DANGEROUS PRECEDENT: AMERICA'S ILLEGAL WAR IN AFGHANISTAN

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Abstract

Osama bin Laden’s death has lead 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 U.S. 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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“The post-Cold War era began with the collapse of one structure, the Berlin Wall in November 1989, and that era ended with the collapse of another structure, the World Trade Center on September 11, 2001.”¹

¹ 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.

I. Introduction

On September 11, 2001 the U.S. was attacked when planes were hijacked and flown into the World Trade Center and the Pentagon. Nearly 3,000 Americans were killed, most of who were civilians. Although members of the terrorist group al Qaeda claimed responsibility for the attacks and the U.S. believed them, the brutality and suddenness of the attacks left the U.S. 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 - the un-recognized, illegitimate drug lords - were the de facto rulers of Afghanistan. Thus, the initial question was could the U.S. 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. The more overlooked question is about this conflict’s legality. “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.” This Article will show that even if America’s initial involvement in Afghanistan arguably comported with international law, its continued military escalation more

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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 of which occurred on April 30, 2011, when American forces, without knowledge or permission from Pakistani government, infiltrated the Pakistani border and killed al Qaeda leader Osama bin Laden.\textsuperscript{5} In the wake of bin Laden’s death, President Obama announced that America would begin withdrawing troops from Afghanistan.\textsuperscript{6}

The plan calls for approximately 30,000 troops to return to America by the end of 2012.\textsuperscript{7} The President announced this great troop reduction as a direct result of bin Laden’s death.

Apparently, since al Qaeda’s leader has been killed in Pakistan, America can reduce it’s 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 in the regulation of the use of force in international law. Under Article 2(4) of the UN 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 in self-defense, pursuant to a UN Security Council resolution, or with the consent from the leader of the host state. At various times throughout the war, America has

\footnotesize{\textsuperscript{5} Scott Wilson, Craig Whitlock & William Branigin, \textit{Osama bin Laden Killed in U.S. Raid, Buried at Sea}, WASHINGTON 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.}

\footnotesize{\textsuperscript{6} Jim Sciutto, Mary Bruce & Devin Dwyer, \textit{Obama Orders Start to US Troop Withdrawal From Afghanistan}, ABCNEWS (June 22, 2011), http://abcnews.go.com/Politics/president-obama-orders-start-us-troop-withdrawal-afghanistan/story?id=13908291.}

\footnotesize{\textsuperscript{7} \textit{Id.} This was celebrated as America leaving Afghanistan. But in reality, since President Obama took office, he has more than tripled the number of troops in Afghanistan, and this withdrawal by 2012 does not eliminate the American presence in Afghanistan. \textit{Id.} It 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. Barack Obama, Address at the U.S. Military Academy at West Point (Dec. 1, 2009), \textit{available at} http://www.huffingtonpost.com/2009/12/01/obama-afghanistan-speech-text-excerpts_n_376088.html.}
claimed its use of force in Afghanistan falls under all three exceptions, and as such all three will be examined here.

The most relatable justification to the general public would appear to be self-defense. There is little doubt America was attacked on 9/11 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 this type of military force do not apply. Outside of self-defense, states can use military force pursuant to a UN Security Council Resolution. However, there is no UN 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, but 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 President Hamid Karzai lacks authority and control over large parts of Afghanistan. The issue is whether someone who does not have control over a nation, and never did, authorizes another country to make war in that nation for more than a decade.

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After exploring these exceptions in 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 of finding is great. America’s persistence to fight an illegal war of this nature, a war not based on self-defense, or authorized by the UN, or by consent of a legitimate leader, establishes a dangerous precedent. State A could prop up a leader in a country B, one who 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 leaders 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 a supposed leader they propped 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. 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.

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9 See AUDREY RUTH CRONIN and JAMES M. LUDES, ATTACKING TERRORISM: ELEMENTS OF GRAND STRATEGY (Georgetown University Press 2004) at 45. Terrorist “[g]roups seeking to evade detection often adopt more horizontal structures so as to limit the damage to the hierarchy if a member is caught . . . They can compartmentalize information and keep themselves from detection by the state, and may even be better able to carry out attacks . . .” Id.
For example, self-defense, as will be explained in greater detail later, has specific requirements under international law, including that the 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 state sponsored armies – the traditional laws governing self-defense become more difficult to apply. Moreover, the other legal way to use force, 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 rarely articulates resolutions authorizing the use of force. Indeed, the “purpose of the United Nations is to save the succeeding generations from the scourge of war.”\textsuperscript{10} All member states are supposed to “settle their international disputes by peaceful means.”\textsuperscript{11}

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 negligently establishes a dangerous precedent for future unauthorized military actions.

II. **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 UN Charter in 1945. The UN 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.”\(^{12}\) Also, “the paramount importance of the Charter of the United Nations” is “the promotion of the rule of law among nations.”\(^{13}\) Article 2(4) of the UN Charter states that no member state may use armed force that threatens the “territorial integrity or political independence of another state.”\(^{14}\) This is the second article of the UN Charter and its placement underscores the importance of the overall goal of the UN, to limit the use of armed force in international relations.\(^{15}\) A member state may only use armed force for peacekeeping and other activities not threatening the territorial integrity or political independence of a state.

