from Afghanistan because the leader of al Qaeda was shot and killed in Pakistan, how was (and is) the war against the Taliban in Afghanistan self-defense against al Qaeda?

This Article will also examine why the other two potential international law exceptions that would allow for U.S. military force do not apply. Outside self-defense, states can use military force pursuant to a U.N. Security Council resolution. However, there is no U.N. Security Council resolution authorizing the use of force in Afghanistan. The third exception for the use of force is consent. This Article will focus on the consent issue in Afghanistan, and more specifically, the requisite legitimacy of a leader necessary to satisfy the consent requirement resulting in a legal use of force. Traditionally, this determination occurs at the outset of the hostilities. However, it can also apply in an ongoing context where force is greatly escalated, such as the American situation in Afghanistan over the past decade. Here, Afghanistan's President Hamid Karzai lacks authority and control over large parts of Afghanistan.<sup>8</sup> The issue is whether an individual who does not have control over a nation, and never did, can authorize another country to make war in that nation for more than a decade.

After exploring the exceptions with regard to America's escalation of military force and promised continued military involvement in Afghanistan until years after bin Laden's death, the conclusion is that America's behavior is most likely illegal under international law. The import of such a finding is great. America's persistence to fight an illegal war of this nature—a war neither based on self-defense, authorized by the U.N., nor fought under the consent of a legitimate leader—establishes a dangerous precedent. State A could prop up a leader in a country B, one who

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<sup>8</sup> See Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT'L L. 1, 49 (2006) (stating that Hamid Karzai was the Chairman of the Interim Authority, whose power was often "circumscribed" and of little effect outside the capital city); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1489 (2003) (noting that even though Karzai "nominally acts as president," much of Afghanistan still remains under control by warlords and drug lords); Panel Discussion, *Building the Institutions of the Nation*, 33 GA. J. INT'L & COMP. L. 171, 182 (2004) (stating that the authority of Hamid Karzai was "still being challenged" at the time of the 2004 panel discussion).

has no authority outside of the support from State A, and then State A could proceed to invade and fight a war for more than a decade based on that leader's supposed authority. One does not have to look far to see the problematic nature of setting such a precedent, with countries like China and Iran growing in stature and importance. This paradigm for fighting terrorism is not one that will maintain international peace and security in the long term. Quite the opposite is true, as it will likely encourage states to make war in whatever country they desire, under the consent of supposed leaders they prop up there.

Furthermore, the increase in terrorism against the West by global and mobile radical jihadists has ensured that the prolonged conflict in Afghanistan is likely to arise with more frequency in the future.<sup>9</sup> As such, this problem is unlikely to dissipate in the near future, but rather will be an increasing phenomenon as states that desire to combat terrorism attempt to legitimize their actions by utilizing the consent doctrine. The consent doctrine will likely be the biggest lure for legitimacy because the other two main justifications for the use force are functionally more problematic.

For example, self-defense, as will be explained in greater detail later, has specific requirements under international law, including that resort to the use of force must be necessary and proportional to the harm or threat of future harm. As individuals continue to engage in terrorism—as opposed to acting within state sponsored armies—the traditional laws governing self-defense become more difficult to apply. Moreover, the other legal way to use force—acting pursuant to a Security Council resolution—is equally problematic. For a variety of reasons, including the need for unanimous permanent member approval, the Security Council

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<sup>9</sup> See Audrey Kurth Cronin, *Sources of Contemporary Terrorism*, in *ATTACKING TERRORISM: ELEMENTS OF A GRAND STRATEGY* 19, 37 (Audrey Kurth Cronin & James M. Ludes eds., 2004) (noting that threats across state borders may be “newly threatening”). Indeed, the new terrorist structures are:

less dependent on internal organizational dynamics to perpetuate themselves and their activities and more characterized by decentralized designs with stand-alone groups that are only loosely transnationally connected . . . .

. . .

[C]omponent cells that operate independently are much more difficult to eliminate; destroying the leadership has limited effect on the health of the overall organization.

*Id.* at 28–29.

rarely articulates resolutions authorizing the use of force. Indeed, one purpose of the United Nations is "to save succeeding generations from the scourge of war."<sup>10</sup> All member states are supposed to "settle their international disputes by peaceful means."<sup>11</sup>

Thus, without self-defense to rely upon or a Security Council resolution, states wishing to invade other states to root out terrorist threats will have only one primary recourse to use force: the consent from the leader of the would-be invaded state. By propping up an illegitimate leader in order to continuously achieve consent, America has negligently established a dangerous precedent for future unauthorized military actions.

## 2. INTERNATIONAL LAW REGARDING THE USE OF FORCE

The rules governing the use of force in international relations have remained relatively constant since their codification in the U.N. Charter in 1945. The U.N. Charter, entered into by 198 member states, lists as its primary goal to "maintain international peace and security, and to that end . . . [engage in] the suppression of acts of aggression."<sup>12</sup> Also, "the paramount importance of the Charter of the United Nations" includes "promotion of the rule of law among nations."<sup>13</sup>

Article 2(4) of the U.N. Charter states that no member state may use armed force that threatens the "territorial integrity or political independence of any state."<sup>14</sup> This statement's placement within the second article of the U.N. Charter underscores the importance of the overall goal of the U.N. to limit the use of armed force in international relations.<sup>15</sup> A member state may only use armed force for peacekeeping and other activities not threatening the territorial integrity or political independence of a state.

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<sup>10</sup> U.N. Charter, pmbi.

<sup>11</sup> *Id.* art. 2, para. 3.

<sup>12</sup> *Id.* art. 1, para. 1.

<sup>13</sup> G.A. Res. 2625 (XXV), Annex, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/5217, at 122 (Oct. 24, 1970). G.A. Res. 2625 is the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations.

<sup>14</sup> U.N. Charter art. 2, para. 4.

<sup>15</sup> See Edward Gordon, *Article 2(4) in Historical Context*, 10 YALE J. INT'L L. 271, 278 (1985) (noting the "primary position" of Article 2(4) in the U.N. Charter).

In this sense, Article 2(4) is a prohibitive law, stating that the use of force cannot be utilized if it rises to a certain standard. By contrast, then, it has been argued that if the use of force falls below this Article 2(4) threshold—in that it does not threaten the territorial integrity of political independence of another state—then the use of force is justified under international law.<sup>16</sup> Thus, the United States could possibly apply this logic to justify its military invasion of Afghanistan—assuming it falls below the threshold of unallowable uses of force.

This, however, is not the case. The U.S. led invasion of Afghanistan in October 2001 was initiated precisely to threaten territorial integrity and political independence of Afghanistan. The United States did not respect the Taliban government's wishes: When the Taliban asked for proof that al Qaeda was there, the United States provided none.<sup>17</sup> Because the United States wanted to overthrow the Taliban government and kill various suspected terrorists in their country,<sup>18</sup> the United States could not look to Article 2(4) as legal justification of its war in Afghanistan. Even if it could, however, America's continued war against the Taliban a decade later is a clear violation of Article 2(4).

In order to determine if America's continued involvement in Afghanistan against the Taliban is in any way legal under international law, a review of the list of possible legal uses of force, or exceptions to Article 2(4), is instructive.

### 2.1. *Self-Defense*

There are two main legal bases for self-defense in international law: historic international law and the U.N. Charter. Before discussing either, it is important to understand the nature of the enemy in Afghanistan and how it has evolved over time.

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<sup>16</sup> See JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW 55 (2d ed. 2005) (discussing the U.N. Charter and the permissibility for the use of force).

<sup>17</sup> See Jonathan I. Charney, Editorial Comment, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L. L. 835, 836-37 (2001) (exploring the United States' self defense justification for its actions in Afghanistan).

<sup>18</sup> See DONALD P. WRIGHT ET AL., A DIFFERENT KIND OF WAR: THE UNITED STATES ARMY IN OPERATION ENDURING FREEDOM OCTOBER 2001-SEPTEMBER 2005, at 27 (2010) (detailing the initial objectives of Operation Enduring Freedom, including "to eliminate Osama bin Laden and his terrorist group, al-Qaeda, and to take down the ruling Taliban regime that harbored these terrorists").



### 2.1.1. *al Qaeda is Not the Taliban*

Any basic understanding of self-defense is based on the premise of defense against the attacker. Someone who is being injured by a member of the New York Giants football team does not then exact self-defense by injuring every member of the Boston Red Sox baseball team. Not only are they not from the same team, they are in a different sport. The former Taliban government of Afghanistan was not only comprised of a different group of people than al Qaeda, but they were also a different type, as they were the government of a state. Members of al Qaeda know no borders and are bonded by a message of hatred of a singular enemy (the West), and not by territory, like the Taliban.<sup>19</sup> Mainstream media and the general public often fail to realize one key distinction regarding America's recent involvement in Afghanistan: Namely, the fight is no longer against those who claimed responsibility for 9/11 (if it ever was). The current war is against the Taliban – not al Qaeda.<sup>20</sup>

It is generally (though not universally) accepted within the international community that in the beginning, October 2001, the Taliban was sufficiently intertwined with al Qaeda to warrant America's self-defense against both actors as a result of 9/11.<sup>21</sup> Yet, it was al Qaeda who was responsible for the 9/11 attacks. This raises an important question: can a state invade another state, claiming self-defense, if that state never attacked it? What if a state only harbors a group responsible for attacks? More relevant in the current climate, can an invading state claim self-defense indefinitely against a state that used to harbor terrorists over a decade ago? In other words, is there a statute of limitations on self-

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<sup>19</sup> See Audrey Kurth Cronin, *Introduction: Meeting and Managing the Threat*, in *ATTACKING TERRORISM*, *supra* note 9, at 1, 2 (“There is evidence that al-Qaeda has evolved into a more decentralized, franchised organization, with less direct control over its cells but more connections with other groups and an increasing convergence of formerly distinct causes.”).

<sup>20</sup> See Lee Ferran, *President Karzai: War on Terror Against al Qaeda Not in Afghanistan, Election Was ‘Good and Fair’*, ABC NEWS (Oct. 13, 2009), <http://abcnews.go.com/GMA/Afghanistan/afghan-president-hamid-karzai-speaks-diane-sawyer/story?id=8812586> (noting that al Qaeda was thrown out of the country in 2001, according to Afghan President Hamid Karzai, and thus implying that the fight in Afghanistan is no longer against al Qaeda).

<sup>21</sup> Cf. Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 904 (2002) (noting that “Operation Enduring Freedom properly aimed at eliminating the military capacity of the Taliban and al Qaeda” but that “[e]liminating the whole government structure created by the Taliban, as a war aim was beyond necessary self-defense”).

defense for merely harboring and does it end at some point after those offending individuals have left the invaded state?

International law provides only some clarity: "a state will be responsible if it sends persons to carry out an attack, adopts the acts of the group after the fact, or develops sufficiently close links with a terrorist group."<sup>22</sup>

2.1.1.1. *Case Example No. 1: Nicaragua v. United States*

The present situation in Afghanistan has (correctly) drawn comparisons to the Nicaraguan situation of the mid-1980s. In fact, "the *Nicaragua* case is the touchstone for much modern analysis of the concept of self-defense."<sup>23</sup> In 1986, Nicaragua sued the United States, claim that it was liable for the actions of the Contras against the Sandinista government in Nicaragua. Specifically, Nicaragua claimed that "by funding, equipping, supplying, and training the Contras, who then carried out attacks within Nicaragua, the US had illegally used force against Nicaragua and was responsible for all the actions of the Contras."<sup>24</sup>

The International Court of Justice (ICJ) rejected Nicaragua's claim that the United States was responsible for the Contras' actions because "to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."<sup>25</sup> In short, because the United States did not exercise "effective control" over the Contra rebels fighting in Nicaragua, the ICJ held that the actions of those rebels were not attributable to the United States.<sup>26</sup> More specifically, the ICJ held that "the mere 'assistance to rebels in the form of provision of weapons or logistical or other support'

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<sup>22</sup> Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT'L L. 435, 448-49 (2005) (citing G.A. Res. 3314 (XXIX), Annex, art. 3, U.N. GAOR, 29th Sess., Supp. No.19, U.N. Doc. A/9619, at 143 (Dec. 14, 1974)).

<sup>23</sup> THOMAS MICHAEL McDONNELL, *THE UNITED STATES, INTERNATIONAL LAW, AND THE STRUGGLE AGAINST TERRORISM* 261 (2010).

<sup>24</sup> *Id.*

<sup>25</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 115 (June 27).

<sup>26</sup> *See id.* (concluding that the actions of Contra rebels could not be attributed to the United States even if it was "preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation").

was explicitly denied the effect of attributing the responsibility for private operations to a particular state."<sup>27</sup>

"Under that standard, the attack on the World Trade Center and the Pentagon can hardly be qualified as an armed attack on the part of Afghanistan against the United States."<sup>28</sup> Thus, using effective control as the test, the U.S. invasion of Afghanistan, to kill the Taliban for aiding and harboring al Qaeda, is not a legal self-defense. "A strict reading of *Nicaragua* suggests that under the publically available evidence[,] the Taliban did not[,] on either 11 September 2001 or on 7 October 2001 'effectively control' al Qaeda."<sup>29</sup> As such, though the international community appears to accept that the Taliban was initially in some way responsible for the actions of al Qaeda, it is far from clear that the Taliban "effectively controlled" al Qaeda. There may have been coordination, joint financing efforts, and harboring, but not necessarily "effective control."<sup>30</sup>

#### 2.1.1.2. Case Example No. 2: *Prosecutor v. Tadic*

Nine years after the *Nicaragua* case, "the International Criminal Tribunal for the Former Yugoslavia (ICTY) . . . developed a new test of attribution—one with a significantly lower threshold than 'effective control.'"<sup>31</sup> In *Prosecutor v. Tadic*, the ICTY had to decide whether the Federal Republic of Yugoslavia was "responsible for the acts of its former soldiers and the military force after they had formed in a neighboring emerging state

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<sup>27</sup> Karl M. Meessen, *Unilateral Recourse to Military Force Against Terrorist Attacks*, 28 YALE J. INT'L L. 341, 345 (2003) (quoting *Military and Paramilitary Activities*, 1986 I.C.J. at 104).

