

Symposium on Operation Enduring Freedom and the War on Terrorism

The Afghanistan War and Self-Defense

John Quigley

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THE AFGHANISTAN WAR AND SELF-DEFENSE

John Quigley*

I. INTRODUCTION

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

This right of defense, which is key to the United States' view of its armed force in Afghanistan in 2001, allows a state to act immediately. The rationale is that the time that may be required for the Security Council to act might allow the aggressor to prosecute its attack unchecked. A state using defensive armed force must immediately report its actions to the Security Council so that the Council may act.³

Armed force used in claimed self-defense must be necessary to protect the victim state, meaning that no alternative short of armed force would suffice.⁴ Additionally, only as much force as is necessary for self-protection may be employed, which means that a state using defensive armed force may not inflict harm beyond that needed for its defense.⁵ Armed force used purportedly in self-defense, but which does not meet the criteria for self-defense, constitutes aggression.

The United States, as a member state of the United Nations, is bound by this legal regime. The United States was a primary proponent of the Charter at the end of World War II. It is one of only five states to occupy

* President's Club Professor in Law, The Ohio State University. LL.B., M.A., Harvard University. I am grateful to my colleague, Professor Mary Ellen O'Connell, both for consulting and for making available a draft of her own article (cited below) on this topic. I am grateful to my colleague Professor Daniel Chow for assistance in translating an excerpt of the Chinese text of the U.N. Charter.

¹ U.N. CHARTER art. 2(4).

² U.N. CHARTER art. 51.

³ *Id.*

⁴ Destruction of the "Caroline," 2 Moore, DIGEST § 217, at 409, 412 (1906).

⁵ Letter from Mr. Webster (USA) to Mr. Fox (Britain), in 29 BRITISH AND FOREIGN STATE PAPERS 1129, 1138 (1857) [hereinafter Webster-Fox].

542 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37

a permanent seat on the U.N. Security Council, a position that gives a state power to veto draft resolutions and, thus, prevent the Council from acting in ways the state does not desire.⁶

In its military action in Afghanistan, the United States purported to act within the constraints imposed by the U.N. Charter. On the day it initiated air strikes against Afghanistan, John Negroponte, U.S. Ambassador to the U.N., sent a letter to the President of the U.N. Security Council reciting that the United States had initiated self-defensive armed action against Afghanistan.⁷ By the act of sending this letter, the United States acknowledged that its armed action would be aggression against Afghanistan unless justified as self-defense.

The United Kingdom purported to act within the same constraints. Like the United States, it sent a letter to the President of the U.N. Security Council asserting that it was acting defensively, although not in defense of itself, but rather in defense of the United States.⁸ The U.N. Charter allows not only "self-defense," but "collective self-defense," meaning that a state under attack may ask other states to aid in its defense.⁹

The self-defense theory propounded in the U.S. and U.K. letters was that Afghanistan was harboring terrorists who attacked the United States, that further attacks might be anticipated, and that military action was needed to deter them. The two letters, each only one page in length, did not recite all of the necessary elements of a valid claim of self-defense. If those elements were present, the claim would be valid.

The U.S.-U.K. defense claim raises serious issues about the scope of self-defense in international law. It is universally acknowledged that a state may use force in its own defense, if necessary to protect itself, pending collective action by the U.N. Security Council to provide that protection. At the same time, the self-defense concept, if read too broadly, eviscerates the prohibition against the use of force. If a state may lawfully attack in defense where it only anticipates a potential

⁶ See U.N. CHARTER art. 27(3).

⁷ Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (2001) [hereinafter USA Letter].

⁸ Letter from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council (Oct. 7, 2001), U.N. Doc. S/2001/947 (2001).

⁹ U.N. CHARTER art. 51.

attack in the future, then many states could lawfully initiate armed action against other states.

This Article reviews the elements of self-defense that must be present for the U.S.-U.K. self-defense claim to be valid: (1) the United States must have been experiencing an armed attack; (2) Afghanistan must have been the perpetrator of that armed attack; (3) armed force must have been the only way to protect against that armed attack; (4) there must have been no time to resort to the U.N. Security Council before initiating the armed force; (5) the armed force employed must have been appropriately directed to protect against the armed attack; and (6) the armed force employed must not, in its scope, have been out of proportion to the harm the United States sought to avert. Next, this Article assesses two bases on which other analysts have sought to justify the U.S.-U.K. armed action: (1) the reaction of the U.N. Security Council to the U.S.-U.K. action, which some view as acquiescence to it; and (2) the doctrine of reprisal, which would allow for an act in response to a prior attack. Finally, the Article examines potential negative consequences to the world community if the U.S. anticipatory self-defense position gains acceptance.

II. THE ELEMENTS OF SELF-DEFENSE

A. *Armed Attack*

The first question is whether the United States was under armed attack when it commenced armed action against Afghanistan on October 7, 2001. The attacks of September 11, 2001, are an element but are not sufficient. A state that has been the victim of a completed attack may not use armed force in response and claim self-defense. Armed force may not lawfully be employed to "send a message" or to deter attacks generally.¹⁰ A state that does so is said to engage in a reprisal rather than in self-defense. Reprisals are not permitted.¹¹

The U.S. and U.K. letters did not rely on the reprisal concept. To the contrary, both letters reflected an acceptance of the prohibition against reprisals. The U.S. letter mentioned, to be sure, the attacks of September 11th, but it critically referred as well to "the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization."¹² A

¹⁰ Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 893 (2002).

¹¹ See *infra* Part IV.

¹² USA Letter, *supra* note 7.

544 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37

weakness of the two letters was that they did not specify information about any particular anticipated attacks. They failed to specify either the anticipated time, location, or target.