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, i.e. it does not threaten the territorial integrity of political independence of another state, then the use of force is justified under international law.\(^{16}\) Thus the U.S. could possibly apply this logic to justify its military invasion of Afghanistan, if 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 precisely to threaten territorial integrity and political independence of Afghanistan. The U.S. did not respect the Taliban government’s wishes, when the Taliban asked for proof that al Qaeda was there, the U.S. provided none.\(^{17}\) Because the U.S. wanted to overthrow the Taliban

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\(^{12}\) Id. at art. 1.


\(^{14}\) U.N. Charter, supra note 11, at art. 2, para 4.


\(^{16}\) See JOHN NORTON MOORE AND ROBERT F. TURNER, NATIONAL SECURITY LAW, (Carolina Academic, 2nd ed. 2005).

government and kill various suspected terrorists in their country, the U.S. could not look to Art. 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.

A) Self Defense

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

i. 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 other 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); not by territory like the Taliban. Mainstream media and the general public often fail to realize one key distinction regarding America’s recent involvement in Afghanistan. Namely, the

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19 See Cronin and Ludes, supra note 9, at 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.” Id.
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.\(^{20}\)

It is generally (though not universally) accepted within the international community that in the beginning, October 2001, the Taliban were sufficiently intertwined with al Qaeda to warrant America’s self-defense against them both as a result of 9/11.\(^{21}\) 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 to the point now, 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 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.”\(^{22}\)

a) **Case Example No. 1: Nicaragua v. United States**

The present situation in Afghanistan has (correctly) drawn comparisons to the Nicaraguan situation in the mid-1980s. In fact, “[t]he *Nicaragua* case is the touchstone for much

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\(^{22}\) 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), art. 3, U.N. GAOR, 29th Sess., Supp. No.19, U.N. Doc. A/9619 Annex (Dec. 14, 1974) (“Definition of Aggression” as: “Any of the following acts, regardless of a declaration of war, shall ... qualify as an act of aggression ... (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”)). *Id.*
modern analysis of the concept of self-defense.” In 1986 Nicaragua sued the U.S., holding them 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 U.S. had illegally used force against Nicaragua and was responsible for all the actions of the Contras.”

The International Court of Justice (ICJ) rejected Nicaragua’s claim that the U.S. was responsible for the Contras’ actions, because for its conduct “to give rise to legal responsibility of the United States, it would in principle have to be proved that the state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.” In short, because the U.S. 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 U.S. More specifically, the ICJ held that “the mere ‘assistance to rebels in the form of provision of weapons or logistical or other support’ was explicitly denied the effect of attributing the responsibility for private operations to a particular state.”

“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.” 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 legal self-defense. “A strict reading of the Nicaragua case suggests that under the publically available evidence the Taliban did not either on September 11,

24 Id.
26 Id. at 54-55.
28 Id. (citing Allain Pellet & Sarah Pellet, The Aftermath of September 11, 10 TILBURG FOREIGN L. REV. 64, 65, 69 (2002)).
2001 or on October 7, 2001 ‘effectively control’ al Qaeda.”\(^{29}\) 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 no “effectively control.”\(^{30}\)

b) **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’.\(^{31}\) 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 (Bosnia), which broke off or seceded from the original state [Yugoslavia].”\(^{32}\)

The ICTY said:

> 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.\(^{33}\)

The ICTY thus established an alternative attribution standard to that in Nicaragua.\(^{34}\)

\(^{29}\) McDonnell, *supra* note 23, at 263. *See also United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 6 (May 24, 1980). This case intimates that if a State may be legally responsible for actions of individual attackers if it adopts the acts of the attackers. There, Iran was responsible for the hostage-taking at the U.S. Embassy 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.*


\(^{32}\) McDonnell, *supra* note 42, at 262.


\(^{34}\) This is true despite claims to the contrary. For an explanation as to why, *See* Christopher Greenwood, *War, Terrorism, and International Law*, in 56 CURRENT LEGAL PROBS. 505, 528 (Michael Freeman ed., 2003).
Yet it is unclear that the Taliban make 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.\(^35\) If the Taliban simply allowed all of that to happen within their country, and only harbored al Qaeda, then the Taliban probably lacked the requisite “overall control” to hold them liable under *Tadic*.\(^36\) 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 US launching an invasion of Afghanistan, toppling its government, inserting a new one in its place, and removing from its soil captured Taliban militia.”\(^37\)

ii. **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 the U.S. has consistently claimed self-defense against the Taliban as the primary reason for its continued invasion.\(^38\) Under President George W. Bush, Charles Allen, then Deputy General Counsel for International Affairs at the Department of Defense, explained that in a global war on terror the U. S. can lawfully target “Al Qaeda and other international terrorists around the world and those who support such terrorists without warning.”\(^39\) Allen suggested the U.S. has “the legal right to target and kill an al-Qaeda suspect on the streets of Hamburg, Germany, or any other peaceful place.”\(^40\)

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40 *Id.*
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, in 1837, U.S. Secretary of State Daniel Webster articulated a definition of self-defense, which evolved into customary international law. This definition arose from the Caroline case, in which a U.S. vessel, the Caroline, was destroyed attempting to deliver goods to Canadian insurgents. 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 that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”

Applying the historical definition of self-defense under international law to the U.S. continued involvement in Afghanistan, one has a difficult time arguing that the military invasion is legal. This is particularly troubling because, from day one throughout the entire invasion, the U.S. has claimed self-defense.