<sup>28</sup> *Id.*

<sup>29</sup> MCDONNELL, *supra* note 23, at 263 (finding little evidence that the Taliban directly funded or equipped, let alone issued orders to al Qaeda); see also *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, ¶ 91 (May 24) (holding that Iran could be liable for injuries incurred by the United States resulting from hostage-taking at the U.S. Embassy). *U.S. v. Iran* intimates that a state may be legally responsible for actions of individual attackers if it "adopts" the acts of the attackers. There, Iran was responsible for hostage-taking militants' actions because of the "failure on the part of the Iranian authorities to oppose the armed attack by militants . . . and . . . the almost immediate endorsement by those authorities of the situation thus created . . ." *Id.*

<sup>30</sup> See Mary Ellen O'Connell, *Re-Leashing the Dogs of War*, 97 AM. J. INT'L L. 446, 451-52 (2003) (book review) (acknowledging that the Taliban's and al Qaeda's activities might have "coordinated or intertwined" and the effective control test could be met if al Qaeda or the Taliban gave one another orders).

<sup>31</sup> O'Connell, *supra* note 22, at 449.

(Bosnia), which broke off or seceded from the original state [Yugoslavia]."<sup>32</sup>

The ICTY determined:

The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.<sup>33</sup>

The ICTY thus established an alternative attribution standard to that in Nicaragua.<sup>34</sup>

Yet it is unclear that the Taliban made Afghanistan liable even under the *Tadic* standard. There is no specific information that the Taliban directly funded al Qaeda or provided them with training, weapons, or supplies.<sup>35</sup> If the Taliban only harbored al Qaeda and did not provide any training or weapons, then the Taliban probably lacked the requisite "overall control" to become liable under *Tadic*.<sup>36</sup> In sum: "*Tadic* and *Nicaragua v. United States* can be reconciled to reach the conclusion that the Taliban's allowing a safe haven to al Qaeda does not justify the [United States] launching an invasion of Afghanistan, toppling its government, inserting a new one in its place, and removing from its soil captured Taliban militia."<sup>37</sup>

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<sup>32</sup> MCDONNELL, *supra* note 23, at 262.

<sup>33</sup> Prosecutor v. Du [Ko Tadi], Case No. IT-94-1-A, Judgment, ¶ 137 (Int'l Crim. Trib. For the Former Yugoslavia July 15, 1999), *available at* <http://icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

<sup>34</sup> Despite claims to the contrary, the proposition that the ICTY established an alternative standard from Nicaragua holds true. For an explanation as to why *Tadic* established a different standard than that used by the ICJ in Nicaragua, see Christopher Greenwood, *War, Terrorism, and International Law*, in 56 CURRENT LEGAL PROBLEMS 505, 521 (Michael Freeman ed., 2004).

<sup>35</sup> See MCDONNELL, *supra* note 23, at 263–64 (noting that while the Taliban allowed al Qaeda to conduct activities in Afghanistan, the Taliban could argue against responsibility under *Tadic* by claiming "that it did not fund al Qaeda or provide it with training, weapons, or supplies.").

<sup>36</sup> See *id.* at 264 (positing that since the Taliban did not provide supplies to al Qaeda or directly coordinate any of its activities, the Taliban may have arguably lacked effective or overall control over al Qaeda under *Tadic*).

<sup>37</sup> *Id.*

### 2.1.2. *Self-Defense Under Historic International Law*

The U.S. invasion of Afghanistan rapidly became a war against the Taliban and not those responsible for September 11. Thus, the continued war is likely illegal under the ICJ's definition of self-defense against a state harboring terrorists. Despite this likelihood, the United States has consistently claimed self-defense against the Taliban as the primary reason for its continued invasion.<sup>38</sup> Charles Allen, then Deputy General Counsel for International Affairs at the Department of Defense under President George W. Bush, explained that in a global war on terror, the United States can lawfully target "[a] Qaeda and other international terrorists around the world and those who support such terrorists *without warning*."<sup>39</sup> Allen suggested the United States has "the legal right to target and kill an [al Qaeda] suspect on the streets of Hamburg, Germany, or any other peaceful place."<sup>40</sup>

Much has been written about the dubious legality of the so-called 'Bush Doctrine' in general. But does the Bush Doctrine approach work, specifically, with Afghanistan as of 2010? Is this type of 'self-defense' legal?

As noted earlier, there are two main origins for self-defense under international law. First, "[i]n 1837, US Secretary of State Daniel Webster articulated a definition of self-defence, which evolved into customary international law."<sup>41</sup> This definition arose from the *Caroline* case, in which British forces destroyed a U.S. vessel, the *Caroline*, while it attempted to deliver goods to Canadian insurgents.<sup>42</sup> The British shot at the *Caroline* and set it on fire. Webster declared that Britain's actions did not constitute legal self-defense, which was only justified if the "necessity of

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<sup>38</sup> See Obama, *supra* note 7 (claiming continued authorization for the United States to send troops to Afghanistan as a result of the September 11th attacks and the Taliban's refusal to turn over Osama bin Laden).

<sup>39</sup> O'Connell, *supra* note 22, at 453. See also Doyle McManus, *A U.S. License to Kill*, L.A. TIMES, Jan. 11, 2003, at A1, A5 (discussing the CIA's "targeted killing" of suspected terrorists).

<sup>40</sup> See O'Connell, *supra* note 22, at 453 (explaining the Bush administration's position that the September 11th attacks were an act of war by al Qaeda and so the United States was engaged in war wherever al Qaeda existed).

<sup>41</sup> Guiora, *supra* note 4, at 8.

<sup>42</sup> *Id.* (articulating the events surrounding the *Caroline* incident).

[that] self-defense [is] instant, overwhelming, leaving no choice of means, and no moment for deliberation."<sup>43</sup>

After applying the aforementioned historical definition of self-defense under international law to the United States' continued involvement in Afghanistan, it is difficult to argue that the military invasion is legal. This difficulty is particularly troubling because the United States has continually claimed self-defense since the onset of the invasion.<sup>44</sup>

Initially, the United States might legitimately have claimed that there was an overwhelming necessity to invade Afghanistan in October 2001 because more attacks by al Qaeda were promised and many members of al Qaeda were suspected of hiding out in Afghanistan.<sup>45</sup> It is now widely believed, however, including by President Karzai himself, that al Qaeda is no longer in Afghanistan.<sup>46</sup> In light of this belief, the United States' deployment of 30,000 more troops, announced in December 2009, more than eight years after the initial invasion, renders untenable the position that America's current military presence falls under the auspices of the Caroline Doctrine of self-defense. This untenable position is further exacerbated by the lack of any attack on the United States

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<sup>43</sup> Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights versus the State's Duty to Protect its Citizens*, 15 TEMP. INT'L. & COMP. L.J. 195, 211 (2001) (noting that use of force in self-defense under this doctrine applies only to the rare case where the need for self-defense is immediate and there is no way to employ less harmful measures).

<sup>44</sup> See President George W. Bush, Address to Joint Session of Congress and the American People, ¶ 19-20 (Sept. 20, 2001), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> [hereinafter Bush Speech (Sept. 20, 2001)] (announcing the Bush Administration's intention to "take defensive measures against terrorism to protect Americans and demanding that the Taliban turn over terrorists" or else "share in their fate"); President George W. Bush, Presidential Address to the Nation (Oct. 7, 2001), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011007-8.html> [hereinafter Bush Speech (Oct. 7, 2001)] (reporting the commencement of military strikes on al Qaeda training camps in Afghanistan); Obama, *supra* note 7 (reaffirming the war's original goal "to defend our homeland" in announcing deployment of additional troops to Afghanistan because the Taliban had purportedly gained momentum and continued to act as a safe haven for al Qaeda in Afghanistan).

<sup>45</sup> See Osama bin Laden, Statement, GUARDIAN (London), Oct. 7, 2001, <http://www.guardian.co.uk/world/2001/oct/07/afghanistan.terrorism15> (threatening continued action against the United States and its allies).

<sup>46</sup> See Ferran, *supra* note 20 (noting the Afghani president's belief that al Qaeda was driven out of Afghanistan in 2001).

by al Qaeda since 9/11, much less by the Taliban or any terrorist from Afghanistan.

Since the mid-nineteenth century, the Caroline Doctrine has been one basis for which states can rely upon self-defense as a use of force under international law. By the mid-twentieth century, however, World War II and Hitler's advancement throughout Europe brought new changes to the international legal landscape. The United Nations was born in 1945 and with it came another, narrower, concept of self-defense under Article 51 of the U.N. Charter.<sup>47</sup>

### 2.1.3. *Self-Defense Under Article 51*

Though self-defense is a broad and sometimes nebulous concept, Article 51 of the 1945 U.N. Charter did its best to codify the main tenets of a legal self-defense action. "In an effort to avoid repeating the horrors of the Second World War, the UN Charter calls on nation states to peacefully resolve their conflicts."<sup>48</sup> A central purpose of the United Nations is "to save succeeding generations from the scourge of war;"<sup>49</sup> therefore, "[a]ll members shall settle their international disputes by peaceful means."<sup>50</sup> However, despite a mandate to try and resolve all disputes by peaceful means, the drafters of the U.N. Charter understood that states have an inherent right to self-defense. The key would be outlining the parameters of when and to what extent self-defense is legally justified.

Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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-defense shall

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<sup>47</sup> See U.N. Charter art. 51 (reserving the right of member states to engage in individual or collective self-defense in response to an armed attack).

<sup>48</sup> Guiora, *supra* note 4, at 9 (stating that Article 51 sought to limit the circumstances in which countries could implement self-defense against other member states to encourage settlement of international disputes through peaceful means).

<sup>49</sup> U.N. Charter Preamble, para. 1.

<sup>50</sup> U.N. Charter Art. 2, para. 3.

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.<sup>51</sup>

There are several key provisions worth noting within Article 51. First, it is only supposed to be triggered “if an armed attack occurs.”<sup>52</sup> This is a significant departure from and limitation of the Caroline Doctrine, which allows for the preemptive use of force if an attack is imminent. Scholars such as Eugene Rostow have argued that strict adherence to the “armed attack” requirement of Article 51 would turn the U.N. into a “suicide pact.”<sup>53</sup> States would conceivably have to wait until fired upon to retaliate, even as they saw the armies running up to the border or bombers flying overhead.

Here, however, it is not necessary to engage fully in the “armed attack” debate because an armed attack on the U.S. preceded America’s military invasion of Afghanistan and subsequent claims of self-defense. Nevertheless, Jules Lobel’s description of Article 51 is instructive:

The United Nations Charter prohibits the use of force except when authorized by the Security Council or when undertaken by individual nations in self-defense and in response to “an armed attack.” Moreover, as a general matter, the United Nations has sought to limit the Article 51 self-defense exception to prevent its misuse. First, Article 51 permits only those actions taken in self-defense; reprisals and retaliations are proscribed under the U.N. Charter. In other words, a nation can respond to an *ongoing* attack, including one waged by a terrorist organization, by using force. However, that nation may not forcibly retaliate against another in response to an unlawful act that the latter committed against the former in the past. The reasoning behind this rule is simple: a nation subject to an ongoing attack cannot be expected to wait for the international community’s aid before fighting back. Obviously, when a nation is under attack, immediate action

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<sup>51</sup> U.N. Charter art. 51.

<sup>52</sup> *Id.*

<sup>53</sup> Eugene Rostow, *Law is Not a Suicide Pact*, N.Y. TIMES, Nov. 15, 1983, at A35.



is necessary. On the other hand, a nation whose citizens are no longer being attacked must seek U.N. intervention; to allow military reprisals would be to encourage the *renewed* use of force. This would result in a spiraling escalation of violence. Thus, the U.S. government, most state actors, the U.N. Security Council, and the International Court of Justice have officially taken the position that armed reprisals are outlawed.<sup>54</sup>

Thus, it appears that continued military involvement in another state can only be allowed if the invading state remains under attack, or, under the Caroline doctrine, under such imminent threat of attack that there is no time for deliberation. Such is not the case for the United States in Afghanistan.<sup>55</sup> Without legitimate approval and authority from Karzai, America's continued involvement in Afghanistan amounts to nothing more than a giant – and illegal – military reprisal.

It can certainly be argued, however, that the United States remains under a general threat of attack from al Qaeda. On December 25, 2009, a Nigerian man, Umar Farouk Abdulmutallab, tried to blow up a plane from Amsterdam heading from Detroit.<sup>56</sup> The man waited almost the entire flight to be sure he was over American soil before attempting to ignite a bomb.<sup>57</sup> He also claimed ties to al Qaeda and, several months prior to this incident, his own father reported him for having radical jihadist tendencies.<sup>58</sup>

But an ongoing threat from al Qaeda does not legally justify the ongoing killing of civilians in Afghanistan. By most accounts

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<sup>54</sup> Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 540 (1999) (internal citation omitted).