Under the U.N. Charter's self-defense provision, the armed attack to which a state responds must be occurring or be so imminent as to be obvious. In a much-cited exchange with Britain in 1842, U.S. Secretary of State, Daniel Webster, said that force may be used in self-defense only if the need is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."¹³

Most publicists reject the suggestion that defensive force may be used against attacks that are anticipated but that are not yet obvious.¹⁴ Article 51 of the Charter allows self-defense "if an armed attack occurs," a formulation that suggests that the armed attack must have commenced.¹⁵ Those publicists who support the doctrine of anticipatory self-defense have said that the force anticipated must be imminent.¹⁶

Article 51, as it appears in the four authentic texts of the Charter, other than English, confirms that an armed attack must have commenced, or at least be commencing, before armed force can be used in self-defense. The Chinese text reads: "[a]t any time any member of the United Nations is attacked by military force."¹⁷ The French text reads: "if a Member of the United Nations is the object of an armed aggression."¹⁸ The Spanish text reads: "in the event of an armed attack against a Member of the United Nations."¹⁹ The Russian text reads: "if an armed attack shall occur on a Member of the Organization."²⁰ All these formulations strongly imply an ongoing attack as the situation in which a state may lawfully use force in its defense. Thus, by the Charter definition, the United States does not appear to have been under armed

¹³ Webster-Fox, *supra* note 5, at 1138.

¹⁴ IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 275-78, 367 (1963); LOUIS HENKIN, *HOW NATIONS BEHAVE* 141-45 (1979); PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 166-67 (1948). *Contra* Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 4 (1972).

¹⁵ U.N. CHARTER art. 51.

¹⁶ D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 184-93 (1958) (discussing the degree of imminence required for anticipatory self-defense, in the view of a publicist supporting the doctrine).

¹⁷ U.N. CHARTER art. 51 (Prof. Daniel Chow trans.).

¹⁸ *Id.* (author trans.).

¹⁹ *Id.* (author trans.).

²⁰ *Id.* (author trans.).

attack as of October 7, 2001. It had suffered a serious attack on September 11th, but that attack was complete as of October 7th.

B. Afghanistan as Perpetrator

The second element of the U.S. claim was that Afghanistan, the state against which it initiated armed force, was the aggressor. The fact that Afghanistan must be the perpetrator was acknowledged by the United States in its letter to the Security Council. The U.S. letter referred to "the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by [Al-Qaeda] as a base of operation."²¹ The letter did not claim that Afghanistan organized or encouraged the September 11th attacks or that it was, as of October 7th, organizing or encouraging attacks by Al-Qaeda.

When the U.N. General Assembly wrote a definition of "aggression," it addressed the situation in which a state uses irregulars, not its regular army, to attack another state. The General Assembly said that if a state sends irregulars who carry out an armed attack on another state, that would be aggression, as much as if it had sent its own armed forces.²² The United States was not alleging, however, that Afghanistan did that. The claim of "harboring" falls short of a claim that Afghanistan was attacking the United States through the instrumentality of Al-Qaeda. By claiming a right of self-defense against a state that "harbors," the United States was pushing the accepted scope of the concept of armed attack.

The United States appeared to rely on instability in Afghanistan as another factor behind the need to use military force, rather than relying on the government of Afghanistan for assistance in curtailing the activity of the Al-Qaeda organization. That reliance is undercut in considerable measure, however, by the fact that it was the United States that was largely responsible for that instability, by virtue of the massive funding it provided to Mujahedin elements in Afghanistan in the 1980s.²³

Sean Murphy argues that the September 11, 2001, attacks are imputable to Afghanistan and, therefore, that Afghanistan is responsible

²¹ USA Letter, *supra* note 7.

²² *Resolution on the Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974), reprinted in 13 I.L.M. 710, 714 (1974).

²³ Terry Atlas, *USSR, U.S. Reach Accord on Afghanistan*, CHI. TRIB., Sept. 14, 1991, at 2; Ahmed Rashid, *Superpowers Plan Afghan Arms Freeze*, INDEP. (London), Apr. 5, 1990, at 14.

for an armed attack against the United States.²⁴ Murphy's analysis is inapposite, however, because the issue is not whether the September 11, 2001, attacks are imputable to Afghanistan, but rather, whether the future attacks against the United States anticipated as of October 7, 2001, were imputable to Afghanistan. Murphy finds Afghanistan responsible on the rationale that it allowed Al-Qaeda to operate from its territory despite knowledge of its intent, that it allowed Al-Qaeda to "exercise governmental functions in projecting force abroad," and that it failed to extradite Al-Qaeda operatives, thereby adopting Al-Qaeda's conduct as its own.²⁵

These points do not establish imputability to Afghanistan either for the September 11, 2001, attacks or for anticipated future attacks. A failure to extradite a suspect does not render a state responsible for the acts of such an individual. Even allowing Al-Qaeda to operate with knowledge of its aims does not suffice. Murphy relies on language of the International Law Commission that suggests that a state is responsible for the acts of a private group if it allows such group to exercise governmental functions.²⁶ However, the International Law Commission was referring to the exercise of governmental functions in the territory of the state, not to what Murphy refers to as exercising governmental functions by projecting force abroad.²⁷

C. *Armed Force As the Only Possible Means*

The third element of the self-defense claim is that armed force was the only way to gain protection. If means causing lesser harm are available, they must be used. Armed force is a means of last resort. Several other options, however, were at hand as of October 7, 2001. At

²⁴ Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 50 (2002); see also O'Connell, *supra* note 10, at 901-02 (citing the U.K. government's reference to close links and mutual support between Al-Qaeda and Taliban).

²⁵ Murphy, *supra* note 24, at 50-51.