Initially, the U.S. might have legitimately claimed the necessity was so overwhelming that it had to invade Afghanistan in October 2001, because more attacks by al Qaeda were

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42 Guiora, supra note 4, at 8.
promised, and many members of al Qaeda were suspected of hiding out in Afghanistan. But it is now widely believed, including by Karzai himself, that al Qaeda is no longer in Afghanistan. In light of this, America’s December 2009 announcement of 30,000 more troops, more than eight years after the initial invasion, makes it untenable that America’s current military presence falls under auspices of the Caroline Doctrine of self-defense. This is further exacerbated by the lack of any attack on the U.S. by al Qaeda since 9/11, much less by the Taliban or any terrorist from Afghanistan.

Since the mid 19th 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 UN Charter.

iii. Self-Defense Under Article 51

Though self-defense is a broad and sometimes nebulous concept, in 1945 Article 51 of the UN 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.” “The purpose of the United Nations is to save the succeeding generations from the scourge of war.” “All Members shall settle their international disputes by peaceful means.” However, despite a mandate to try and resolve all disputes by peaceful means, the drafters of the UN understood that states have an inherent right to self-

46 Ferran, supra note 20.
48 Guiora, supra note 4, at 9.
50 U.N. Art. 2, supra note 11, at para. 3.
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 be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.  

There are several key provisions worth noting within Art. 51. First, it is only supposed to be triggered “when an armed attack occurs.” 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 Art. 51 would turn the UN into a “suicide pact.” States would conceivably have to wait until fired upon, even as they saw the armies running up to the border or bombers flying overhead.

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

The United Nations Charter prohibits the use of force except when authorised by the Security Council or when undertaken by individual nations in self-defence and in response to ‘an armed attack.’ Moreover, as a general matter, the United Nations has sought to limit the Article 51 self-defence exception to prevent its

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51 U.N. Art. 51, supra note 47.
52 U.N. Art. 51, supra note 47.
misuse. First, Article 51 permits only those actions taken in self-defence; 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 organisation, 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 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 spiralling 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.$^{54}$

Thus, it appears 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 U.S. in Afghanistan.$^{55}$ 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 U.S. 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.$^{56}$ The man waited almost the entire flight to be sure he was over American soil before attempting to ignite a bomb.$^{57}$ The man


$^{57}$ Id.
claimed ties to al Qaeda and, several months prior to this incident, his own father reported him for having radical jihadist tendencies.  

But an ongoing threat from al Qaeda does not legally justify the ongoing killing of civilians in Afghanistan. By most accounts America is not fighting al Qaeda in Afghanistan anymore – they are fighting the Taliban. Umar Abdulmutallab did not come from Afghanistan. He is not a member of the Taliban. He is a wealthy Nigerian 23 year-old that was recruited by al Qaeda in London and met with a radical American Muslim cleric in Yemen. This illustrates the difficulty in pursuing a global war on terror and highlights the need for clearer guidelines of 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 U.S. by al Qaeda – originating in Afghanistan – is credible. Since 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. But it is highly unlikely that any such attacks by al Qaeda would originate in Afghanistan, as they have long since left the region. Unfortunately for America, its continued military involvement in Afghanistan withers under the scrutiny of the self-defense concepts of necessity and proportionality.

58 Id.
59 Ferran, supra note 20; Obama, supra note 7.
62 Ferran, supra note 20. According to many, Yemen is the new hotbed of al Qaeda. See Robert F. Worth, On the Ground in Yemen, N.Y. TIMES MAGAZINE, (July 24, 2011.)
a) **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 right to individual and collective self-defense through military action.”

By relying on Article 51 of the U.N. Charter, the U.S. indicated that OEF should be evaluated against the standards for self-defense actions under international law.

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. “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.”

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 U.S. would not need to rely on the consent doctrine exception, or a UN Security Council resolution, because it would already be acting in accordance with international law.

If any nation suffers an attack and subsequently responds militarily in self-defense within the confines of Art. 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.

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63 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 Falklands Conflict*, 18 N.Y. INT'L L. REV 81, 89 (2005) (“It should be noted that 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, amongst others, the 1919 Covenant of the League of Nations, the Locarno Treaty and the 1928 Treaty of Paris.”).


66 Gul and Royal, supra note 55, at 55.

67 Nor would the U.S. need to rely on the Caroline Doctrine and other customary international law.
To determine if military intervention is necessary and proportional, one must look at the stated goals of the intervention. Former President George W. Bush articulated the military objectives of the U.S. 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 leaders; and (3) the cessation of terrorist activities in Afghanistan.”

These appeared to be reasonable goals and as such there was and still is a general international consensus that, initially, the U.S. invasion of Afghanistan was both necessary and proportional.