<sup>55</sup> *But see* Saad Gul & Katharine M. Royal, *Burning the Barn to Roast the Pig? Proportionality Concerns in the War on Terror and the Damadola Incident*, 14 WILLAMETTE J. INT'L L. & DIS. RES. 49, 67–68 (2006) (“The list of terrorist attacks attributed to al-Qaeda is long and geographically-diverse: Yemen in 1992, Kenya and Tanzania in 1998, U.S.S. Cole berthed in Yemen in 2000, New York City in 2001, Bali in 2002, Madrid in 2004, and London in 2005.”) Notice, however, there have, at the time of this Article, been no terrorist attacks on U.S. soil since 2001.

<sup>56</sup> *See* Kevin Krolicki & Jeremy Pelofsky, *Nigerian Charged with Trying to Blow up U.S. Jet*, REUTERS, Dec. 26, 2009, available at <http://www.reuters.com/article/idUSLDE5BP03M20091226> (discussing the details of Abdulmutallab's attempted attack and outlining the U.S. reaction to the attempt).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

America is not fighting al Qaeda in Afghanistan anymore—it is fighting the Taliban.<sup>59</sup> Umar Abdulmutallab did not come from Afghanistan. He is not a member of the Taliban. He is a wealthy Nigerian twenty-three-year-old who was recruited by al Qaeda in London and met with a radical American Muslim cleric in Yemen.<sup>60</sup> This situation illustrates the difficulty in pursuing a global war on terror and highlights the need for clearer guidelines for when a leader can authorize a military invasion.

At present, more than a decade after the invasion, it is highly questionable whether the threat of future attacks against the United States by al Qaeda—originating in Afghanistan—is credible. Since Osama bin Laden's death in April 2011, many have warned of a possible backlash by al Qaeda, a sort of payback for killing bin Laden.<sup>61</sup> But it is highly unlikely that any such attacks by al Qaeda would originate in Afghanistan, as they have long since left the region.<sup>62</sup> Unfortunately for America, its continued military involvement in Afghanistan withers under the scrutiny of the self-defense concepts of necessity and proportionality.

#### 2.1.3.1. Necessity and Proportionality in 2011

“In support of the legality of Operation Enduring Freedom, the U.S. invoked Article 51 of the U.N. Charter and proclaimed the

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<sup>59</sup> See Ferran, *supra* note 20 (noting President Karzai's comment that al Qaeda has “no base in Afghanistan”); Obama, *supra* note 7 (addressing the Taliban's power and the “military strategy that will break the Taliban's momentum [in Afghanistan]”).

<sup>60</sup> See Rich Schapiro, *Flight 253 Terrorist Umar Farouk Abdulmutallab Led Life of Luxury in London Before Attempted Attack*, N.Y. DAILY NEWS, Dec. 27, 2009, [http://articles.nydailynews.com/2009-12-27/news/17942464\\_1\\_umar-farouk-abdulmutallab-british-international-school-traffic-square](http://articles.nydailynews.com/2009-12-27/news/17942464_1_umar-farouk-abdulmutallab-british-international-school-traffic-square) (describing Abdulmutallab's background, his family wealth, his education in top schools, and his luxurious apartment in London's “poshest neighborhoods”).

<sup>61</sup> See DAILY MAIL REPORTER, *First the Tears, Now the Anger: Pakistanis Burn U.S. Flags as Backlash Over bin Laden's Death Grows*, MAIL ONLINE (London), May 4, 2011, <http://www.dailymail.co.uk/news/article-1383011/Osama-Bin-Laden-dead-Pakistanis-burn-US-flags-backlash-grows.html> (discussing protests and public burnings of U.S. flags in reaction to bin Laden's death); Will Brodie, *Expert Warns of Backlash After bin Laden Death*, THE AGE (Melbourne), May 2, 2011, <http://www.theage.com.au/world/expert-warns-of-backlash-after-bin-laden-death-20110502-1e495.html> (noting one professor's prediction that “al-Qaeda will remain strong without its infamous leader”).

<sup>62</sup> See Ferran, *supra* note 20 (stating that “[a] Qaeda was driven out of Afghanistan in 2001.”). According to many, Yemen is the new hotbed of al Qaeda. See Robert F. Worth, *On the Ground in Yemen*, N.Y. TIMES MAG., July 24, 2011, at 25, 31 (discussing al Qaeda's presence and methods of communication in Yemen).

right to individual and collective self-defense through military action.”<sup>63</sup> By relying on Article 51 of the U.N. Charter, the United States indicated that OEF should be evaluated against the standards for self-defense actions under international law.<sup>64</sup>

In addition to the requirements already discussed, international law imposes two more basic requirements on states that engage in self-defensive armed responses: necessity and proportionality.<sup>65</sup> “Although neither requirement is conclusively defined in international law, each obligation aims to regulate the force needed to subdue the enemy accomplished with minimal collateral damage.”<sup>66</sup>

If America’s continued military involvement in Afghanistan is necessary and proportional to the threat, then whether Karzai provides legitimate approval for the continued invasion is legally irrelevant. The United States would not need to rely on the consent doctrine exception or a U.N. Security Council resolution because it would already be acting in accordance with international law.<sup>67</sup> If any nation suffers an attack and subsequently responds militarily in self-defense within the confines of Article 51, then its behavior is legal under international law. Self-defense’s inapplicability becomes an issue if the militarily intervention is no longer necessary or proportional to the threat posed by the invaded state.

To determine whether military intervention is necessary and proportional, one must look at the stated goals of the intervention. Former President George W. Bush articulated the military

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<sup>63</sup> Gul & Royal, *supra* note 55, at 54. For a history and analysis of the right to self-defense under international law, see Saad Gul, *The Bells of Hell: An Assessment of the Sinking of ANR General Belgrano in the Context of the Falkands Conflict*, 18 N.Y. INT’L L. REV. 81, 89 (2005) (“Article 51 does not create the right of self-defense . . . it reflects a customary norm that was already well established prior to World War II by, among others, the 1919 Covenant of the League of Nations, the Locarno Treaty and the 1928 Treaty of Paris.”).

<sup>64</sup> Jack M. Beard, *America’s New War on Terror: the Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL’Y 559, 566–67 (2002) (explaining differences in scope between Article 51 self-defense and inherent right of self-defense under customary international law).

<sup>65</sup> See George K. Walker, *The Lawfulness of Operation Enduring Freedom’s Self-Defense Responses*, 37 VAL. U. L. REV. 489, 521 (2003) (detailing the “basic requirements of . . . necessity and proportionality”).

<sup>66</sup> Gul & Royal, *supra* note 55, at 55.

<sup>67</sup> Nor would the United States need to rely on the Caroline Doctrine and other customary international law.

objectives of the United States in Afghanistan in his September 20, 2001, Address to a Joint Session of Congress and his October 7, 2001, address to the country. America's three main goals were "[1] the destruction of terrorist training camps and infrastructure within Afghanistan; [2] the capture of Al Qaeda and Taliban leaders; and [3] the cessation of terrorist activities in Afghanistan."<sup>68</sup>

These goals appeared to be reasonable and as such there was and still is a general international consensus that, initially, the United States invasion of Afghanistan was both necessary and proportional.<sup>69</sup>

But by December 2001 the Taliban government was extinguished and al Qaeda largely removed from the region.<sup>70</sup> As former CIA analyst Kenneth Pollack of the Brookings Institution notes "[y]ou have to understand that the CIA considers Afghanistan its most successful arena. This is where the CIA believes it has won two wars, in 1989 and 2001."<sup>71</sup> The victorious war the CIA refers to was America's self-defense war against al Qaeda in response to the 9/11 attacks. But that is not who the United States is fighting in Afghanistan in 2011. Without the original enemy, America's continued war making in Afghanistan against the Taliban has become unnecessary under international law:

When Kuwait was liberated, the coalition forces did not go all the way to Baghdad and did not eliminate the regime of

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<sup>68</sup> K. ALAN KRONSTADT, CONG. RESEARCH SERV., RS21658, INTERNATIONAL TERRORISM IN SOUTH ASIA 2 (2003), available at <http://www.fas.org/irp/crs/RS21658.pdf>. See also Bush Speech (Sept. 20, 2001), *supra* note 44 (announcing the start of the 'War on Terror' and demanding the closure of terrorist training camps and the handover of terrorists); Bush Speech (Oct. 7, 2001), *supra* note 44 (announcing military strikes in Afghanistan in response to non-compliance with American demands).

<sup>69</sup> See Gul & Royal, *supra* note 55, at 55 (explaining that Operation Enduring Freedom met the necessary and proportional requirements); O'Connell, *supra* note 21, at 908 ("[Operation Enduring Freedom] was a lawful decision since the United States had initially been the victim of a significant armed attack and it had clear and convincing evidence of both planned future attacks and Afghanistan's responsibility for both past and planned attacks.").

<sup>70</sup> Ferran, *supra* note 20. See also O'Connell, *supra* note 21, at 908 (contemplating the legality of America's operations in Afghanistan "after the fall of the Taliban government").

<sup>71</sup> Joe Klein, *The CIA Double Cross: How Bad a Blow in Afghanistan?*, TIME, Jan. 7, 2010, <http://www.time.com/time/politics/article/0,8599,1952149,00.html>.

Saddam Hussein. . . . Operation Enduring Freedom properly aimed at eliminating the military capacity of the Taliban and al Qaeda. Leaders of either group could be apprehended and brought to justice in the United States or elsewhere. Eliminating the whole government structure created by the Taliban, as a war aim was beyond necessary self-defense. Attacking other states is wholly unjustifiable.<sup>72</sup>

The analogy to Kuwait is interesting and will be explored in more detail below. But the most striking thing about this assessment is when it occurred—the summer of 2002. Since then, the United States has continued to bomb and kill thousands of Afghan civilians.<sup>73</sup> Is it still necessary to kill Afghan civilians in a fight against the Taliban when al Qaeda is the group that attacked America more than a decade ago?

There is also strong debate regarding the proportionality of the continuous attacks in Afghanistan.<sup>74</sup> International law “defines proportionality not in terms of the *original* aggression,<sup>75</sup> but in terms of what is required to neutralize and deter *future* aggression: ‘Proportionality contemplates responses parallel in intensity to an initial aggression and designed to discourage future attacks.’”<sup>76</sup>

Another definition of proportionality focuses on the endgame. Does the action taken in response to an attack, or threat of attack, reduce the threat? Does it eliminate an ongoing attack? “[I]n the case of action taken for the specific purpose of halting and repelling an armed attack, this does not mean that the action

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<sup>72</sup> O’Connell, *supra* note 21, at 904.

<sup>73</sup> See Marc W. Herold, A Dossier on Civilian Victims of United States’ Aerial Bombing of Afghanistan, Appendix 4: Daily Casualty Count of Afghan Civilians Killed by U.S. Bombing and Special Forces Attacks, October 7 Until Present Day (October 16, 2003) (unpublished manuscript), <http://pubpages.unh.edu/~mwherold/AfghanDailyCount.pdf>.

<sup>74</sup> See O’Connell, *supra* note 21, at 904 (noting “that [the] amount and type of force” the United States used “may have exceeded both necessity and proportionality”).

<sup>75</sup> Enzo Cannizzaro, *The Role of Proportionality in the Law of International Countermeasures*, 12 EUR. J. INT’L L. 889, 893 (2001).

<sup>76</sup> Gul & Royal, *supra* note 55, at 59–60. However, early international law did impose such a requirement. See Cannizzaro, *supra* note 75, at 891 (noting that “the requirement that the injurious consequences of the response be roughly equivalent with those of the wrongful act”). See generally Gul & Royal *supra*, at 53 (detailing events on 9/11 and weeks afterward); BOB WOODWARD, BUSH AT WAR (Simon & Schuster 2002) (chronicling the aftermath of 9/11).

should be more or less commensurate with the attack. Its lawfulness cannot be measured except by its capacity for achieving the desired result."<sup>77</sup> The desired results from the initial Afghanistan invasion were clear—remove and weaken al Qaeda until little or no terrorist activities remain in Afghanistan.<sup>78</sup> This goal was arguably accomplished by December 2001.<sup>79</sup> This is further buttressed by Secretary of State Colin Powell's comments, ten days into the initial invasion, in which he indicated America's goal was not to entirely eliminate the Taliban.<sup>80</sup>

Yet despite this seemingly accomplished goal, America remains militarily engaged in Afghanistan more than a decade later. Further, in 2010 America significantly ramped up its war efforts by doubling the number of troops in Afghanistan to specifically eliminate the Taliban entirely.<sup>81</sup> Even with Obama's proposed

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<sup>77</sup> Roberto Ago, *Addendum to Eighth Report on State Responsibility*, [1980] (2)(1) Y.B. INT'L L. COMM'N 13, 69, U.N. Doc. A/CN.4/318/ADD.5-7.

<sup>78</sup> See, e.g., Bush Speech (Sept. 20, 2001) *supra* note 44 ("[T]he United States of America makes the following demands on the Taliban: . . . Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities."); Bush Speech (Oct. 7, 2001), *supra* note 44 ("[T]he United States military has begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan . . . to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime.").