²⁶ *International Law Commission, Responsibility of States for Internationally Wrongful Acts*, art. 9, U.N. GAOR, 56th Sess., Supp. No. 10, at 45, U.N. Doc. A/56/10 (2001).

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Id.

²⁷ *Id.*

the same time as it initiated military action against Afghanistan, the United States sought to shut off financing to Al-Qaeda. It thereby acknowledged that there was at least this other means, even if it claimed that this means alone might not suffice.

Another possible means was criminal prosecution of those responsible in Al-Qaeda. The United States did not, however, make a credible demand on Afghanistan for the surrender of Al-Qaeda figures. It made only broad-brush demands that Afghanistan surrender those responsible for the September 11th attacks. It did not provide names of particular suspects or detailed information about their involvement. Afghanistan pressed for detailed evidence about particular individuals, but the United States declined to provide any. In extradition practice, a state presents particularized information to meet a probable cause standard of guilt with regard to any individual sought.²⁸ In requesting this information, the Taliban government of Afghanistan was thus adhering to accepted standards of international conduct.

With regard to Osama bin Laden, whom the United States *did* specifically name, Afghanistan indicated willingness, both before and after October 7, 2001, to discuss a surrender, but the United States refused to talk to the Taliban government.²⁹ As Cherif Bassiouni, a leading analyst of extradition law, stated, "The United States . . . never formally sought bin Laden's extradition from Afghanistan, nor did it present to Afghanistan's government any evidence of his criminal involvement in the terrorist attacks on New York and Washington."³⁰ Hence, Bassiouni characterizes the U.S. armed action in Afghanistan as an "over-reaction."³¹

No state can expect another to surrender persons suspected of criminal violations without proving direct contact and providing detailed information. The fact that the United States did not seriously

²⁸ 18 U.S.C. § 3184 (2000); *Collins v. Loisel*, 259 U.S. 309, 310-17 (1921); *Ex parte La Mantia*, 206 F. 330 (S.D.N.Y. 1913).

²⁹ Genaro C. Armas & Pauline Jelinek, *Bush Brushes Off Latest Taliban Offer; Rejects Bid to Hand bin Laden to Third Country*, REC. (Bergen County, N.J.), Oct. 15, 2001, at 1; Charles Osgood, *President Bush Rejects Taliban Offer to Negotiate* (CBS News television broadcast, Oct. 15, 2001), reprinted in LEXIS, Nexis News Library.

³⁰ M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 87 (2002).

³¹ *Id.*

pursue the surrender of Al-Qaeda figures as a means of protecting itself casts doubt on its need to use force.

The situation for the United States was that of serious harm caused by a criminal act in violation of the laws of New York and of the United States.³² If the United States had an opportunity to protect itself by gaining the surrender of persons responsible for the future attacks it anticipated against itself, then it was required to pursue that course. Such efforts might have turned out to be fruitless. In the circumstances, however, the United States did not make a serious effort. Having failed to seek extradition properly, the United States does not have a credible case that its use of armed force in Afghanistan was “necessary.”

D. Avoidance of the U.N. Security Council

The fourth element, related to the concept of necessity, is that a state may use unilateral force against an armed attack only if there is no prospect that the U.N. Security Council can protect it from the attack. Article 51 allows defensive force only until the Security Council acts, thereby implying that if the Security Council is in a position to act, a state under attack has no need to resort to armed force by itself.³³ If indeed there is time for an approach to the Security Council, there is no need to use force unilaterally, and, hence, no right to use force in self-defense.

The United States did not, however, assert that Afghanistan, or Al-Qaeda, was about to attack as of October 7, 2001. Viewing the situation in the best light for the United States, if future attacks were to occur, their time could not be determined; hence, they might occur at any time. Even on that set of facts, there is no valid reason for the United States not to approach the Security Council. The Council is accustomed to convening on short notice to cope with developing situations, and the United States, given its powerful position within the United Nations, can convince the Council to act in a particular way more readily than other states.

As of early October 2001, moreover, the United States enjoyed the sympathy of the U.N. membership, as reflected in the resolution of condolence that the Security Council passed the day after the September

³² Mark A. Drumbl, *Judging the 11 September Terrorist Attack*, 24 HUM. RTS. Q. 323, 332 (2002) (concluding, after considering UN Charter rules on use of force, that “the 11 September attack more closely approximates a criminal attack than an armed attack”).

³³ U.N. CHARTER art. 51.

11th attacks.³⁴ In 1990, following Iraq's invasion of Kuwait, the United States had been able to gain a Security Council resolution that gave the Council's imprimatur to military action the United States sought to take.³⁵

In addition to its resolution of condolence, the Security Council had adopted Resolution 1373 on September 28, 2001, in which it called for a series of measures against international terrorism.³⁶ In Resolution 1373, the Security Council referred to the attacks of September 11, 2001, as a threat to the peace, a finding that, under U.N. Charter Article 39, can lead to the imposition of economic (Article 41) or military (Article 42) sanctions.³⁷ Resolution 1373 made this characterization in such a sweeping fashion, however, as to cast doubt on what the Council had in mind. The preamble clause in question, referring to the attacks of September 11, 2001, provided: "Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security."³⁸

Crucially, the Security Council did not, in Resolution 1373, mention Afghanistan in any way, much less call for armed action there.³⁹ As a result, the Security Council neither organized, nor authorized, armed action by any state in the territory of Afghanistan. Resolution 1373 did refer, in its preamble, to "the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations as reiterated in resolution 1368," but it did not specify Afghanistan or any other territory as a permissible target for defensive armed force.⁴⁰

In Resolution 1373, the Security Council organized economic sanctions against terrorist groups.⁴¹ Arguably, that resolution constituted the Security Council's "action" under Article 51, thereby precluding unilateral armed action against Afghanistan. However, the meaning of the phrase "until the Security Council acts" in Article 51 is less than precise in such circumstances.