But by December 2001 the Taliban government was extinguished and al Qaeda largely removed from the region. 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." 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 U.S. 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 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

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68 Bush, supra note 44.
69 O’Connell, supra note 21, at 904. “[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 and future attacks and Afghanistan’s responsibility for both past and planned attacks;” Gul and Royal, supra note 124, at 55.
70 Ferran, supra note 20. See also O’Connell, supra note 21, at 908.
71 Joe Klein, The CIA Double Cross: How Bad a Blow in Afghanistan?, TIME MAGAZINE (Jan. 7, 2010), http://www.time.com/time/politics/article/0,8599,1952149,00.html?
structure created by the Taliban, as a war aim was beyond necessary self-defense. Attacking other states is wholly unjustifiable.\textsuperscript{72}

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 U.S. has continued to bomb and kill thousands of Afghan civilians.\textsuperscript{73} 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.\textsuperscript{74} International law defines proportionality “not in terms of the original aggression,\textsuperscript{75} 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.’ ”\textsuperscript{76}

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 should be more or less commensurate with the attack. Its lawfulness cannot be measured except by its capacity for achieving the desired result.”\textsuperscript{77} The desired results from the initial Afghanistan invasion were clear. Remove and weaken al Qaeda,

\begin{footnotesize}
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\item O’Connell, supra note 21, at 904.
\item O’Connell, supra note 21, at 904.
\item However, early international law did impose such a requirement (noting that “the requirement that the injurious consequences of the response be roughly equivalent with those of the wrongful act.”) See Gul and Royal, supra note 55, at 53 (detailing events on 9/11 and weeks afterward); and BOB WOODWARD, BUSH AT WAR (Simon & Schuster 2002) (chronicling the aftermath of 9/11).
\end{enumerate}
\end{footnotesize}
so there were little or no remaining terrorist activities in Afghanistan.\textsuperscript{78} This goal was arguably accomplished by December 2001.\textsuperscript{79} This is further buttressed by Secretary of State Colin Powell’s comments, ten days into the initial invasion, where he indicated America’s goal was not to entirely eliminate the Taliban.\textsuperscript{80}

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.\textsuperscript{81} Even with Obama’s proposed troop reductions in 2011-2012, America is still slated to have around 70,000 troops actively fighting in Afghanistan well into 2014.\textsuperscript{82} Proponents of the war offer numerous policy reasons to support America’s continued heavy involvement,\textsuperscript{83} 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

\begin{footnotesize}
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\item \textsuperscript{78} Bush, supra note 44.
\item \textsuperscript{79} See O’Connell, supra note 21, at 908; Ferran, supra note 20; Klein, supra note 71.
\item \textsuperscript{80} O’Connell, supra note 21, at 904.
\item \textsuperscript{82} Sciutto, et al, supra note 6.
\item \textsuperscript{83} Schmitt & Shanker, supra note 81. In addition, 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. From Fort Hood, Texas, to Colorado, to Yemen, followers of al Qaeda reside all over the globe. See Deb Feyerich and Jeanne Meserve, Suspect in Terror Probe Admits Ties to al Qaeda, Official Says, CNN (Sept. 18, 2009), http://www.cnn.com/2009/CRIME/09/18/terror.raid/index.html; Joanna Sugden, ‘Hundreds of al-Qaeda militans planning attacks from Yemen’, N.Y.TIMES (Dec. 29, 2009), http://www.timesonline.co.uk/tol/news/world/article6970574.ece.
\end{itemize}
\end{footnotesize}
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.\textsuperscript{84}

The goals remain primarily the same – and they remain accomplished.\textsuperscript{85} 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. Members of the Taliban have not declared a jihad against the U.S. or the West. To the contrary, the Taliban claims it simply wants the U.S. to leave:

\begin{quote}
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 colonize 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.\textsuperscript{86}
\end{quote}

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.\textsuperscript{87} 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 Art. 51.\textsuperscript{88} America continues to embark on a new war against the Taliban. America’s continued reliance on Art. 51 self-defense for this war is misplaced and unjustifiable.

\textsuperscript{84} O’Connell, \textit{supra} note 21, at 908.
\textsuperscript{85} See Klein, \textit{supra} note 71. “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.” \textit{Id}.
\textsuperscript{87} See GRETCHEN PETERS, SEEDS OF TERROR (Thomas Dunne Books 2009). 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.
\textsuperscript{88} See O’Connell, \textit{supra} note 21.
III. UN 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; (3) as a necessary and proportional response under Art. 51, there is still another way to legally use force - and that is to obtain UN Security Council approval. Thus, despite America’s apparent lack of legal authority for the use of force in Afghanistan under all the aforementioned possible legal justifications, a UN Security Council Resolution authorizing the use of force would legitimize its continued military invasion.

Long before the U.S. invaded Afghanistan, at the 25th anniversary of the UN, a Resolution was passed that helped clarify the rules for international use of force. That Resolution is called the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States (hereinafter “UN Declaration”). The UN Declaration was particularly concerned with state sovereignty in the new emerging interconnected global world. To that end, the UN 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 fulfil in good faith the obligations assumed by them in accordance with the Charter.

Principle (a) is essentially a recitation of Article 2(4) of the UN Charter. As 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

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89 G.A. Res. 2625, supra note 13.
90 G.A. Res. 2625, supra note 13.
unilaterally using force to overthrow the current government of Afghanistan, a country that never attacked it, the U.S. violated the first Principle of the Declaration.

America also arguably violated Principle (c). The establishment of the Interim Authority is not inherently against 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 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 nor when election fraud has taken place.91 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 UN Charter obliges all member states “to peacefully resolve their conflicts.”92 “The purpose of the United Nations is to save the succeeding generations from the scourge of war.”93 “All Members shall settle their international disputes by peaceful means.”94 The unilateral actions of the U.S. in Afghanistan do not comport with its obligations under the UN Charter, unless, of course, there is specific UN Security Council Resolution authorizing and approving of the continued use and extent of force in Afghanistan against the Taliban.