<sup>79</sup> See generally O'Connell, *supra* note 21, at 904 (indicating that the United States caused the fall of the Taliban by December 2001 and citing criticism of certain acts of continued U.S. force after that date); Ferran, *supra* note 20, paras. 1-4 (announcing statements by President Hamid Karzai that the war against al Qaeda should not be in Afghanistan because they were driven out in 2001); Klein, *supra* note 71, at 31 (describing how the fatal 2010 attack on the CIA in Afghanistan challenges many assumptions because the CIA believes it won the war there in 2001).

<sup>80</sup> See O'Connell, *supra* note 21, at 904 (explaining that although Operation Enduring Freedom completely routed the Taliban from power, Powell's statement indicates that the United States didn't initially intend to use disproportionate force, i.e., eliminate the Taliban entirely).

<sup>81</sup> See Obama, *supra* note 7 (announcing President Obama's plan to send 30,000 more troops to Afghanistan for eighteen months with the overarching aim of disrupting, dismantling, and defeating al Qaeda in Afghanistan and Pakistan); Eric Schmitt & Tom Shanker, *General Calls for More U.S. Troops to Avoid Afghan Failure*, N.Y. TIMES, Sept. 20, 2009, <http://www.nytimes.com/2009/09/21/world/asia/21afghan.html> (describing General McChrystal's August 2009 report that additional troops were needed in Afghanistan in order to avoid a mission failure); Scitutto et al., *supra* note 6 (reporting on the winding down of the 2010 surge which had purportedly helped advance U.S. objectives aimed at "disrupting and dismantling al Qaeda and inflicting 'serious losses' on the Taliban").

troop reductions in 2011–2012, America is still slated to have roughly 70,000 troops actively fighting in Afghanistan well into 2014.<sup>82</sup> Proponents of the war offer numerous policy reasons to support America's continued heavy involvement,<sup>83</sup> but is this behavior really proportional to the threat of al Qaeda coming out of Afghanistan? The facts simply do not support such an assertion. Thus, "[t]he most serious question regarding the legality of [Operation] Enduring Freedom concerns whether the operation remained necessary and proportional to America's self-defense after the fall of the Taliban government."<sup>84</sup>

The goals remain primarily the same—and they remain accomplished.<sup>85</sup> Is it really necessary to militarily defeat the Taliban to keep America safe from the terrorists that were responsible for the September 11 attacks more than a decade ago? Notably, there are no claims in the international community that the Taliban are the "terrorists" directly responsible for 9/11.

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<sup>82</sup> Sciutto et al., *supra* note 6 (noting that according to current plans, President Obama will withdraw 33,000 troops total by the summer of 2012).

<sup>83</sup> See Schmitt & Shanker, *supra* note 81 (describing General McChrystal's statements in August 2009 that a failure to "gain the initiative and reverse insurgent momentum in the near term" creates the risk that defeating the insurgency will become impossible). The argument that al Qaeda will simply return to Afghanistan if America leaves is beyond the scope of this Article. Nevertheless, perhaps such an inquiry fails to ask the right question. Al Qaeda is not a local Afghanistan or Pakistan operation. Whether they return to Afghanistan misses the point, for several reasons. First, followers and members of al Qaeda no longer need to go to Afghanistan to be trained or to study and learn jihadist ways to destroy the West. Followers of al Qaeda reside all over the globe, from Fort Hood, Texas, to Colorado, to Yemen. See, e.g., Deb Feyerich and Jeanne Meserve, *Suspect in Terror Probe Admits Ties to al Qaeda, Official Says*, CNN, (Sept. 18, 2009, 9:44 PM), <http://www.cnn.com/2009/CRIME/09/18/terror.raid/index.html> (describing the arrest of a 24-year old resident of Colorado and national of Afghanistan for his involvement in an alleged terrorist plot in the United States); *Hundreds of militants Planning Attacks from Yemen, Foreign Minister Says*, FOXNEWS.COM (Dec. 29, 2009), <http://www.foxnews.com/story/0,2933,581370,00.html> (reporting that according to the Foreign Minister of Yemen, hundreds of al Qaeda are planning terror attacks from Yemen). Second, because al Qaeda is united by an ideology, it has no specific territory (like Afghanistan) that can be taken to defeat it. Traditional warfare methods, such as those currently being utilized by the United States through Predator drone bombing and hand-to-hand combat, may not be effective. See generally Cronin, *supra* note 9, at 1 ("[I]nternational terrorism is an enduring challenge that will not be 'defeated' as in a 'war.'").

<sup>84</sup> O'Connell, *supra* note 21, at 908.

<sup>85</sup> See generally Klein, *supra* note 71 at 31 ("You have to understand that the CIA considers Afghanistan its most successful arena. This is where the CIA believes it has won two wars, in 1989 and 2001").

Members of the Taliban have not declared a jihad against the United States or the West. To the contrary, the Taliban claims it simply wants the United States to leave:

We had and have no plan of harming countries of the world, including those in Europe . . . our goal is the independence of the country and the building of an Islamic state . . . . Still, if you (NATO and U.S. troops) want to colonise the country of proud and pious Afghans under the baseless pretext of a war on terror, then you should know that our patience will only increase and that we are ready for a long war.<sup>86</sup>

Regardless of that statement's veracity, the Taliban is still primarily comprised of drug lords that are defending themselves against the onslaught of American troops.<sup>87</sup> Thus, despite claims to the contrary, America's military involvement is no longer a self-defense action against al Qaeda that comports with the concepts of necessity and proportionality under Article 51.<sup>88</sup> America continues to embark on a new war against the Taliban. America's continued reliance on Article 51's self-defense provision to justify this war is misplaced and unjustifiable.

### 3. U.N. AUTHORIZATION

If a State cannot legitimately use force (1) under the Caroline doctrine; (2) in self-defense under Nicaragua's "effective control" test or the Tadic test; or (3) as a necessary and proportional response under Article 51, there is still another way to legally use force—by obtaining U.N. Security Council approval. Thus, despite America's apparent lack of legal authority for the use of force in

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<sup>86</sup> Sayed Salahuddin & Peter Graff, *Taliban Say Control Area After Battle with U.S.*, REUTERS, Oct. 7, 2009, available at <http://www.reuters.com/article/idUSSP402619>.

<sup>87</sup> This is not to argue that the Taliban are kind and fair individuals worthy of ruling Afghanistan. But however undesirable and violent they may be, they are not radical jihadists like members of al Qaeda. See generally GRETCHEN PETERS, SEEDS OF TERROR (2009) (describing the pervasive narcotics trade by the Taliban in Afghanistan and the extensive resulting profits to the insurgency in Afghanistan, and arguing that nexus between drug traffickers and terrorist groups is the new axis of evil).

<sup>88</sup> See generally O'Connell, *supra* note 21, at 902–04 (describing four conditions for a country to take military action against another state in self-defense in absence of a U.N. Security Council authorization, including that force be necessary and proportional to the injury threatened).



Afghanistan under all the aforementioned possible legal justifications, a U.N. Security Council Resolution authorizing the use of force would legitimize its continued military invasion.

Long before the United States invaded Afghanistan, the U.N. passed a Resolution which helped clarify the rules for international use of force. That Resolution, entitled the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (U.N. Declaration), was passed in 1970 on the 25th anniversary of the U.N.<sup>89</sup> The U.N. Declaration was particularly concerned with state sovereignty in the new emerging interconnected global world. To that end, the U.N. Declaration codified seven principles, five of which are directly relevant to America's continued military involvement in Afghanistan:

- (a) The principle that States 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, . . .
- (c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter, . . .
- (e) The principle of equal rights and self-determination of peoples, . . .
- (f) The principle of sovereign equality of States, . . .
- (g) The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter . . .<sup>90</sup>

Principle (a) is essentially a recitation of Article 2(4) of the U.N. Charter. As already noted, America's use of force in Afghanistan easily violates this principle, as the use of force is *designed* to threaten the political independence and territorial integrity of the state. By unilaterally using force to overthrow the current government of Afghanistan, a country that never attacked it, the United States violated the first Principle of the Declaration.

America also arguably violated Principle (c). The establishment of the Interim Authority is not inherently against

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<sup>89</sup> G.A. Res. 2625, *supra* note 13.

<sup>90</sup> *Id.*

international law in it of itself. But when coupled with the rest of America's actions, the installation of the Interim Authority constitutes intervention within the domestic jurisdiction of another state, in this case to America's benefit. America helped install an ersatz government with a puppet leader, and continued to conduct war in that country at the behest of that appointed leader, who remained in power through rigged elections and security provided by America. The rigged elections of 2004 and 2009 also violate Principle (e), as the self-determination and equal rights of the Afghan people are not being observed when in 2004 the American backed Karzai government made sure that Karzai received "over 75% of all state and radio coverage" and "85% of all the editorial coverage of candidates" nor when election fraud has taken place.<sup>91</sup> This is not the behavior of a state that values the sovereign equality of all states. (Principle (f)).

Finally, Principle (g) requests that member states fulfill in good faith the obligations assumed by them in accordance with the Charter. The U.N. Charter obliges all member states "to peacefully resolve their conflicts."<sup>92</sup> Its preamble states the purpose of the United Nations is "to save the succeeding generations from the scourge of war."<sup>93</sup> "All Members shall settle their international disputes by peaceful means . . ."<sup>94</sup> The unilateral actions of the United States in Afghanistan do not comport with its obligations under the U.N. Charter, unless, of course, there is specific U.N. Security Council Resolution authorizing and approving of the continued use and extent of force in Afghanistan against the Taliban.

### *3.1. Resolutions 1368 and 1373*

Following the 9/11 attacks on America, the U.N. Security Council swiftly passed two resolutions addressing appropriate responses to terrorism. The first, passed September 12, 2001, is Resolution 1368, the key provisions of which are as follows:

*The Security Council, Reaffirming the principles and purposes of the Charter of the United Nations, Determined to combat*

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<sup>91</sup> Andrew North, 'Heavy Poll Bias' Towards Karzai, BBC NEWS (Oct. 4, 2004, 5:32 PM), [http://news.bbc.co.uk/2/hi/south\\_asia/3712460.stm](http://news.bbc.co.uk/2/hi/south_asia/3712460.stm).

<sup>92</sup> Guiora, *supra* note 4, at 9.

<sup>93</sup> U.N. Charter Preamble, para. 1.

<sup>94</sup> U.N. Charter art. 2, para. 3.

by all means threats to international peace and security caused by terrorist acts, *Recognizing* the inherent right of individual or collective self-defence in accordance with the Charter, . . .

3. *Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;

4. *Calls also* on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999;

5. *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations . . .

.<sup>95</sup>

And two weeks later, the Security Council passed 1373:

*The Security Council, Reaffirming* its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001, . . . *Reaffirming* further that such acts, like any act of international terrorism, constitute a threat to international peace and security, *Reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001), . . . 2. *Decides also* that all States shall: . . . (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; . . . 3. *Calls* upon all States to: . . . (c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent

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<sup>95</sup> S. C. Res. 1368, pmb. arts. 3-5, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

and suppress terrorist attacks and take action against perpetrators of such acts . . . .<sup>96</sup>

Notably, neither of these resolutions specifically authorizes the use of military force in Afghanistan. Some scholars argue, however, that these resolutions articulate a new set of rules regarding self-defense and the use of force in international relations.<sup>97</sup> There are others, such as Thomas Franck, who argue that these resolutions do in fact authorize the United States to use force against the Taliban, and they do so without creating a new set of self-defense laws.<sup>98</sup> "Resolution 1368 makes even clearer, in the context of condemning the September 11 attack on the United States, the responsibility for terrorism of 'sponsors of these terrorist attacks' including those 'supporting or harbouring the perpetrators.' (para. 3). The Taliban clearly fit that designation."<sup>99</sup>

Franck wrote this in 2001, when arguably those responsible for "supporting or harboring the perpetrators", al Qaeda, were still in Afghanistan. But that was more than a decade ago, and al Qaeda has largely left the region.<sup>100</sup> For example, bin Laden and members

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<sup>96</sup> S. C. Res. 1373, pmb., arts. 2-3, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>97</sup> See, e.g., Jose E. Alvarez, Editorial Comment, *Hegemonic International Law Revisited*, 97 AM. J. INT'L. L. 873, 879 (2003) (surveying the recent practice of the U.N. Security Council and the refusal to explicitly endorse Operation Iraqi Freedom, as evidence of the Council's new 'legislative phase' in which it has created legally binding regulations rather than authorize specific responses to specific instances involving specific states). The veracity of this argument is in doubt, however, as evidenced by Alvarez's parade of qualifiers before articulating it:

Given the legislative efforts in at least one of those resolutions (1373) and the tendency for many of the Council's actions to be read as having broader normative effect, the prospective endorsement of individual and collective self-defense by the Council, together with its later acquiescence in Operation Enduring Freedom, may signal, depending on how the Council's license comes to be interpreted by its licensee, the advent of three new general rules with respect to defensive force in the age of terrorism.

*Id.* (citations omitted).

<sup>98</sup> Thomas M. Franck, Editorial Comments, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L. L. 839, 842-43 (2001) (arguing that Resolutions 1368 and 1373 expand the definition of an attack and an attacker, but preserve a state's discretion to define an attack as part of the inherent right of self-defense preserved in Article 51 of the U.N. Charter).

<sup>99</sup> *Id.* at 841.