³⁴ S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001).

³⁵ S.C. Res. 678, U.N. SCOR, 45th Sess., Res. & Decs. 27, U.N. Doc. S/INF/46 (1990).

³⁶ S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

³⁷ *Id.*; see U.N. CHARTER arts. 39, 41, 42.

³⁸ S.C. Res. 1373, *supra* note 36.

³⁹ Drumbl, *supra* note 32, at 328.

⁴⁰ S.C. Res. 1373, *supra* note 36.

⁴¹ *Id.*

Even given a construction of facts most beneficial to the United States, there seems to have been a possibility of gaining protection by action initiated by the Security Council. The U.N. Charter allows unilateral force only if there is no time to approach the Council. Such was not the situation facing the United States as of October 7, 2001.

E. Armed Force in Self-Protection

The fifth element is that the armed force used by the United States must have been geared toward self-protection. This means that it must have been undertaken with the aim of self-protection and that the force must have been calculated to result in self-protection. Armed force used in self-defense typically has a defined objective to reverse the armed attack, such as driving a foreign army back to a certain line. With the U.S.-U.K. armed action in Afghanistan, the objective was ambiguous.

The U.S. use of force may relate to its desire to control Central Asian oil by controlling a pipeline to be built through Afghanistan. According to one body of opinion, it was the Taliban's refusal, in mid-2001, to come to terms with Washington over a pipeline that was the United States' prime motive for overthrowing the Taliban.⁴² If this was the major reason for use of force, rather than self-protection, then self-defense would be unavailable.

Apart from that possibility, the objective asserted by the United States was twofold: eliminate the Al-Qaeda in Afghanistan and bring about a political disposition in Afghanistan in which Al-Qaeda could not operate. However, the United States did not explain how its armed force was directed towards those ends, or how these ends, even if achieved, would protect the United States. It was not clear that capturing Al-Qaeda operatives in Afghanistan would protect the United States, given that Al-Qaeda apparently recruited primarily outside Afghanistan and maintained groups of operatives in other countries.

The U.S. posture, to be sure, was that its attack on Afghanistan was only one piece of a military-political effort designed to thwart Al-Qaeda activity everywhere in the world. Nonetheless, its acts against Afghanistan must be shown to have been calculated to self-protection. By attacking Afghanistan, particularly given the obvious jeopardy in

⁴² Salim Muwakkil, *Nightmares of Reason: Sorting Fact from Fiction in 9/11 Conspiracy Theories*, IN THESE TIMES, June 24, 2002, at 14.

which Afghan civilians would be placed, the United States ran the risk of causing further resentment against it in a region of the world in which such resentment was already rife.⁴³ That resentment, in fact, was the likely cause of the attacks the United States experienced on September 11, 2001.⁴⁴ The perpetrators, as Michael Kelly stated, "were incensed about America's involvement in the Middle East on a variety of points that led to a general amalgam of single-minded abhorrence fused with indignancy."⁴⁵

By the bombing it undertook in Afghanistan, the United States killed an inestimable number of military personnel.⁴⁶ It also killed civilians estimated to number between three and four thousand.⁴⁷ Civilian casualties caused by the aerial bombardment of Afghanistan in 2001 yielded significant popular resentment, both in Afghanistan and throughout the region.⁴⁸

The tactic used in Afghanistan of firing from afar based on information supplied by sources on the ground, as well as the use of cluster bombs and bombs that kill within a large radius of the impact point, carried great risk of civilian casualties.⁴⁹ In Afghanistan, the United States undertook a mode of bombing that minimized the possibility of harm to its own personnel. This method of bombing led to many non-combatant deaths and, at the same time, fueled resentment

⁴³ Seth Mydans, *Anti-American Protests Increase and Sponsors Plan More*, N.Y. TIMES, Oct. 10, 2001, at B7 (reporting resentment against the United States in Indonesia in connection with the bombing of Afghanistan).

⁴⁴ John Quigley, *International Law Violations by the United States in the Middle East as a Factor Behind Anti-American Terrorism*, 63 U. PITT. L. REV. 815, 816 (2002).

⁴⁵ Michael J. Kelly, *Understanding September 11th—An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV. 283, 284 (2002).

⁴⁶ Seamus Milne, *The Innocent Dead in a Coward's War: Estimates Suggest US Bombs Have Killed at Least 3767 Civilians*, GUARDIAN, Dec. 20, 2001, at 16 (reporting a study concluding 10,000 deaths of military personnel).

⁴⁷ *Id.* (reporting a study concluding that 3767 civilians were killed).

⁴⁸ Rory Carroll, *Death Blamed on U.S. Blunder*, GUARDIAN, Dec. 28, 2001, at 8 (reporting bombing of convoy of tribal elders going to Kabul for government ceremony, killing sixty); Nuala Haughey, *Pakistanis Ready to Give Blood as Outrage Grows*, IRISH TIMES, Oct. 29, 2001, at 7 (reporting concern in Pakistan over civilian casualties in Afghanistan); *US Bombing in Afghanistan Misses Terrorists, Strikes Villages*, CNBC News Transcripts (Hardball with Chris Matthews), Dec. 3, 2001 (reporting villagers killed by bombs); see CENTER FOR ECONOMIC AND SOCIAL RIGHTS, *HUMAN RIGHTS AND RECONSTRUCTION IN AFGHANISTAN* (May 2002) (reporting on the basis of a survey, negative sentiment to U.S. bombing tactics because of civilian casualties).

⁴⁹ Milne, *supra* note 46, at 16 (analyzing bombing tactics in Afghanistan).

that might place the United States at risk of violent attack in the future.⁵⁰ Even if the military action in Afghanistan might disarm substantial numbers of Al-Qaeda operatives, there was no assurance that, in the long term, the United States would not be giving greater numbers of individuals in the region reason to undertake violent action against it.