92 Guiora, supra note 4, at 9.
93 U.N., supra note 10.
94 U.N., supra note 11 at para. 3.
A) **Resolutions 1368 and 1373**

Following the 9/11 attacks on America, the UN 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 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; . . .

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 and suppress terrorist attacks and take action against perpetrators of such acts . . .

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Notably, neither of these resolutions specifically authorizes the use of military force against 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.97 There are others, such as Thomas Franck, who argues that these resolutions do in fact authorize the U.S. to use force against the Taliban, and they do so without creating a new set of self-defense laws.98 “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.”99

Franck wrote this in 2001, when arguably those responsible for “sponsoring 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.100 For example, bin Laden and members of his family were found and killed in their home of more than five years in Pakistan.101 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 U.S. authorization to war against the Taliban until 2025.102 Thus, though Franck may be correct in that, as of 2001, Security Council

97 Jose E. Alvarez, Hegemonic International Law Revisited, 97 AM. J. INT’L. L. 873, 879 (2003). The veracity of these new rules is in doubt, however, as evidenced by Alvarez’s parade of qualifiers before articulating them:
   “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.
98 Id. at 841.
99 Id. at 841.
100 Ferran, supra note 20. See also O’Connell, supra note 21, at 908.
101 Wilson et al, supra note 5.
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. 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. According to Greg Maggs, the resolutions: “[D]id not say what the right to self-defence entails. Most particularly, it did not say that al-Qaeda had committed an ‘armed attack’ for the purposes of Article 5 and it did not say that the United States had a right to act in self-defence in response to the attack by al-Qaeda.”

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. The concluding language of Resolution 1368 comes closest to authorizing the use of force, when the UN Security Council states its “readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism.” Compare that language, however, to that of Security Council Resolution 678, regarding Iraq’s 1990 invasion of Kuwait. Resolution 678 specifically: “Authorizes Member States co-operating with the Government of Kuwait . . . use all

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103 Ferran, supra note 20. See also O’Connell, supra note 21, at 908.
104 Alvarez, supra note 97 at 879.
106 Guiora, supra note 4, at 15. “Security Council Resolutions 1368 and 1373 – do not provide a sufficiently clear guideline regarding when a state may act.” Id. (emphasis in original).
107 S.C. Res 1368, supra note 95 (emphasis added.)
necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area."\textsuperscript{108}

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 \textit{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 here. The situation in Afghanistan is at minimum a standard deviation away from Kuwait in 1990, as America’s war in Afghanistan is no longer against those who attacked America, where as America’s intervention in Kuwait was directly against Saddam Hussein.\textsuperscript{109} Thus, though there may be confusion regarding what Resolutions 1368 and 1373 affirmatively authorize, it is clear that they do not authorize the indefinite use of military force against the Taliban in Afghanistan.\textsuperscript{110} “Instead, the coexisting International Security Assistance Force (ISAF), established by Resolution 1386, has an explicit, though very limited, mandate to assist the new Afghan authorities in maintaining security in Kabul and surrounding areas.”\textsuperscript{111}


\textsuperscript{109} Peters, \textit{supra} note 87. Ferran, \textit{supra} note 20.

\textsuperscript{110} United Nations Assistance Mission in Afghanistan (UNAMA), http://unama.unmissions.org/Default.aspx?tabid=1748. There are two other UN organizations that currently operate in Afghanistan, though neither one has an authorization for the use of force by the Security Council. In December 2001 the UN established the UNAMA. The “UNAMA is a political Mission directed and supported by the United Nations Department of Peacekeeping Operations. As an ‘integrated’ Mission, UNAMA has two main areas of operation, development and humanitarian issues, and political affairs.” \textit{Id.} The International Security Assistance Force (ISAF) was deployed at the end of 2001 and has a “peace-enforcement mandate under Chapter VIII of the UN Charter.” \textit{Id.} Like the UNAMA, the ISAF is designed to provide a safe environment for humanitarian efforts to take place in Afghanistan. “Both organizations have adopted an integrated approach coordinating governance, development and security efforts in order to help the Government of Afghanistan promote peace and stability throughout the country.” \textit{Id.}

B) 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.\textsuperscript{112} But 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.\textsuperscript{113} 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 is 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. As an analogy, regulating torture is a good example. 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 lead to widespread abuses worldwide.\textsuperscript{114}

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 remains unclear under either the Nicaragua or Tadic standard.\textsuperscript{115} This underscores the importance of having legitimate rulers place before they authorize the use of military force in

\textsuperscript{113} See id. at 469-70.
\textsuperscript{115} O’Connell, supra note 22, at 450.
their states. This practical focus should minimize legal loopholes and add legitimacy to any unilateral invasion of a state that may be harboring terrorists.

IV. The U.S. 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, with Operation Enduring Freedom (OEF), the U.S. invaded Afghanistan as a direct response to the events of 9/11. Then President George W. Bush articulated the military objectives of the U.S. in Afghanistan both in his Sept. 20th Address to a Joint Session of Congress and his Oct. 7th address to the country. The three main goals of OEF were: “(1) the destruction of terrorist training camps and infrastructure within Afghanistan; (2) the capture of al-Qaeda leaders; and (3) the cessation of terrorist activities in Afghanistan.”