<sup>100</sup> See generally O'Connell, *supra* note 21, at 908 ("It appears that proportionality is the concept around which the law of armed conflict and international criminal law enforcement are coming to coalesce. September 11 and

of his family were found and killed in their home of more than five years in Pakistan.<sup>101</sup> It is highly doubtful that those responsible for the September 11 attacks, and in particular the specific members of the Taliban that harbored them, are still in Afghanistan. It is even more doubtful that the Security Council, in passing Resolution 1368, meant to give the United States authorization to war against the Taliban until 2025.<sup>102</sup> Thus, though Franck may be correct in that, as of 2001, Security Council Resolution 1368 did arguably authorize America to use force against the Taliban in Afghanistan because in 2001 they were harboring the perpetrators of September 11, that same resolution can no longer be relied upon in 2011 for America's continued war against the remaining members of the Taliban, as the perpetrators of September 11 are likely long gone.<sup>103</sup> In short, the Taliban has nothing left to harbor.

Others disagree further and maintain these resolutions do not introduce a broader meaning of self-defense, even if directed only at terrorism.<sup>104</sup> According to Greg Maggs, Resolution 1368 "did not say what the right to self-defense entails. Most particularly, it did not say that al Qaeda had committed an 'armed attack' for the purposes or [sic] Article 5 and it did not say that the United States had a right to act in self-defense in response to the attack by al Qaeda."<sup>105</sup>

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its aftermath show that the once-clear divisions between crime and war are breaking down."); Ferran, *supra* note 20 (noting President Karzai's statement that "Al Qaeda was driven out of Afghanistan in 2001").

<sup>101</sup> Wilson et al., *supra* note 5 (describing the raid which killed Osama bin Laden in Pakistan).

<sup>102</sup> See Joshua Keating, *Karzai Sees Foreign Troops in Afghanistan for up to 15 Tears*, Morning Brief, FOREIGN POL'Y, Jan. 28, 2010, <http://blog.foreignpolicy.com/node/88604> (reporting President Karzai's 2010 statements at a multi-national conference that an international presence could be in Afghanistan for up to fifteen years to develop sustainable Afghan security forces).

<sup>103</sup> See generally O'Connell, *supra* note 21, at 908 (noting that after the fall of the Taliban government self-defense may no longer a valid basis for the United States' continued warfare in Afghanistan); Ferran, *supra* note 20 ("Afghan President Hamid Karzai said that the fight against al Qaeda was not in his country, but he welcomes additional U.S. troops to help protect the population").

<sup>104</sup> See Alvarez, *supra* note 97, at 879 (arguing that the legislative efforts in the resolutions, along with additional factors, may signal the advent of new general rules with respect to defensive force in the age of terrorism).

<sup>105</sup> Gregory E. Maggs, *The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the U.N. Charter and What the United States Can Do About It*, 4 REGENT J. INT'L L. 149, 166 (2006).

What can generally be agreed upon is that while the resolutions may not be clear in what they authorize, they are clear in what they do not authorize.<sup>106</sup> The concluding language of Resolution 1368 comes closest to authorizing the use of force, when the U.N. Security Council stated its “*readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism . . .*”<sup>107</sup> Compare that language, however, to that of Security Council Resolution 678, regarding Iraq’s 1990 invasion of Kuwait. Resolution 678 specifically “[a]uthorizes Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.”<sup>108</sup>

In 1990, the Security Council specifically authorized member states to use whatever force necessary to expel Saddam Hussein from Kuwait. None of the current resolutions regarding the attacks of September 11 similarly *authorize* any state to use whatever means necessary to expel and destroy al Qaeda anywhere in the world. Moreover, enacting such a resolution would not likely solve the crux of the problem. The situation in Afghanistan is, at a minimum, a standard deviation away from Kuwait in 1990, as America’s war in Afghanistan is no longer directed against al Qaeda, whereas America’s intervention in Kuwait was directed against Saddam Hussein.<sup>109</sup> Thus, though there may be confusion regarding what Resolutions 1368 and 1373 affirmatively authorize, it seems clear that they do not authorize the indefinite use of military force against the Taliban in Afghanistan. “Instead, the coexisting *International Security Assistance Force* (ISAF), established by Resolution 1386, has an explicit, though very limited, mandate to assist the new Afghan

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<sup>106</sup> See Guiora, *supra* note 4, at 14–15 (stating that the resolutions may have neither said that al Qaeda had committed a qualifying armed attack nor that the US had a right to respond in self-defense). “Security Council Resolutions 1368 and 1373—do not provide a sufficiently clear guideline regarding *when* a state may act.” *Id.* at 15.

<sup>107</sup> S.C. Res. 1368, *supra* note 95, ¶ 5 (emphasis added).

<sup>108</sup> S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

<sup>109</sup> See PETERS, *supra* note 87, at 21 (describing the current war by the United States against the Taliban’s drug trafficking); Ferran, *supra* note 20 (reporting statements by President Karzai that al Qaeda was driven out of Afghanistan in 2001).

authorities in maintaining security in Kabul and surrounding areas."<sup>110</sup>

### 3.2. *The Failed State Doctrine*

The situation in Afghanistan is somewhat unique in that it can be argued that Afghanistan has some of the hallmarks of a failed state. A failed state is a state that lacks a functioning political decision-making process and fails to "exercise meaningful control over its borders or territory."<sup>111</sup> At present, there is no failed state doctrine in international law with respect to use of force. This is most likely the result of the inherent difficulties in promulgating such a doctrine.<sup>112</sup> However, a failed state designation, or lack thereof, is beside the point for the purposes of the use of force in Afghanistan. Regardless of whether a state has officially "failed" or not, characteristics of that state's leader can still be examined to determine whether he or she is authorized to allow a military invasion in his or her state. The difficulties of having a system that rests on a particular definition of a controversial term, such as *failed state*, are many. Attempts to regulate torture, for instance, aptly demonstrate such difficulties. The word *torture* is so difficult to define that any laws that prohibit the use of torture are subject to widely varying interpretation, no matter how extensive the definition. The resulting inconsistency has led to widespread abuses worldwide.<sup>113</sup>

Thus, for the purposes of allowing a foreign military to make war in a state, the decision should not turn on whether that state has officially been classified as a failed state. Whether an arguably failed state can be invaded and held accountable for the actions of rebels or terrorists within its territory remains unclear under either

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<sup>110</sup> Jaume Saura, *Some Remarks on the Use of Force Against Terrorism in Contemporary International Law and the Role of the Security Council*, 26 LOY. L.A. INT'L & COMP. L. REV. 7, 22 (2003).

<sup>111</sup> Ben N. Dunlap, *State Failure and the Use of Force in the Age of Global Terror*, 27 B.C. INT'L & COMP. L. REV. 453, 469 (2004).

<sup>112</sup> *See id.* at 470 ("State failure has no legal meaning under international law. States have legal personality that outlives any one regime or government, and their status cannot be terminated by other states. Moreover, the criteria for statehood are interpreted quite flexibly.").

<sup>113</sup> *See generally* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds. 2005) (compiling the Bush Administration's legal memoranda which supported the use of torture).

the *Nicaragua* or *Tadic* standards.<sup>114</sup> This underscores the importance of having legitimate rulers in place before authorizing the use of military force in the territories of such states. This practical focus should minimize legal loopholes and add legitimacy to any unilateral invasion of a state that may be harboring terrorists.

#### 4. THE UNITED STATES' INVASION OF AFGHANISTAN

In order to properly assess the legitimacy of utilizing the consent doctrine as justification for America's continued war in Afghanistan, a review of how Hamid Karzai came into power there is instructive. In 2001—in direct response to the September 11th attacks—the United States invaded Afghanistan under the operation referred to as Operation Enduring Freedom (OEF).<sup>115</sup> President George W. Bush articulated the military objectives of the United States in Afghanistan both in his September 20th Address to a Joint Session of Congress and his October 7th address to the country. As previously stated, the three main goals of OEF were: “[1] the destruction of terrorist training camps and infrastructure within Afghanistan, [2] the capture of Al Qaeda and Taliban leaders, and [3] the cessation of terrorist activities in Afghanistan.”<sup>116</sup>

Moving quickly, the United States teamed up with the Northern Alliance—a coalition of Afghan militias opposed to the Taliban regime—to remove the Taliban from Kabul within three weeks of the October 7, 2001 invasion.<sup>117</sup> Per prior U.S. custom, the United States stated that it did not desire to remain a *de facto* power. Instead, it helped facilitate a new interim government out of whole cloth—the Interim Authority. Meetings between the U.N.

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<sup>114</sup> See O'Connell, *supra* note 22, at 449–50 (noting that applying the prevailing *Tadic* test to a failed state is less clear, but the “better argument” is that if a state is unable to control terrorist activities in its territory, a state may use force in self-defense against attacks originating in the failed state).

<sup>115</sup> See Bush Speech (Oct. 7, 2001), *supra* note 44 (announcing military strikes against al Qaeda terrorist training camps and Taliban military installations of the Taliban regime in Afghanistan “to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime”).

<sup>116</sup> *Supra* text accompanying note 68.

<sup>117</sup> See Harris, *supra* note 8, at 48 (noting that the United States allied with the Northern Alliance and took control of Kabul by November 2001); Koh, *supra* note 8, at 1489 (characterizing an “extraordinarily swift and successful military campaign to oust the Taliban and restore democracy” in Afghanistan).



and expatriate groups in Germany decided that Hamid Karzai would lead the Interim Authority, which “shall be the repository of Afghan sovereignty.”<sup>118</sup> This became known as the Bonn Agreement and was signed on December 5, 2001.<sup>119</sup> Thus, before the conclusion of 2001, it appeared the Bonn Agreement and the Interim Authority restored sovereignty to Afghanistan. The Taliban were driven from Kabul, and a new interim leader was abruptly installed in their place. But to refer to Karzai as the leader of Afghanistan is misleading. The reality was—and still is—far different.

#### 4.1. Hamid Karzai's Involvement with the Mujahedin

To understand the extent of Karzai's authority and leadership (or lack thereof), it is useful to understand how and why he was chosen to become the interim leader. In 1979, the former Soviet Union invaded Afghanistan. Under the Reagan administration, the United States applied the time-tested “enemy of my enemy is my friend” approach to international relations, and subsequently decided to fund the rebellion in Afghanistan.<sup>120</sup> Specifically, the CIA funded the Pakistani Inter-Services Intelligence (ISI), or essentially the Pakistani version of the CIA.<sup>121</sup> It was in the CIA-funded ISI alliance that the idea of “jihad” was invoked to motivate rebellious militants against the “secular communists.”<sup>122</sup> It was not difficult to motivate certain angry, devout Muslims or to convince them to view the Soviets as unholy, rebel invaders of their land. In short, “the U.S. allowed the use of Islamic religious doctrine and propaganda to galvanize groups of Muslims in order to fight America's war against the Soviets.”<sup>123</sup>

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<sup>118</sup> Harris, *supra* note 8, at 49 (quoting Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, U.N. Doc. S/2001/1154 (Dec. 5, 2001)).

<sup>119</sup> See *id.* at 49 (referring to the December 5, 2001 agreement as “the Bonn Agreement”).

<sup>120</sup> See Zack Hofstad, *Do Unalienable Rights Apply to All? Extreme Shari'a Law and How United States Foreign Policy Towards Iran and Afghanistan Has Fueled Its Spread*, 6 REGENT J. INT'L L. 191, 216-17 (2008) (describing the United States' Pakistan-centered response to the Soviet invasion of Afghanistan).

<sup>121</sup> See *id.* at 215-16 (noting that the CIA funded the ISI).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 216.

A radical group of jihadist fighters, “[t]he mujahedin, or holy warriors,” emerged from the CIA-ISI alliance.<sup>124</sup> The mujahedin believed in “jihad and the rifle alone: no negotiations, no conferences, and no dialogues.”<sup>125</sup> In total, somewhere between 10,000–80,000 mujahedin were trained by the CIA-funded ISI to fight against the Soviets during the 1980s.<sup>126</sup> Hamid Karzai was one of them.<sup>127</sup>

#### 4.2. Problems After the Fall of the Taliban

By December 2001 the Interim Authority was specifically established in Afghanistan to take over and temporarily be in command. Karzai, a former mujahedin warrior, was only supposed to be the leader for the period before an official Constitution was drafted, a task mandated to be completed within eighteen months.<sup>128</sup>

The initial idea was for Karzai to form a legitimate government in Afghanistan.<sup>129</sup> That has failed to materialize. “The Karzai regime has little authority over most of Afghanistan.”<sup>130</sup> Indeed, after nearly a decade since Karzai took over, his authority remains as tenuous as ever: “every aspect of the intelligence community’s work in Afghanistan is being called into question. According to a report, made public—remarkably—by Major General Michael Flynn, military intelligence has been ‘ignorant’ about the local power structures in combat areas, imperiling U.S. troops on the ground.”<sup>131</sup> There are local power structures in the combat areas

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* (quoting MAHMOOD MAMDANI, *GOOD MUSLIM, BAD MUSLIM* 127 (2004)).

<sup>126</sup> *Id.*

<sup>127</sup> See *President Hamid Karzai*, THE EMBASSY OF AFGHANISTAN, <http://www.embassyofafghanistan.org/president.html> (last visited Nov. 17, 2011) (detailing Karzai’s involvement with the mujahedin in Pakistan during the 1980s and his subsequent involvement with the mujahedin government in Afghanistan during the 1990s).