F. *Scope of Armed Force Used*

The sixth element is that the force employed must not have been out of proportion to the ends. The United States bombed a country much of whose population already teetered on the edge of starvation. Even before October 7, 2001, Afghans began fleeing in expectation that the United States would bomb. As the aerial bombardment continued, nongovernmental organizations and U.N. agencies pled for a bombing pause to allow the distribution of humanitarian aid to avert widespread starvation and other privation to the population.

The proportionality requirement in the law of self-defense merges here with a requirement contained in a separate body of law, so-called humanitarian law, which also seeks to protect civilians.⁵¹ Even if the United States, making its self-defense claim, could reasonably assert that killing Afghani civilians by starvation and by accident was necessary to protect the United States from Al-Qaeda, humanitarian law would not allow that course.⁵² Bombing cannot lawfully be carried out if the anticipated effect, direct or indirect, is the death of a substantial number of civilians.⁵³

The number of civilians in Afghanistan killed by the United States exceeded the number killed in the United States on September 11, 2001.⁵⁴ The fact that the United States killed more than the number killed in the United States is not dispositive on the issue of proportionality, although

⁵⁰ See *supra* note 43 and accompanying text.

⁵¹ O'Connell, *supra* note 10, at 902-03.

⁵² See Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 51(5)(b), 1152 U.N.T.S. 3 (defining an indiscriminate attack as "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated").

⁵³ See *id.*

⁵⁴ See *A Nation Challenged*, N.Y. TIMES, Dec. 20, 2001, at B2 (indicating that the number of dead and missing in September 11th attacks, once thought to be much higher, had been revised downward to just below three thousand); *supra* notes 46-47 and accompanying text.

it does show that the United States caused substantial harm in pursuing its aim of self-protection.

The issue is the necessity for the type of force employed. If self-protection could be gained by lesser means, as indicated above, then it is not permitted. Lesser means might, as indicated above, be means other than the use of armed force. However, even if other means can be ruled out as potentially ineffective, the armed force used must not exceed what is necessary.

III. SECURITY COUNCIL ACQUIESCENCE

In response to the U.S. letter of October 7, 2001, the Security Council neither took action to organize U.N. activity to protect the United States against Afghanistan, nor to tell the United States to stop armed action against Afghanistan. A likely reason for Security Council inaction is that Council members knew that the United States and United Kingdom would veto any draft resolution critical of their armed action.

Had the Security Council adopted a resolution rejecting the U.S.-U.K. argument of self-defense and collective self-defense, this would have been an indication of the weakness of the claim. The Council could, in theory, demand that the state using force in claimed self-defense stop doing so, and such a demand would be binding on that state under Article 25 of the U.N. Charter.

On the other hand, the Council could adopt a resolution approving the claim of self-defense. Such a resolution would mean that the state's acts, at least to that point in time, were consistent with the Charter, in the view of Council members.

In practice, the Council typically adopts no resolution in such circumstances. In 1993, when the United States bombed Iraq's intelligence headquarters in Baghdad, it claimed self-defense. As in 2002, it sent a letter to the Council explaining its self-defense claim. The claim was that Iraq had attempted to assassinate George Bush in Kuwait. The Council held a meeting to discuss the U.S. claim and the evidence supporting it. Following a discussion of several hours, the Council adjourned and did not return to the issue.⁵⁵

⁵⁵ John Quigley, *Missiles with a Message: The Legality of the United States Raid on Iraq's Intelligence Headquarters*, 17 HASTINGS INT'L & COMP. L. REV. 241, 271 (1994).

The U.N. Charter is silent on the significance of Council inaction in such a situation. Clearly, the Council's silence means that the Council does not intervene to stop the state that is acting in self-defense or that has already taken an action in self-defense. The issue of whether silence legalized the action is another matter. One might argue that since the Council has the obligation to act to maintain international peace, its silence in the face of an act of armed force across an international border must mean that it has exercised its power in the direction of concluding that the use of force was lawful.

On the other hand, the Security Council's own procedures may make it difficult to read much into Council inaction. Given the veto possibility, inaction may mean that some states deemed the action unlawful but were aware that they could not muster nine affirmative votes, including those of the five permanent members, for a resolution of condemnation.

Some analysts have taken the general political reaction to the armed action in Afghanistan as a condonation of its legality.⁵⁶ A failure by states to require enforcement of applicable rules on use of force in a particular case does not, however, change the rules on use of force.

The issue of the legality of the use of force followed by Council inaction could, in theory, be adjudicated if, after the use of force in claimed self-defense and subsequent Security Council silence, the use of force was challenged in the International Court of Justice. The court would be asked to rule that the state using force had done so unlawfully.⁵⁷ There is no reason to conclude that silence by the Security Council would require the court to reject the claim. The court could assess the use of force based on applicable legal norms.

Moreover, in the circumstances of the U.S.-U.K. claim, silence may not bespeak approval of their use of force. Since both the United States and United Kingdom are permanent members of the Council, there would have been no chance of Security Council action in opposition. What seems to have occurred is that the Council immediately turned its attention to humanitarian aspects of the U.S.-U.K. use of force, on the rationale that, while stopping the action was futile, some good might be done to limit the extent of the use of force and to protect civilians from

⁵⁶ Drumbl, *supra* note 32, at 329.

⁵⁷ See, e.g., *Military and Para-Military Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14.

military action that was certain to put them at risk.⁵⁸ Thus, the Council did not evidence a belief that the United States and the United Kingdom were acting lawfully when they initiated military action against Afghanistan.