Moving quickly, the U.S. teamed up with the Northern Alliance, and removed the Taliban from Kabul within three weeks of the October 7, 2001 invasion. The U.S., as has been its custom, 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 UN and expatriate groups in Germany decided that Hamid Karzai would lead the Interim Authority, which “shall be the repository of Afghan sovereignty.” This became known as the Bonn Agreement and was signed on December 5, 2001.

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

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116 See Bush supra note 44.
117 See Bush supra note 44.
118 See Harris, supra note 8, at 49; Koh, supra note 8 at 1489.
119 Harris, supra note 8, at 49.
120 Harris, supra note 8, at 49.
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.

A. Hamid Karzai

To understand the extent (or lack thereof) of Karzai’s authority and leadership, it is useful to understand how and why he was chosen to be the interim leader. In 1979, the former Soviet Union invaded Afghanistan. Under the Reagan administration, the U.S., applying the time-tested “enemy of my enemy is my friend approach” to international relations, decided to fund the rebellion in Afghanistan. More specifically, the CIA funded the Pakistani Inter Services Intelligence (“ISI”), or essentially the Pakistani version of the CIA. It was here, in the CIA-funded ISI alliance, that the idea of “jihad” was used to motivate the rebellious militants against the evil communists. It was not difficult to motivate some angry, devout Muslims or to convince them to see the Soviets as un-holy, 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.”

The most radical group of jihadist fighters to emerge from the CIA-ISI alliance was the mujahedin, or holy warriors. The mujahedin believed in “jihad and the rifle alone: no negotiations, no conferences, and no dialogues.” In total somewhere between 10,000 – 80,000

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121 Zack Hofstad, Do Unalienable Rights Apply to All? Extreme Sharia Law and how the United States Foreign Policy Towards Iran and Afghanistan has Fueled its Spread, 6 REGENT J. INT’L L. 191, 217 (2008).
122 Id.
123 Id. at 256.
124 Id.
125 Id.
126 Id.

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mujahedin were trained by the ISI to fight against the Soviets in the 1980s. Hamid Karzai was one of them.

B. 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 18 months.

The initial idea was for Karzai to form a legitimate government in Afghanistan. That has failed to materialize. “The Karzai regime has little authority over most of Afghanistan.” And 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.” There are local power structures in the combat areas because Karzai does not have actual power over them. Yet the U.S. 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?

127 Hofstad, supra at 237.
130 See Harris, supra note 8.
132 See Klein, supra note 71.
After a cursory examination of the situation it would appear so. The U.S. and the U.N. both recognize Karzai 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.” Recognition legitimizes a de facto leadership situation. Furthermore, UN admission can equal recognition. Thus, at first glance, America and the UN’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, have long since left the region. Bin Laden, found in Pakistan, not Afghanistan, is dead. Thus, America’s war in Afghanistan is against the Taliban, a group who never attacked America. It is here that the U.S. 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 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 U.S. feel if China did this in

135 Id.
136 Id.
137 Ferran, supra note 20.
138 Wilson et al, supra note 5.
Taiwan?\textsuperscript{139} America’s continued war in Afghanistan supposedly legitimized by Karzai’s blessing is a very dangerous precedent that will likely be an increasing phenomenon, as “[t]raditional state v state war is largely a relic.”\textsuperscript{140}

C. 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, that 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 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.\textsuperscript{141} “Territory is considered occupied when it is actually placed under the authority of the hostile army.”\textsuperscript{142} Moreover, “occupation extends only to the territory where such authority has been established and can be exercised.”\textsuperscript{143} It is important to note, however, that:

\textsuperscript{139} This idea may not be as far-fetched as it seems. The world is no longer uni-polar, 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. With America’s continued war in Afghanistan could serve as a model to China and others.

\textsuperscript{140} Guiora, supra note 4.

\textsuperscript{141} 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.

\textsuperscript{142} Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, Annex, art. 42, 36 Stat. 2277, 1 Bevans 631 [hereinafter Convention Respecting the Laws and Customs of War on Land].

\textsuperscript{143} Id.
the 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 . . .  

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 already started 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.” Much of the fighting is occurring in parts of Afghanistan in which the local warlords and the Taliban, not the U.S. or Karzai, are in control. 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.

Second, America is not merely an “occupying power,” as America 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 additional troops to Afghanistan. Such a 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

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145 See Convention Respecting the Laws and Customs of War on Land, supra note 142.
146 Drumbl, supra note 131 at 359; See Klein, supra note 71.
147 See Saura, supra note 111.
makes Afghanistan, though not historically the most 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.

V. How America Came to Rely on the Consent Doctrine in Afghanistan

The U.S. 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 U.S. claimed self-defense as authorization for the war. In reality, the U.S. had little other choice under international law. As it has been discussed, the United Nations Security Council did not authorize the use of force in Afghanistan. The invasion on its face violated Article 2(4) of the UN Charter, prohibiting any use of force that threatens the territorial integrity of political independence of any state. This left the U.S. claiming self-defense against a foe, the Taliban, which never attacked it.

This is the basic underpinning of the Bush Doctrine of pre-emptive war. “[A]s a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed.” In a sense, the U.S. announced it had the authority to strike whomever, whenever, if, in the sole opinion of the U.S., any country somehow posed a danger or potential danger, or harbored someone who posed a potential danger to the U.S. Many scholars, in the U.S. and abroad, have criticized the Bush Doctrine, as it marked a sharp departure from

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150 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.


international law governing the use of force. Though some accepted the idea of invading a foreign country to go after terrorists that attacked your country, they would not accept that notion indefinitely. How long can the U.S. stay in Afghanistan and claim self defense against al Qaeda?