<sup>128</sup> See Thomas H. Johnson, *The Prospects for Post-Conflict Afghanistan: A Call of the Sirens to the Country’s Troubled Past*, 5 STRATEGIC INSIGHTS (2006), <http://www.nps.edu/Academics/centers/ccp/publications/OnlineJournal/2006/Feb/johnsonFeb06.pdf> (assessing Afghanistan’s current politics, development and stability).

<sup>129</sup> See Harris, *supra* note 8, at 49 (describing how U.S. presence in Afghanistan is a form of occupation).

<sup>130</sup> Mark A. Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 COLUM. J. TRANSNAT’L L. 349, 360 (2004).

<sup>131</sup> Klein, *supra* note 71, at 31.

because Karzai does not have actual power over them. Yet, the United States continues to conduct war in Afghanistan under the authority and approval provided by Karzai, the man who lacks power and control. Is this specter of authority sufficient to satisfy international law?

After a cursory examination of the situation, it would appear so. The United States and the U.N. both recognize Karzai as the leader of Afghanistan.<sup>132</sup> Recognition is the “formal acknowledgment by existing States of the normal political consequences flowing from the status of the entity that is recognized.”<sup>133</sup> Recognition can legitimize a *de facto* leadership situation.<sup>134</sup> Furthermore, U.N. admission can equal recognition.<sup>135</sup> Thus, at first glance, America and the U.N.’s approval would appear to conclude the inquiry—Karzai is the leader of Afghanistan. But a deeper inquiry into the matter reveals otherwise. Karzai was forcefully imposed on the Afghan people, and militarily protected, in large part, by America. Moreover, by most accounts, al Qaeda, the terrorist group responsible for 9/11, has long since left the region.<sup>136</sup> Osama bin Laden, found in Pakistan, not Afghanistan, is dead.<sup>137</sup> Thus, America’s war in Afghanistan is against the Taliban, a group who never attacked America. It is here that the United States’ continued presence in Afghanistan is especially troubling. Does an imputed leader such as Karzai have the legitimacy to authorize such a use of force in “his” state against a foe that never attacked America?

An affirmative answer would set a dangerous precedent for the world. Any nation, from China to Venezuela, could first invade a

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<sup>132</sup> See, e.g., Pamela Constable & Joshua Partlow, *Karzai Declared Winner of Afghan Election a Day After Rival Quits*, WASH. POST, Nov. 3, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/02/AR2009110203455.html> (noting that U.N., U.S., and European officials congratulated Karzai on his reelection to the Afghan Presidency).

<sup>133</sup> JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 539–40 (2d ed. 2006).

<sup>134</sup> See *id.* at 540 (noting that the effect of a “collective acknowledgement of status (or its collective denial)” is sometimes “to legitimize a *de facto* situation.”).

<sup>135</sup> See *id.* (“[T]he collective acknowledgment of status that might have been effected by a system of organized collective recognition is achieved by admission to the United Nations . . .”).

<sup>136</sup> See Ferran, *supra* note 20 (noting Karzai’s statement that al Qaeda is no longer in Afghanistan, having been “driven out . . . in 2001”).

<sup>137</sup> See, e.g., Wilson et al., *supra* note 5 (reporting the death of Osama bin Laden in a U.S. raid).

country, then have a leader installed who was subsequently protected by its military, and then on the newly installed leader's apparent authority, remain militarily active in that nation, killing the native people for more than a decade without any international legal repercussions. How would the United States react if China did this in Taiwan?<sup>138</sup> America's continued war in Afghanistan supposedly legitimized by Karzai's blessing is a very dangerous precedent that will likely be an increasingly common phenomenon, as "[t]raditional state v [sic] state war is largely a relic."<sup>139</sup>

#### *4.3. The Law of Occupation*

Though Afghanistan is a particularly useful example in many ways, it is important to note that it is not the perfect example of the consent doctrine. That is because many of the legitimacy problems regarding Karzai, which will be discussed below, arise in a context where America is already militarily present in Afghanistan. In more general terms, the cleanest example would be to assess the legitimacy of a leader to determine consent before a military invasion takes place. Here, America invaded Afghanistan in October 2001, before Karzai took office. Thus, some discussion regarding the law of occupation is necessary before proceeding with Afghanistan as an example of a state with a leader who may not have the requisite legitimacy to authorize the foreign use of force.

The term "occupying power" has a specific definition under the various international laws and agreements that comprise the Law of Armed Conflict.<sup>140</sup> "Territory is considered occupied when it is actually placed under the authority of the hostile army."<sup>141</sup>

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<sup>138</sup> This idea may not be as far-fetched as it seems. The world is no longer unipolar, and China very well may be able to persuade the U.N. to recognize a leader of a country that is not a real leader in any practical sense of the word. America's continued war in Afghanistan could serve as a model to China and others.

<sup>139</sup> Guiora, *supra* note 4, at 3.

<sup>140</sup> The Law of Armed Conflict is comprised of the Hague Conventions of 1899 and 1907, in addition to the four Geneva Conventions of 1864, 1906, 1929, and 1949, as well as the Additional Protocols of 1977 and 2005. See, e.g., William H. Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 *YALE J. INT'L L.* 319-20 (2003) (arguing in favor of the Law of Armed Conflict's appropriateness as a "legal framework for regulating the use of force in the war on terrorism").

<sup>141</sup> Convention Respecting the Laws and Customs of War on Land, art. 42, Oct. 18, 1907, 36 Stat. 2277, U.N.T.S. 539 (outlining the circumstances in which territory is considered occupied).

Moreover, "occupation extends only to the territory where such authority has been established and can be exercised."<sup>142</sup> It is important to note, however, that:

[T]he degree of control that the foreign military force exercises over specific territory may ebb and flow, making such broad tests of occupational authority difficult to apply . . . . As Eyal Benvenisti notes, however, the modern concept of occupation, as exemplified by U.N. Security Council Resolution 1483, only contemplates a temporary term of authority by the foreign power over the occupied territories . . . .<sup>143</sup>

Thus, with respect to America's involvement in Afghanistan, it may be argued that America is simply an occupying power and therefore does not need the approval of Karzai to continue its current military operations.

Such a decision would be premature, however. First, even assuming, *arguendo*, that America is merely the occupying power, it is only supposed to have control where "such authority has been established and can be exercised."<sup>144</sup> Much of the fighting is occurring in parts of Afghanistan in which the local warlords and the Taliban, not the United States or Karzai, are in control.<sup>145</sup> No clear authority has been established. This argument resonates with some scholars so strongly that it leads them to conclude that because of this, Karzai cannot possibly provide legitimate consent for war in Afghanistan.<sup>146</sup>

Second, America is not merely an "occupying power," as it is doing far more than just occupying Afghanistan. The fighting has dramatically increased over time, and in the first few months of 2010 America added 30,000 more troops to Afghanistan.<sup>147</sup> Such a

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<sup>142</sup> *Id.*

<sup>143</sup> Richard Morgan, *The Law At War: Counterinsurgency Operations and the Use of Indigenous Legal Institutions*, 33 HASTINGS INT'L & COMP. L. REV. 55, 62 (2010).

<sup>144</sup> Convention Respecting the Laws and Customs of War on Land, *supra* note 141, art. 42 (referring to the definition of an occupied territory).

<sup>145</sup> See Drumbl, *supra* note 130, at 360 (explaining that the Karzai government "has little authority over most of Afghanistan"); Klein, *supra* note 71 (quoting Major General Michael Flynn as stating that military intelligence has been "ignorant" of Afghanistan's local power structures).

<sup>146</sup> See Saura, *supra* note 110, at 22 (arguing that the U.S. presence in Afghanistan is not authorized by Resolution 1373).

<sup>147</sup> See Sheryl Gay Stolberg & Helene Cooper, *Obama Adds Troops, but Maps Exit Plan*, N.Y. TIMES, Dec. 1, 2009, <http://www.nytimes.com>

dramatic increase in troops, which (for reasons that will be explained later) resulted only after a yearlong wait for Karzai's approval, changes the character of any previous occupation into a military offensive. Since this influx of troops, this has been, in a sense, a whole new war. This new war makes Afghanistan, though not historically obvious, a particularly useful example of the consent doctrine and the requisite authority a leader needs to authorize the foreign use of force. It is in that vein that Karzai's leadership will be further explored.

##### 5. HOW AMERICA CAME TO RELY ON THE CONSENT DOCTRINE IN AFGHANISTAN

The United States invaded Afghanistan in 2001 in search of those responsible for 9/11—al Qaeda. Since the Taliban government of Afghanistan was protecting or harboring al Qaeda members, the United States claimed self-defense as authorization for the war.<sup>148</sup> In reality, the United States had little other choice under international law. As it has been discussed, the U.N. Security Council did not authorize the use of force in Afghanistan.<sup>149</sup> The invasion on its face violated Article 2(4) of the U.N. Charter, prohibiting any use of force that threatens the territorial integrity of political independence of any state. This left the United States claiming self-defense against a foe, the Taliban, which never attacked it.

This is the basic underpinning of the Bush Doctrine of preemptive war. “[A]s a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed.”<sup>150</sup> In a sense, the United States announced it had the

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/2009/12/02/world/asia/02prexy.html?pagewanted=all (discussing President Obama's deployment of additional troops to Afghanistan).

<sup>148</sup> See Authorization for Use of Military Force Against Terrorists, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the use of force against those who planned the attacks of September 11, 2001); *Bush Announces Opening of Attacks*, CNN (Oct. 7, 2001), [http://articles.cnn.com/2001-10-07/us/ret.attack.bush\\_1\\_qaeda-targets-al-kandahar?\\_s=PM:US](http://articles.cnn.com/2001-10-07/us/ret.attack.bush_1_qaeda-targets-al-kandahar?_s=PM:US) (discussing the commencement of U.S. air strikes in Afghanistan in response to Afghanistan's refusal to “close terrorist training camps, turn over al Qaeda leaders and return international citizens detained in Afghanistan”).

<sup>149</sup> Further, the Security Council also did not authorize the *indefinite* use of force in Afghanistan, long after al Qaeda had left and bin Laden had been killed.

<sup>150</sup> OFFICE OF THE PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002), available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002>.

authority to strike whomever, whenever, if, in the sole opinion of the United States, any country somehow posed a danger or potential danger, or harbored someone who posed a potential danger to United States.<sup>151</sup> Many scholars, in the United States and abroad, have criticized the Bush Doctrine, as it marked a sharp departure from international law governing the use of force.<sup>152</sup> Though some accepted the idea of invading a foreign country to go after terrorists that attacked their country, they would not accept that notion indefinitely.<sup>153</sup> How long can the United States stay in Afghanistan and claim self-defense against al Qaeda?

According to Karzai himself, "al Qaeda was driven out of Afghanistan in 2001."<sup>154</sup> In fact, when bin Laden was found and killed in Pakistan in April 2011, it was discovered that he had been operating and running al Qaeda from that base camp in Pakistan for at least the past five years.<sup>155</sup> Thus, from as early as 2002, the United States has not been fighting al Qaeda with its war in Afghanistan. It has been fighting against the Taliban, making claims of self-defense dubious.

America recognized early on that since al Qaeda was largely absent from Afghanistan, the legality of its war there was increasingly tenuous. As a result, the United States quickly decided to hold free and fair democratic elections in Afghanistan by 2004. This was not borne out of altruism or a strong desire to see the Afghan people have a free society. Rather, the United States needed a legitimate and legal reason to continue making war in Afghanistan, against a foe that never attacked it. America

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<sup>151</sup> See Peter Baker, *Bush to Restate Terror Strategy*, WASH. POST, Mar. 16, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/15/AR2006031502297.html> (reiterating President Bush's strategy to preemptively strike the terrorists).

<sup>152</sup> See Jane Gilliland Dalton, *The United States National Security Strategy: Yesterday, Today, and Tomorrow*, 52 NAVAL L. REV. 60, 60 (2005) (noting that President Bush's National Security Strategy contains "four major themes with significant international law implications").

<sup>153</sup> See MCDONNELL, *supra* note 23, at 261 (discussing attempts to limit the right of self-defense in an effort to avoid further violence, and discussing other potentially analogous scenarios, including whether the United States could justify its attack on Nicaragua with a self-defense argument); O'Connell, *supra* note 21, at 889 ("At the outset, [the operation] did indeed meet the conditions of lawful self-defense, but later stages of the operation may have gone beyond the bounds of proportionality.").

<sup>154</sup> Ferran, *supra* note 20.

<sup>155</sup> See Wilson et al., *supra* note 5 (detailing the events surrounding Osama bin Laden's death).

needed Karzai to be elected by the people, so his consent to the war could create at least the illusion of legitimacy for its continued invasion and active military presence in Afghanistan.<sup>156</sup>

### 5.1. *The 2004 Afghanistan Election*

In 2004 the United States announced that Afghanistan was going to have a fair and democratic election.<sup>157</sup> The seemingly democratic system installed in Afghanistan by the Interim Authority called for an elected President of Afghanistan to serve a five-year term.<sup>158</sup> In order to avoid a run-off, the winner of the general election in Afghanistan also had to have more than fifty percent of the popular vote.<sup>159</sup> Thus, heading into the 2004 election America's primary focus was ensuring, at all costs, that Hamid Karzai received more than fifty percent of the vote.