Smaller states that are Security Council members, moreover, may put themselves at risk by objecting to a position advocated by the United States. In 1990, when the United States sought authorization from the Council for military action against Iraq, Yemen expressed objections about the need for military action and suggested that economic sanctions be given more time to work.⁵⁹ Yemen voted against the crucial Resolution 678, which provided the authorization for the military attack.⁶⁰ Kuwait's Ambassador to the United States, Sheik Saud Nasir al-Sabah, was quoted as saying that U.S. Secretary of State James Baker told him the United States would cut aid to Yemen because of its vote against Resolution 678.⁶¹ The State Department did not deny the published report that after the vote on Resolution 678, a U.S. diplomat told Yemeni Ambassador Al-Ashtal that the vote "will be the most expensive vote you will have cast."⁶² The United States carried through on the threat.⁶³ The State Department informed Congress it would cut aid to Yemen from a planned \$22 million to under \$3 million.⁶⁴

The United States also uses positive measures to gain acquiescence by smaller states. When it sought Security Council authorization for military action against Iraq in 1990, it wooed Third-World members of the Security Council by promising financial aid.⁶⁵ Given the dependence of many smaller states on U.S. goodwill in a single-superpower world, the silence of such a state in the wake of a military action by the United

⁵⁸ See S.C. Res. 1378, U.N. SCOR, 56th Sess., 4415th mtg., U.N. Doc. S/RES/1378 (2001).

⁵⁹ U.N. SCOR, 45th Sess., 2963d mtg. at 36, U.N. Doc. S/PV.2963 (1990) (Mr. Al-Ashtal, Yemen).

⁶⁰ S.C. Res. 678, *supra* note 35; U.N. SCOR, 45th Sess., 2963d mtg. at 64-65, U.N. Doc. S/PV.2963 (1990).

⁶¹ Judith Miller, *Kuwaiti Envoy Says Baker Vowed 'No Concessions' to Iraqis*, N.Y. TIMES, Dec. 5, 1990, at A22.

⁶² Rick Atkinson & Barton Gellman, *Iraq Trying to Shelter Jets in Iran, U.S. Says*, WASH. POST, Jan. 29, 1991, at A1.

⁶³ Frederic L. Kirgis Jr., *The United States Commitment to the Norms of the United Nations and Its Related Agencies*, 1 TRANSNAT'L L. & CONTEMP. PROBS. 125, 140-41 (1991).

⁶⁴ Atkinson & Gellman, *supra* note 62.

⁶⁵ *World News Tonight* (ABC television broadcast, Nov. 29, 1990), reprinted in LEXIS, Nexis News Library.

States cannot be taken to reflect a view by that state that the action was lawful.

IV. THE ARMED ACTION IN AFGHANISTAN AS REPRISAL

Michael Kelly sought to justify the armed action in Afghanistan as a reprisal, arguing that this doctrine, which existed in customary law prior to the U.N. Charter, remains valid.⁶⁶ The doctrine of reprisal was accepted in international law in the pre-U.N. Charter era, when no international mechanism existed to respond to a threat to the peace. "The reprisal appears in the classical doctrine of international law," writes Ian Brownlie, "as a lawful mode of self-help, part execution and part sanction. Its value lies in the possibility of gaining redress without creating a formal state of war."⁶⁷ Force could be used in reprisal, either to deter future attacks or as retribution for past attacks, so long as the level of the force used did not exceed that of the prior force.⁶⁸

The doctrine of reprisal, however, did not survive into the U.N. Charter era.⁶⁹ Reprisals today are unlawful.⁷⁰ Although the Charter did not mention reprisal, it implicitly eliminated the doctrine.⁷¹ The Charter prohibits force in Article 2(4) and then provides for only one exception, namely self-defense in Article 51.⁷² The idea enshrined in the U.N. Charter was that only self-defense would justify military force. Derek Bowett wrote:

Few propositions about international law have enjoyed more support, than the proposition that, under the Charter of the United Nations, the use of force by way of reprisals is illegal. Although, indeed, the words 'reprisals' and 'retaliation' are not to be found in the Charter, this proposition was generally regarded by writers and by the Security Council as the logical and necessary consequence of the prohibition of force in

⁶⁶ Kelly, *supra* note 45, at 285.

⁶⁷ BROWNIE, *supra* note 14, at 220.

⁶⁸ Portugal v. Germany (Naulilaa Arbitration), 2 R.I.A.A. 1011 (1928) (defining conditions for and permissible scope of reprisal); Bowett, *supra* note 14, at 2-3 (defining conditions for use of force in reprisal).

⁶⁹ BROWNIE, *supra* note 14, at 1265 ("There is a general assumption by jurists that the Charter prohibited self-help and armed reprisals.").

⁷⁰ BOWETT, *supra* note 16, at 13.

⁷¹ BROWNIE, *supra* note 14, at 1265.

⁷² U.N. CHARTER art. 51.

Article 2(4), the injunction to settle disputes peacefully in Article 2(3) and the limiting of permissible force by states to self-defense.⁷³

In 1970, in a resolution purporting to construe the Charter provisions on use of force, the U.N. General Assembly provided, "States have a duty to refrain from acts of reprisal involving the use of force."⁷⁴ The International Court of Justice has quoted this language approvingly.⁷⁵

The Security Council has stood firmly behind the principle that reprisal is aggression.⁷⁶ Britain carried out air attacks in Yemen in 1964, justifying them as a legitimate response to prior Yemeni attacks on the territory of the South Arabian Federation.⁷⁷ Britain told the Council that the action was self-defense rather than reprisal,⁷⁸ but the Council rejected the British argument and issued a condemnation of Britain in which it stated that it "condemns reprisals as incompatible with the purposes and principles of the United Nations."⁷⁹

As noted above, neither the United States, nor the United Kingdom, invoked the reprisal doctrine but relied instead on Article 51 in their submissions to the Security Council. They recognized that, despite the massive loss of life in the September 11th attacks, they could not rely on them alone as a basis for armed action in Afghanistan.