According to Karzai himself, “al Qaeda was driven out of Afghanistan in 2001.” 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. Thus, from as early as 2002, the U.S. 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 U.S. 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 U.S. needed a legitimate and legal reason to continue making war in Afghanistan, against a foe that never attacked it. America needed Karzai to get 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.

154 See Mary Ellen O’Connell, supra note 21; McDonnell, supra note 23.
155 Ferran, supra note 20.
156 Wilson et al, supra note 5.
157 There is mounting evidence of this as more details have emerged from Karzai’s most recent “election.” For example, his recent pronouncement that American troops need to be actively engaged in Afghanistan until 2025. See Keating, supra note 102.
A) The 2004 Afghanistan Election

In 2004 the U.S. announced that Afghanistan was going to have a fair and democratic election. The seemingly democratic system installed in Afghanistan by the Interim Authority called for an elected President of Afghanistan to serve a five-year term. In order to avoid a run-off, the winner of the general election in Afghanistan also had to have more than 50% of the popular vote. Thus, heading into the 2004 election America’s primary focus was ensuring that Hamid Karzai, received more than 50% of the vote - at all costs.

Those costs included an unfair democratic process. By all accounts “the 2004 election was rigged.” From the beginning, the U.S. made sure the message was out that Karzai was supposed to win, by ensuring that Karzai received “over 75% of all state and radio coverage” since campaigning began in late 2004. On the state-controlled Afghan radio – a key medium in Afghanistan – Karzai received 85% of all the editorial coverage of candidates. 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. 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

159 Id.
162 North, supra note 91.
163 North, supra note 91.
164 See Radio Free Europe, Afghanistan: Journalist Given Death Sentence for ‘Blasphemy’, (Jan. 23, 2008), http://www.rferl.org/content/article/1079389.html. “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.
for the 2004 Afghanistan Presidential election required each person to dip their finger in indelible ink as they cast their vote. 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. 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. Said Mr. Badhardost “This is not an election, this is a comedy.”

It is upon that basis, a farce of an election under the veil of a fair democratic process, that the U.S. 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.

B) 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. Yet the U.S 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. The U.S. was continuing to use force against a former government of Afghanistan. The more years the U.S. was removed from 9/11, the less Bush’s preemptive war doctrine seemed to apply. By

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166 Id.
167 Id.
168 Id.
169 Harris, *supra* note 8; Koh, *supra* note 8.
the time America’s next election arrived, Presidential hopeful Barack Obama campaigned on a promise to change the way America fought the war on terror.\(^{171}\)

That mantra of change may have won Obama the election by a landslide, but it did not ensure change regarding 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.\(^{172}\) 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, as it wanted to add tens of thousands of more troops to fight the war in Afghanistan. What 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 America and the continued legitimacy of the use of force under international law, the 2009 Afghanistan Presidential elections did not produce such a result.

C) 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.\(^{173}\) “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.\(^{174}\)


\(^{172}\) Schmitt and Shanker, *supra* note 81.


\(^{174}\) *Id.*
By August 30, Abdullah’s contentions about the fairness of the election were proving true. There were more than 550 documented specific and major allegations of fraud by August 30, just ten days after the election.\textsuperscript{175} “The spike indicates just how pervasive ballot box stuffing and voter intimidation may have been during the country’s August 20 vote, threatening the legitimacy of the election.”\textsuperscript{176}

After the votes were counted, it only got worse. By October, UN backed fraud investigators threw out nearly a third of Karzai’s votes, over one million total, because they were fraudulent.\textsuperscript{177} That left Karzai short of the 50% majority he 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 ruler of Afghanistan. However, these UN 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.\textsuperscript{178}

At the same time, Americans were dying every day in Afghanistan at an increasingly alarming rate.\textsuperscript{179} American generals urged the Obama administration to send more troops, but the White House refused, claiming that “no decision on sending more troops to Afghanistan would be made before the election crisis is resolved.”\textsuperscript{180} In other words: “[a] decision had been held up in part because the blatant rigging of the August election jeopardized the legitimacy of


\textsuperscript{176} Id.

\textsuperscript{177} Id. The UN investigators were specifically assigned to watch over the 2009 election, in an attempt to avoid the scandals associated with the 2004 Afghanistan presidential election. Id. Unfortunately, they only served to verify the magnitude of the fraud in the 2009 election.

\textsuperscript{178} Id.

\textsuperscript{179} Afghanistan Coalition Military Fatalities By Year, http://icasualties.org/.

\textsuperscript{180} Peter Graff, *Analysis-Afghan Election Fraud Dispute does Obama no Good*, (Sept. 9, 2009), http://www.reuters.com/article/idUSL9270936.
Karzai’s government, which has been an important prerequisite for U.S. counterinsurgency strategy.  

As such, the stage was set for the IEC to announce the run-off.

Only that never happened.

Every member of the IEC was appointed by Karzai. 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 withdrawing, stating the ballot “would not have been fair” and accusing the IEC of bias. Abdullah further said that a fair election was “impossible.” Even Karzai admitted there was widespread “fraud” in the election.

Obama administration officials that repeatedly expressed concerns about the credibility of the Karzai government. Obama himself admitted the process was messy, but was “in accordance” with Afghan law. 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.