Those costs included an unfair democratic process. By all accounts, the 2004 election appeared to be rigged.<sup>160</sup> From the beginning, the United States made sure the message was out that Karzai was supposed to win, by ensuring that Karzai received "over 75% of all state TV and radio coverage" since campaigning began in late 2004.<sup>161</sup> On the state-controlled Afghan radio—a key medium in Afghanistan—Karzai received eighty-five percent of all

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<sup>156</sup> There is mounting evidence of this as more details have emerged from Karzai's most recent "election." One example is his recent pronouncement that American troops need to be actively engaged in Afghanistan until at least 2020. See Keating, *supra* note 102.

<sup>157</sup> See Ahto Lobjakas, *Afghanistan: NATO, U.S. Will Not Accept Full Responsibility for Fairness of Election*, RADIO FREE EUROPE/RADIO LIBERTY (Aug. 16, 2004), <http://www.rferl.org/content/article/1054335.html> (discussing the U.S. insistence that the elections must be "free and fair," but that the ultimate responsibility rests with Afghanistan).

<sup>158</sup> See *id.* (discussing the months leading up to Afghanistan's 2004 presidential election); see also *President Hamid Karzai*, *supra* note 127 (noting that upon election in 2004, Karzai's first term was slated to last for five years).

<sup>159</sup> See Sayed Salahuddin, *Factbox: Profiles of Key Afghan Presidential Candidates* (August 19, 2009), REUTERS, available at <http://www.reuters.com/article/2009/08/19/us-afghanistan-election-profiles-sb-idUSTRE5711NJ20090819> (discussing the numerous presidential candidates in Afghanistan, and the need to win more than 50% of the vote to avoid a run-off).

<sup>160</sup> See Associated Press, *Fraud Allegations Double in Afghan Election* (Aug. 30, 2009), <http://www.msnbc.msn.com/id/32617636> (underscoring the 2,096 allegations of fraud and voter intimidation received by the complaints commission).

<sup>161</sup> North, *supra* note 91.



the editorial coverage of candidates.<sup>162</sup> There was also no “check” on Afghanistan’s state-controlled media, as in America’s democracy. There was no *Saturday Night Live* television program making fun of the media-loving Barack Obama, or giving Sarah Palin a chance to defend herself and be funny.<sup>163</sup> How can there be a legitimate democratic election if the key tenets of democracy are disregarded in the electoral process?

More specifically, the 2004 election was marred by an indelible ink scandal that tainted the vote count. In an effort to prevent fraud and ensure an accurate vote count, the election polls for the 2004 Afghanistan Presidential election required each person to dip their finger in indelible ink as they cast their vote.<sup>164</sup> However, numerous Afghans, including at least two presidential candidates, complained that the ink used at the polling stations came off far too easily, thereby allowing one person to vote multiple times.<sup>165</sup> One presidential candidate Ramazan Badhardost, was so upset by the fungible nature of the ink that he urged the Independent Election Commission (IEC) to cancel the entire election.<sup>166</sup> Said Mr. Badhardost, “this is not an election, this is a comedy.”<sup>167</sup>

It is upon that basis, a farce of an election under the veil of a fair democratic process, that the United States garnered authorization from an “elected leader” to increase its military involvement in Afghanistan. The international community should be careful about accepting this as the model for compliance with international law.

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<sup>162</sup> North, *supra* note 91.

<sup>163</sup> See *Afghanistan: Journalist Given Death Sentence for ‘Blasphemy’*, RADIO FREE EUROPE/RADIO LIBERTY (Jan. 23, 2008), <http://www.rferl.org/content/article/1079389.html> (illustrating the extent to which the Afghani media is controlled through an account of a journalist sentenced to death for an article considered blasphemous). “Afghan media outlets have sprung up in large numbers since the ouster of the hard-line Taliban regime in late 2001, although press freedoms frequently run up against official obstacles or opposition from conservative forces that include the clergy.” *Id.*

<sup>164</sup> See Foreign Staff, *Afghanistan Election: ‘Indelible Ink’ Washes Off Voters’ Fingers*, TELEGRAPH (London), Aug. 20, 2009, <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/6061343/Afghanistan-election-indelible-ink-washes-off-voters-fingers.html> (describing the ink as a less than satisfactory safeguard against voter fraud due to its potential to be removed).

<sup>165</sup> *Id.* See also *Afghan Poll Hailed as a ‘Success’*, BBC NEWS (Aug. 20, 2009, 5:46 PM), <http://news.bbc.co.uk/2/hi/8212306.stm> (noting a presidential candidate’s complaint that the ink easily washed off).

<sup>166</sup> *Id.* (noting that Bashardost “call[ed] on authorities to stop the election”).

<sup>167</sup> *Id.*

### 5.2. *Aftermath of the 2004 Election*

After Karzai was elected President in 2004, nothing immediately changed. He still lacked power outside of Kabul and the drug warlords were still the actual rulers of Afghanistan.<sup>168</sup> Yet the United States continued to fight a war against the Taliban under Karzai's approval. As the war continued on, public support in America and abroad began to wane.<sup>169</sup> The United States was continuing to use force against a former government of Afghanistan. The more years the United States was removed from 9/11, the less Bush's preemptive war doctrine seemed to apply. By the arrival of the 2008 U.S. presidential election, presidential hopeful Barack Obama campaigned on a promise to change the way America fought the war on terror.<sup>170</sup>

While this overall mantra of change may have won Obama the election by a landslide, it did not promise scaling back the war in Afghanistan. Quite the contrary, as Obama's first year in office drew to a close, General McChrystal and others were telling the President that he needed to vastly increase the number of American troops in Afghanistan.<sup>171</sup> 2009 also marked the conclusion of Karzai's first term as "elected" President of Afghanistan. Once again America had a great incentive to ensure Karzai remained in office because it wanted to add tens of thousands of more troops to fight the war in Afghanistan. What

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<sup>168</sup> See Harris, *supra* note 8, at 48-56 (describing the interim Afghan government that was created during the U.S. occupation of Afghanistan, and the lack of authority that it possessed outside of the capital); Koh, *supra* note 8, at 1489-90 (citing the insufficient allocation of resources to geographical areas outside of the capital as the reason for Karzai's lack of control).

<sup>169</sup> See Jeffrey M. Jones, *In U.S., More Optimism About Iraq, Less About Afghanistan*, GALLUP (Mar. 18, 2009), <http://www.gallup.com/poll/116920/optimism-iraq-less-afghanistan.aspx> (charting a decline in American optimism toward military efforts in Afghanistan, but noting that the majority of Americans still support the war in Afghanistan); *Europeans Rally Against War in Afghanistan*, JERUSALEM POST, Sept. 20, 2008, <http://www.jpost.com/International/Article.aspx?id=115063> (characterizing heightened unpopularity of the war in Afghanistan through European antiwar protests).

<sup>170</sup> See Jake Tapper, *Obama Delivers Bold Speech About War on Terror*, ABC NEWS (Aug. 1, 2007), <http://abcnews.go.com/Politics/story?id=3434573&page=1> (providing an overview of Barack Obama's campaign initiatives pertaining to the U.S. war on terror).

<sup>171</sup> See Schmitt and Shanker, *supra* note 81 (describing a defense report submitted by a U.S. general recommending deployment of more U.S. troops to Afghanistan in order to bolster low confidence and defeat an increasingly "savvy" insurgency).

was true in 2004 was even truer in 2009—America needed legal justification for the war, and without seeing any other legal basis for being there, it needed consent from a legitimate leader. Unfortunately for the United States and the continued legitimacy of the use of force under international law, the 2009 Afghanistan Presidential elections did not produce such a result.

### 5.3. *The 2009 Afghanistan Election*

This 2009 election drew even more questions and complaints than those from 2004. This time one particular challenger to Karzai emerged, Abdullah Abdullah. The election was held on August 20, 2009. After the initial votes came in, Abdullah and Karzai both claimed victory.<sup>172</sup> “As far as my campaign is concerned, I am in the lead, and that’s despite the rigging which has taken place,” Abdullah told the Associated Press.<sup>173</sup>

By August 30, Abdullah’s contentions about the election’s fairness were proving true. There were more than 550 documented specific and major allegations of fraud by August 30, just ten days after the election.<sup>174</sup> “The spike indicates just how pervasive ballot box stuffing and voter intimidation may have been during the country’s Aug. 20 vote, threatening the legitimacy of the election.”<sup>175</sup>

After the votes were counted, it only got worse. By October, “U.N. backed fraud investigators . . . threw out nearly a third of . . . Karzai’s votes,” over one million total, because they were fraudulent.<sup>176</sup> That left Karzai short of the fifty percent majority he

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<sup>172</sup> Associated Press, *Hamid Karzai, Rival Abdullah Abdullah Both Claim Victory in Afghan Presidential Election*, N.Y. DAILY NEWS, Aug. 21, 2009, [http://www.nydailynews.com/news/2009/08/21/2009-08-21\\_karzai\\_rival\\_both\\_claim\\_victory\\_in\\_afghan\\_pres\\_election.html](http://www.nydailynews.com/news/2009/08/21/2009-08-21_karzai_rival_both_claim_victory_in_afghan_pres_election.html).

<sup>173</sup> *Id.*

<sup>174</sup> See *Afghanistan Election Marred by More than 550 Fraud Allegations*, N.Y. DAILY NEWS, Aug. 30, 2009, [http://www.nydailynews.com/news/world/2009/08/30/2009-08-30\\_afghanistan\\_election\\_marred\\_by\\_more\\_than\\_550\\_fraud\\_allegations.html](http://www.nydailynews.com/news/world/2009/08/30/2009-08-30_afghanistan_election_marred_by_more_than_550_fraud_allegations.html) (describing the allegations against Karzai for corrupt election practices and attributing the decline of Karzai’s popularity to the resurgence of violence and his recruitment of former warlords to gain votes).

<sup>175</sup> *Id.*

<sup>176</sup> *Nearly a Third of Afghan President Hamid Karzai’s Votes Thrown Out by UN Backed Fraud Investigators*, N.Y. DAILY NEWS, Oct. 19, 2009, [http://articles.nydailynews.com/2009-10-19/news/17935872\\_1\\_karzai-campaign-spokesman-independent-election-commission-karzai-supporters](http://articles.nydailynews.com/2009-10-19/news/17935872_1_karzai-campaign-spokesman-independent-election-commission-karzai-supporters). The U.N. investigators were specifically assigned to watch over the 2009 election in an

needed to win in Afghanistan and avoid a run-off against Abdullah. This represented the worst case scenario for America – proof that the elections were rigged and that Karzai was not the rightful, legitimate leader of Afghanistan. However, these U.N. backed investigators were only there to report the findings; it was up to the IEC to announce the final results or commence with the run-off.<sup>177</sup>

At the same time, Americans were dying every day in Afghanistan at an increasingly alarming rate.<sup>178</sup> American generals urged the Obama administration to send more troops, but the White House refused, claiming that “no decision on sending more U.S. troops to Afghanistan would be made before the election crisis is resolved . . .”<sup>179</sup> In other words, “[a] decision had been held up in part because the blatant rigging of the August election jeopardized the legitimacy of Karzai’s government, which has been an important prerequisite for U.S. counterinsurgency strategy.”<sup>180</sup> As such, the stage was set for the IEC to announce the run-off. However, that never happened.

Every member of the IEC was appointed by Karzai.<sup>181</sup> For two straight weeks, the IEC made no pronouncement and gave no indication that any runoff was coming. Not surprisingly, after two weeks of inaction by the IEC, Abdullah had enough. Abdullah officially put an end to the charade masquerading as an election by

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attempt to avoid the scandals associated with the 2004 Afghanistan presidential election. *Afghanistan Election Marred by More than 550 Fraud Allegations*, *supra* note 174. Unfortunately, they only served to verify the magnitude of the fraud in the 2009 election. U.N. Official: ‘Widespread Fraud’ in Afghanistan Election, FOXNEWS.COM (Oct. 11, 2009), <http://www.foxnews.com/world/2009/10/11/official-widespread-fraud-afghanistan-election>.

<sup>177</sup> *Id.*

<sup>178</sup> See, e.g., *Afghanistan Coalition Military Fatalities By Year*, ICAUSALITIES, <http://icasualties.org/> (diagraming American deaths per year in Afghanistan, which include 98 deaths in 2006, 117 deaths in 2007, 155 deaths in 2008, and 317 deaths in 2009).

<sup>179</sup> *Nearly a Third of Afghan President Hamid Karzai’s Votes Thrown Out by UN Backed Fraud Investigators*, *supra* note 176.

<sup>180</sup> Kevin Whitelaw, *Karzai ‘Victory’ Puts Spotlight on U.S. Troop Decision*, NPR (Nov. 2, 2009), <http://www.npr.org/templates/story/story.php?storyId=120016883>.