⁷³ Bowett, *supra* note 14, at 1.

⁷⁴ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 122, U.N. Doc. A/8028 (1970).

⁷⁵ *Military and Para-Military Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 101.

⁷⁶ Bowett, *supra* note 14, at 7 (stating that, with regard to Security Council practice on Israel's cross-border raids at guerrilla bases in the 1950s and 1960s, "[o]n occasion after occasion . . . the Security Council formally condemned Israel for illegal reprisals and rejected this form of plea of self-defense").

⁷⁷ The Federation was a British protectorate but was considered by Yemen to be an occupied sector of Yemen. U.N. SCOR, 19th Sess., 1109th mtg. at 8, U.N. Doc. S/PV.1109 (1964) (containing the statement of Mr. Pachachi of Iraq).

⁷⁸ *Id.* at 4 (containing a U.K. delegate stating, "this action was not a retaliation or a reprisal," rather "it was a measure of defence").

⁷⁹ S.C. Res. 188, U.N. SCOR, 19th sess., Res. & Decs. 1964, at 10, U.N. Doc. S/INF/19/Rev.1 (1966) (containing two abstentions: the United Kingdom and the United States).

V. THE PITFALLS OF ANTICIPATORY SELF-DEFENSE

Where an attack, like the serious attack of September 11, 2001, has occurred and additional future attacks can be expected, Mary Ellen O'Connell suggested that a state may use force in self-defense, even if it cannot give details as to the expected attacks.⁸⁰ This rationale was espoused by the United States, beginning in 1986, as a way in which states might lawfully use force in their own defense. The U.S. Department of State, under George Schultz, developed a legal rationale for responding to state-sponsored terror attacks, whereby a state might use force in self-defense if it had reason to believe that a state that has already used force is planning to do so in the near future.⁸¹

Under this rationale, the United States bombed Libya in 1986. The idea was that one can consider that an armed attack is occurring if some force has already been used and other force is anticipated. Although it did not specify dates, the United States asserted that Libya planned terrorist attacks in the future, and it claimed to know the identity of particular U.S. installations that were to be targeted.⁸² It did not make public details that would have permitted verification of this claim.⁸³ It did not purport to know precisely when such attacks would occur.

The Schultz rationale was not accepted as an appropriate interpretation of the U.N. Charter.⁸⁴ In reaction to the U.S. bombing of Libya, the U.N. General Assembly passed a resolution condemning the United States.⁸⁵ In the Security Council, a draft resolution to condemn the United States for aggression was tabled, and nine of the Council's fifteen members voted in favor of the resolution (five votes against and one abstention).⁸⁶ The resolution failed because it was vetoed by France, Great Britain, and the United States.⁸⁷

If self-defense applies when an armed attack is not obvious, there is risk of three potential misuses of force. First, states may claim self-defense for attacking in situations in which the attack may never have

⁸⁰ O'Connell, *supra* note 10, at 893-99.

⁸¹ Bernard Gwertzman, *Plots on Global Scale Charged*, N.Y. TIMES, Apr. 15, 1986, at A1.

⁸² *Id.*

⁸³ *Id.*; see also *Announcement by Speakes, id.*, Apr. 15, 1986, at A13.

⁸⁴ See, e.g., G.A. Res. 38, U.N. GAOR, 41st Sess., Supp. No. 53, at 34, U.N. Doc. A/41/38 (1987).

⁸⁵ *Id.*

⁸⁶ U.N. SCOR, 41st Sess., 2682d mtg. at 43, U.N. Doc. S/PV.2682 (1986).

⁸⁷ *Id.*

materialized. The Pakistan-India military standoff of 2002 provides an example. Each state brought troops up to its common border in large numbers, and each issued belligerent-sounding official remarks.⁸⁸ As of late-May 2002, either state could have asserted, with some plausibility, that the other was going to attack. Hence, if self-defense may be invoked against potential future attacks, either Pakistan or India could have attacked the other in self-defense.

Second, self-defense too broadly construed gives states the opportunity to invent anticipated attacks as a pretext. An example is Israel's June 5, 1967, armed attack on Egypt, which occurred after Egypt had drawn troops near its border with Israel. Israel claimed that Egypt had, that day, shelled three Israeli villages and that Egyptian jet fighters were flying towards Israel. Israel's U.N. representative, Abba Eban, told the U.N. Security Council, "Egyptian forces engaged us by air and land, bombarding the [Israeli] villages of Kissufim, Nahal-Oz and Ein Hasheloshah," and that "approaching Egyptian aircraft appeared on our radar screens."⁸⁹ In fact, Israel's decision to invade Egypt had been made the previous day by Israel's cabinet, Egypt had not shelled into Israel, and Egypt's jet fighters were not approaching Israel.⁹⁰ The story Eban had recited before the Security Council was false.

A month later, Israel implicitly acknowledged that Eban's story had been invented when Prime Minister Levi Eshkol recounted the onset of hostilities without mentioning any shelling or radar screen sightings but claimed that Israel had expected an imminent attack from Egypt's troops arrayed near the border and that Israel had acted in "legitimate defense."⁹¹ However, even that version was invented. Israeli officials who were present at the June 4th cabinet meeting contradicted the prime minister. Itzhak Rabin, as Chief of Staff, had reported to the cabinet at the June 4th meeting that Egypt was not about to attack Israel.⁹² The troops that Egypt had brought up to Israel's border, he told the cabinet, "would not have been enough to unleash an offensive against Israel. He

⁸⁸ Mohamad Bazzi, *India, Pakistan Told to Cool Off; Bush, UN Seek to Lessen Threats of War*, NEWSDAY, May 21, 2002, at A06.