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.

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183 Id.
184 Id.
185 Ferran, supra note 20.
186 Kates, supra note 182.
187 Whitelaw, supra note 181.
188 Whitelaw, supra note 181.
189 Obama, supra note 7.
VI. Karzai is Not the Legitimate Leader of Afghanistan

In order for the U.S. 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.” Recognition legitimizes a de facto leadership situation. Furthermore, UN admission can equal recognition. For example, Karzai is the recognized leader Afghanistan by the U.S. and the UN. 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 the rigged elections and support of 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.

A) He Was Appointed

From 2001 – 2004, Karzai was only the Interim Authority, specially appointed and not elected by the people. The fact that the UN 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, that would have favored legitimacy. But that is not what happened. The result is an appointed leader, selected by a combination of outside parties not all too familiar with the region.

190 Crawford, supra note 134 at 539.
191 Crawford, supra note 134 at 539.
192 Crawford, supra note 134 at 539.
193 O’Connell, supra note 21 at 904.
194 There may be, in fact, no one current leader of Afghanistan.
B) 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 – 2004, that is precisely what happened. Worse still, as 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 UN Charter’s overall mantra commanding states to refrain from unilaterally using force to promote their own self-interests.195

C) 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.”196 Karzai’s lack of control and authority in Afghanistan has continues 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.”197

“Security remains a major concern in that country [Afghanistan] and the authority of the transitional government of President Hamid Karzai is still being challenged.”198 Current Legal Adviser to the U.S. State Department Harold Koh noted that “[W]hile Hamid Karzai nominally

195 U.N. Charter, supra note 11.
196 Harris, supra note 8, at 49.
197 Drumbl, supra note 131, at 359.
acts as president of Afghanistan, outside of Kabul, much of the country remains under the de facto control of warlords and drug lords.” Even inside Kabul there is chaos. For example, in July 2011, his most trusted bodyguard killed Karzai’s brother. In short, Karzai does not and has never had control over most of Afghanistan. He therefore cannot legitimately grant access to something he does not have control over.

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 to Afghanistan as a “narco-state” with Karzai’s supposed government “plagued by limited capacity and widespread corruption.” 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.” Afghanistan 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.

D) 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 . . . [States] determinations must have definitive legal effect.” 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/government.

199 Koh, supra note 8, at 1479, 1489.
200 Julius Cavendish, Bodyguard who killed Karzai’s brother was trusted CIA contact, THE INDEPENDENT (July 16, 2011), http://www.independent.co.uk/news/world/asia/bodyguard-who-killed-karzais-brother-was-trusted-cia-contact-2314580.html.
203 Crawford, supra note 134 at 20.
For example, in December 2009, the mayor of Kabul was sentenced to four years in prison on corruption charges.\(^{204}\) Initially, Afghans were thrilled to see the mayor finally have to succumb to some rule of law in Afghanistan. “The very next day, however, 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.”\(^{205}\) “The fact that he stayed in office so long astonished Afghans . . . it has placed the entire Afghan judiciary under the spotlight.”\(^{206}\)

Kabul University Professor Nasrullah Stanekzai agrees “[w]ithout a fundamentally strong judicial system we cannot find our way to justice. And people cannot trust their government.”\(^{207}\) 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.”\(^{208}\)

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

VII. 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,\(^{209}\)  

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\(^{205}\) Id.  
\(^{206}\) Id.  
\(^{207}\) Id.  
\(^{208}\) Id.  

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decade plus long “self defense” actions that result in thousands of innocent deaths per year, while not being in self defense. Nor do the attacks even have to be against the people whom attacked the now intruding state. Following America’s lead, states may no longer need a UN Security Council resolution to attack, nor approval from a legitimate leader. Any nation, from North Korea to Iran, could first invade a country, then have a leader installed 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 spotlight squarely on America’s illegal war. For example, President Mahmoud Ahmadinejad has urged the UN to open a fact-finding mission into the legality of America’s war in Afghanistan. This was in 2010, even before the death of bin Laden in Pakistan. By placing the international spotlight on America’s illegal war in Afghanistan, Iran takes the spotlight off its somewhat suspect uranium expeditions.

VIII. 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

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209 Barbara Prett, “Iran urges UN inquiry into wars in Iraq and Afghanistan,” BBC NEWS (April 13, 2010), http://news.bbc.co.uk/2/hi/middle_east/8616850.stm. Mr. Ahmadinejad claimed “the invasions had only victimised people in the region.” Id.
210 Id.
scrutiny of Article 51’s notions 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 auspicious on a UN Security Council resolution authorizing the use of force. 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 leader of Afghanistan. It is widely regarded, even in America, that Karzai is not a legitimate leader of Afghanistan.

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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211 See UNAMA, supra note 110. There are UN organizations established in 2001 that authorize the OEF and others to secure Kabul and other cities in Afghanistan to allow for peacekeeping and humanitarian and political assistance to take place. This is not the same, however, as Security Council authorization the to use any means necessary to fight the war on terror against the Taliban and anyone else it suspects might have assisted al Qaeda a decade ago. For example, neither the UNAMA nor the ISAF authorize the U.S. to fire predator drones into a crowd of a 1000 civilians in the hopes of killing 3 suspected al Qaeda or Taliban members.

212 Chandrasekaran, supra, note 201.