<sup>181</sup> See Brian Kates, *Afghan Election Commission Declares Hamid Karzai Winner*, N.Y. DAILY NEWS, Nov. 2, 2009, [http://www.nydailynews.com/news/world/2009/11/02/2009-11-02\\_afghan\\_election\\_commission\\_declares\\_hamid\\_karzai\\_winner\\_of\\_presidential\\_election.html](http://www.nydailynews.com/news/world/2009/11/02/2009-11-02_afghan_election_commission_declares_hamid_karzai_winner_of_presidential_election.html) (reporting on the IEC’s declaration that Karzai won the presidential election by default).

withdrawing, stating the ballot “would not have been fair” and accusing the IEC of bias.<sup>182</sup> Abdullah further said that a fair election was “impossible.”<sup>183</sup> Even Karzai admitted there was widespread “fraud” in the election.<sup>184</sup>

Obama administration officials have repeatedly expressed concerns about the credibility of the Karzai government.<sup>185</sup> Obama himself admitted “the process was messy, but was ‘in accordance’ with Afghan law.”<sup>186</sup> This description rang hollow and exposed America’s true feelings about the situation in Afghanistan—it needed Karzai to win regardless of the cost. To wit, the day after Abdullah’s withdrawal, the IEC declared Karzai the winner and President of Afghanistan.<sup>187</sup>

Less than a month later, President Obama, with newly elected President Karzai’s blessing, ordered more than 30,000 additional American troops to fight in Afghanistan.<sup>188</sup>

#### 6. KARZAI IS NOT THE LEGITIMATE LEADER OF AFGHANISTAN

In order for the United States to utilize the consent doctrine as a legal means for making war in Afghanistan, it needs consent from the leader of Afghanistan. Despite the rigged elections, Karzai is recognized as the leader of Afghanistan. Recognition is the “formal acknowledgment by existing States of the normal political consequences flowing from the status of the entity that is recognized.”<sup>189</sup> Recognition legitimizes a *de facto* leadership situation.<sup>190</sup> Furthermore, U.N. admission can equal recognition.<sup>191</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> See Ferran, *supra* note 20 (reporting that though Karzai represented that “the election, as a whole, was good and free and democratic[,]” Karzai nonetheless admitted to instances of electoral fraud).

<sup>185</sup> See Kates, *supra* note 181 (noting that, in an effort to increase Karzai’s credibility, various U.S. government officials had pressed Karzai to consent to a run-off during the controversial 2009 Afghan election).

<sup>186</sup> Whitelaw, *supra* note 180.

<sup>187</sup> *Id.*

<sup>188</sup> Obama, *supra* note 7.

<sup>189</sup> CRAWFORD, *supra* note 133, at 539–40.

<sup>190</sup> See *id.* at 540 (noting that the effect of a “collective acknowledgement of status (or its collective denial)” is often “to legitimize a *de facto* situation”).

<sup>191</sup> See *id.* (“[T]he collective acknowledgment of status that might have been effected by a system of organized collective recognition is achieved by admission to the United Nations . . .”).

For example, Karzai is the recognized leader of Afghanistan by the United States and the U.N.<sup>192</sup> At first glance this would seem to end the inquiry. But it should not, because Karzai has little actual power, and only remains in power through fraudulent elections and support from the invading state to which he provides consent. Because of all of the following, Hamid Karzai is not the legitimate leader of Afghanistan, and therefore cannot legalize America's military intervention there.<sup>193</sup>

### *6.1. He Was Appointed*

From 2001 through 2004, Karzai was only the Interim Authority, specially appointed and not elected by the people. The fact that the U.N. and expatriate groups in Germany decided that Hamid Karzai would lead the Interim Authority raises suspicions about the legitimacy of Karzai's rule. Had Karzai been elected by the Afghan people in 2001 in a fair and just election, such a result would have favored legitimacy. But that is not what happened. The result is an appointed leader, selected by a combination of outside parties who are not all too familiar with the region.

### *6.2. For Years Karzai Maintained Only Temporary Status*

It seems oxymoronic that by definition a temporary, or interim, authority figure could have the power to invite in the military of another state to make war there. Yet from 2001 through 2004, that is precisely what happened. Worse still, in the case of Afghanistan, that temporary authority, Karzai, was put in place (in part) by the U.S. military. The argument that America has the authority to militarily intervene because the pro-tem interim leader America installed consents is as circular as it is illogical. This behavior is also contrary to the U.N. Charter's overall mantra commanding

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<sup>192</sup> See, e.g., Statement By His Excellency Hamid Karzai at the 61st Session of the U.N. G.A. (Sept. 20, 2006), available at <http://www.un.org/webcast/ga/61/pdfs/afghantistan-e.pdf> (referring in a U.N. document to Hamid Karzai as "His Excellency Hamid Karzai President of the Islamic Republic of Afghanistan"); *Hamid Karzai Profile*, ACADEMY OF ACHIEVEMENT, <http://www.achievement.org/autodoc/page/kar0pro-1> (last updated Feb. 2, 2005) (recognizing Hamid Karzai as the president of Afghanistan).

<sup>193</sup> There may be, in fact, no sole current leader of Afghanistan.

states to refrain from unilaterally using force to promote their own self-interests.<sup>194</sup>

### 6.3. Karzai Lacks Actual Control or Power Over the Region

As noted, Karzai's temporary status changed when he was "elected" in 2004 and 2009. Yet Karzai still lacks control and exercises little power over the country he is supposedly leading. From the beginning, "the authority of the interim governing administration was circumscribed, state institutions were virtually non-existent, and the Interim Authority exercised almost no authority outside of the capital."<sup>195</sup> Karzai's lack of control and authority in Afghanistan has continued to the present. "The Karzai regime has little authority over most of Afghanistan. Those who exercise authority, such as local warlords, tend to be ultra-conservative."<sup>196</sup>

"[S]ecurity remains a major concern in that country [Afghanistan] and the authority of the transitional government of President Hamid Karzai is still being challenged."<sup>197</sup> Current Legal Adviser to the U.S. State Department Harold Koh noted that "[w]hile Hamid Karzai nominally acts as president of Afghanistan, outside of Kabul, much of the country remains under the de facto control of warlords and drug lords."<sup>198</sup> Even inside Kabul there is chaos. For example, in July 2011, his most trusted bodyguard killed Karzai's brother.<sup>199</sup> In short, Karzai does not and has never had control over most of Afghanistan. He therefore cannot legitimately grant access to something over which he does not have control.

Worse still, Karzai's lack of control is not even debatable, as America admits he has no real power or control over Afghanistan. For example, in late 2009 Secretary of State Hillary Clinton referred

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<sup>194</sup> See U.N. Charter, art. 2, para. 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.").

<sup>195</sup> Harris, *supra* note 8, at 49.

<sup>196</sup> Drumbl, *supra* note 130, at 360.

<sup>197</sup> Panel Discussion, *supra* note 8, at 182.

<sup>198</sup> Koh, *supra* note 8, at 1489.

<sup>199</sup> See Julius Cavendish, *Bodyguard Who Killed Karzai's Brother was Trusted CIA Contact*, INDEPENDENT (London), July 16, 2011, <http://www.independent.co.uk/news/world/asia/bodyguard-who-killed-karzais-brother-was-trusted-cia-contact-2314580.html> (noting that the bodyguard had been recruited by the Taliban after working closely with U.S. officials).

to Afghanistan as a “narco-state” with Karzai’s supposed government “plagued by limited capacity and widespread corruption.”<sup>200</sup> A narco-state is “an area that has been taken over and is controlled and corrupted by drug cartels and where law enforcement is effectively nonexistent.”<sup>201</sup> This presents a situation where the invading state *admits* that the alleged leader has no control or authority over invaded Afghanistan, while simultaneously relying on the alleged leader’s supposed legitimate authority to make war in Afghanistan. Such a self-fulfilling justification for war is fundamentally flawed and illegitimate.

#### 6.4. Afghanistan’s Judiciary System is Corrupt

“[I]n every legal system some organ must be competent to determine with certainty the subjects of the system. . . . [The States’] determinations must have definitive legal effect.”<sup>202</sup> Without definitive legal recourse and guidance coming from the state government, the people will not be effectively governed by the state. In Afghanistan, the corrupt judiciary system is further evidence of a lack of legitimate and actual power from an alleged leader and government.

For example, in December 2009, the mayor of Kabul was sentenced to four years in prison on corruption charges.<sup>203</sup> Initially, Afghans were thrilled to see the mayor finally have to succumb to some rule of law in Afghanistan. However:

The very next day, . . . Sahebi [the disgraced mayor] was back in the Mayoral Office after a higher court granted him bail. And despite official statements that he is not allowed to continue running the capital city, Sahebi did just that for nearly a week before resigning on December 13.<sup>204</sup>

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<sup>200</sup> Rajiv Chandrasekaran, *U.S. Resetting its Relationship with Karzai*, WASH. POST, Nov. 20, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/19/AR2009111903992.html?hpid=topnews>.

<sup>201</sup> *Narco-state*, DICTIONARY.COM, <http://dictionary.reference.com/browse/narco-state> (lasted visited Nov. 15, 2011).

<sup>202</sup> CRAWFORD, *supra* note 133, at 20.

<sup>203</sup> Abubakar Siddique, *Weak Judiciary Pushes Some Afghans To Taliban*, RADIO FREE EUROPE/RADIO LIBERTY, Dec. 13, 2009, <http://www.rferl.org/articleprintview/1902781.html>.

<sup>204</sup> *Id.*



Indeed, "[t]he fact that he stayed in office so long astonished Afghans . . . it has placed the entire Afghan judiciary under the spotlight."<sup>205</sup>

Kabul University Professor Nasrullah Stanekzai agrees that "[w]ithout a fundamentally strong judicial system we cannot find our way to justice. And people cannot trust their government."<sup>206</sup> According to J. Alexander Tier, who oversees Afghanistan and Pakistan at the U.S. Institute of Peace, the lack of the alleged government's ability to resolve disputes has done more than just put the judiciary in the spotlight. "The Afghan government will not be legitimate if it is not seen to be involved in the resolution of disputes; if it is not seen to be involved in justice."<sup>207</sup>

In sum, Karzai is not a legitimate ruler of Afghanistan; therefore, the consent doctrine is not a legally viable method to justify America's continued use of force in Afghanistan.

#### 7. THE UNINTENDED CONSEQUENCES OF FIGHTING THIS ILLEGAL WAR

America should be concerned about setting a troublesome precedent with its continued military presence and fighting in Afghanistan. Without any legal justification for the war on terror in Afghanistan, America unwittingly opens the door for other nations to undertake similar, decade-plus long "self-defense" actions that result in thousands of innocent deaths per year, while not legally being in self-defense. Nor do the attacks even have to be against the people who attacked the now intruding state. Following America's lead, states may no longer need a U.N. Security Council resolution to attack, nor approval from a legitimate leader. Any nation, from North Korea to Iran, could first invade a country, then facilitate installation of a leader who was subsequently protected by its military, and then on the newly installed leader's apparent authority, continue making war for more than a decade without any international legal repercussions. The negative consequences of establishing such a precedent should not be underestimated.

In addition, America's illegal actions allow other nations to deflect attention from their own wrongdoings and place the

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<sup>205</sup> *Id.* (quoting Kabul University law professor Najeeb Mahmood).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

spotlight squarely on America's illegal war. For example, President Mahmoud Ahmadinejad has urged the United Nations to open a fact-finding mission into the legality of America's war in Afghanistan.<sup>208</sup> This was in 2010, even before bin Laden's death in Pakistan. By placing the international spotlight on America's illegal war in Afghanistan, Iran takes the spotlight off its somewhat suspect uranium expeditions.<sup>209</sup>

## 8. CONCLUSION

America's continued war on terror in Afghanistan is somewhat of a misnomer. It is no longer against al Qaeda terrorists but against Taliban drug lords. The war is no longer (if it ever was) a self-defense action, as those responsible for the attack, al Qaeda, have long since left the region. This is further evidenced by bin Laden's 2011 death in Pakistan (where he had been living for more than 5 years), not Afghanistan. The continued fighting also fails under the scrutiny of Article 51's elements of necessity and proportionality. With al Qaeda gone and bin Laden dead, America's behavior is neither necessary nor proportional.

The fighting is also not taking place under the auspices of a U.N. Security Council resolution authorizing the use of force.<sup>210</sup> Without a Security Council resolution specifically authorizing the continued attacks on the Taliban indefinitely, the only remaining way for America to legally continue to use force against the Taliban in Afghanistan is through the approval of a legitimate

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<sup>208</sup> See Barbara Plett, *Iran Urges UN Inquiry into Wars in Iraq and Afghanistan*, BBC NEWS (Apr. 13, 2010), [http://news.bbc.co.uk/2/hi/middle\\_east/8616850.stm](http://news.bbc.co.uk/2/hi/middle_east/8616850.stm) (discussing Ahmadinejad's request for a U.N. fact-finding team to investigate the intentions and results of Western military action in Afghanistan and Iraq, which coincided with a rise in international tension over Iran's nuclear program).

<sup>209</sup> See *id.*

<sup>210</sup> Instead, the Security Council has instituted a program, the United Nations Assistance Mission in Afghanistan (UNAMA) to promote the Afghani government's recovery efforts. See Press Release, Security Council, Security Council Extends Mandate of United Nations Assistance Mission in Afghanistan to Help Promote Government-Led Recovery Efforts, U.N. Press Release SC/9889 (Mar. 22, 2010), <http://www.un.org/News/Press/docs/2010/sc9889.doc.htm> (announcing and describing Resolution 1917 (2010), which realigns UNAMA "to assist [Afghanistan's] Government in the transition to national leadership of the country's recover efforts").

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leader of Afghanistan. It is widely thought, even in America, that Karzai is not a legitimate leader of Afghanistan.<sup>211</sup>

At this juncture, the war is most likely illegal. By continuing to fight, America loses a significant amount of moral high ground and tangible international leverage. America also unwittingly establishes a precarious blueprint for future states to follow. Whatever sound (or unsound) reasons American policymakers have for continuing the war, its illegality foreshadows a destabilizing future.

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<sup>211</sup> See Chandrasekaran, *supra* note 200 (detailing the efforts of U.S. officials to get Karzai to accede to an election run-off, and implying a lack of American confidence in the legitimacy of his position).