⁸⁹ U.N. SCOR, 22d Sess., 1348th mtg. at 15, U.N. Doc. S/PV.1348 (1967).

⁹⁰ RITCHIE OVENDALE, *THE ORIGINS OF THE ARAB-ISRAELI WARS 180* (1984).

⁹¹ *Admission on Attack*, TIMES (London), July 8, 1967, at 3 (statement of Prime Minister Levi Eshkol).

⁹² *Le général Rabin ne pense pas que Nasser voulait la guerre*, LE MONDE, Feb. 29, 1968, at 1 (quoting Chief of Staff Itzhak Rabin).

knew it and we knew it.”⁹³ Menachem Begin, then a cabinet minister, stated later that Egypt’s troop movements did “not prove that Nasser was really about to attack us. We must be honest with ourselves. We decided to attack him.”⁹⁴

A third risk of an overly broad concept of self-defense is mistake on the part of the state using force. A state may erroneously believe that another state is acting to its detriment. An example is the U.S. missile attack on a factory in the Sudan in 1998. The United States reported to the Security Council that it had acted in self-defense on the basis of Article 51,⁹⁵ claiming that the factory was producing a chemical called Empta, which is used to make the deadly VX nerve gas.⁹⁶ Furthermore, it claimed that the factory was connected to Osama bin Laden and that bin Laden had bombed the United States embassies in Kenya and Tanzania and was planning similar attacks elsewhere.⁹⁷

Sudan denied that the factory was producing such materials and asked for a U.N. Security Council inquiry.⁹⁸ The United States replied that its evidence was solid and that there was no need for an inquiry.⁹⁹

⁹³ *Id.*

⁹⁴ *Excerpts from Begin Speech at National Defense College*, N.Y. TIMES, Aug. 21, 1982, at A6; *see also* Amnon Kapeliouk, *Israël était-il réellement menacé d’extermination?*, LE MONDE, June 3, 1972, at 4 (citing General Matitiahu Peled, a member of Israel’s general staff in 1967, who stated that the Israeli thesis that Egypt was about to attack was invented by the Israeli government only after the war).

⁹⁵ Letter from the Permanent Representative of the United States of America Addressed to the President of the Security Council (Aug. 20, 1998), U.N. Doc. S/1998/780 (1998); *see also* Letter from the President to the Speaker of the House and the President of the Senate, Aug. 21, 1998, White House Press Release, Aug. 22, 1998, *reprinted in* 9 FOREIGN POLICY BULLETIN 15 (No. 5, 1998) (“The United States acted in exercise of our inherent right of self-defense consistent with Article 51 of the United Nations Charter. These strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities.”).

⁹⁶ Department of State Fact Sheet, Aug. 21, 1998, *reprinted in* 9 FOREIGN POLICY BULLETIN, *supra* note 95, at 13 (“The U.S. is confident this Sudanese government-controlled facility is involved in the production of chemical weapons agents.”).

⁹⁷ Steven Lee Myers, *Dozens of Ship-Launched Cruise Missiles Strike at Same Moment*, N.Y. TIMES, Aug. 21, 1998, at A10; *see also* Address by the President to the Nation, Aug. 20, 1998, *reprinted in* 9 FOREIGN POLICY BULLETIN, *supra* note 95, at 6; *Excerpts from Press Briefing by Secretary of State Albright and National Security Advisor Berger*, Aug. 20, 1998, *reprinted in* 9 FOREIGN POLICY BULLETIN, *supra* note 95, at 8.

⁹⁸ Letter from Sudanese State Minister for External Relations Roric to the President of the U.N. Security Council, U.N. Press Release S/1998/786, Aug. 21, 1998, *reprinted in* 9 FOREIGN POLICY BULLETIN, *supra* note 95, at 14.

⁹⁹ *Excerpts from Daily Press Briefing by Department of State Deputy Spokesman Foley*, Aug. 26, 1998, *reprinted in* 9 FOREIGN POLICY BULLETIN, *supra* note 95, at 17 (“In response to

However, within a few days, highly placed U.S. officials acknowledged to reporters that they could not show that the factory had produced nerve gas.¹⁰⁰ Although the United States did not formally admit error, following the statements to that effect by high officials, it stopped asserting its certainty over the evidence.

These examples reflect the serious danger to international order posed by a reading of self-defense that allows it to be invoked in situations in which the attack being defended is not obvious. The invocation of self-defense by the United States and the United Kingdom for their use of force against Afghanistan must be assessed with these concerns in mind.

The aim of deterrence of future armed attacks is inconsistent with the use of force in self-defense under Article 51. Armed force may not be employed to deter "further acts of aggression" unless the state is confronted with an attack that is already in progress or at least imminent. Otherwise, the victim state must confine itself to reporting its situation to the Security Council and to seeking Security Council action.

Although many might think it appropriate that a state use unilateral force to deter future attacks under particular facts, here, as elsewhere in the law, a rule is applied out of concern for abuse. Torture of a suspect by police is absolutely prohibited, even though some might think torture is appropriate if a suspect has information about imminent acts of violence that might cause many deaths.¹⁰¹ The absolute aspect of the rule is premised on a concern that the exceptional case may be hard to confine to particular facts and that the exception might swallow up the rule.

The requirement that the armed force be in response to an armed attack is, moreover, a continuing requirement. Even if it could be

your question about investigations, we've made very clear—the Security Council took this up on Monday—we made clear that in our view ... it wasn't necessary. We believe we have convincing evidence that satisfied us; and the Security Council didn't go further with it on Monday."); see also *White House Rejects Jimmy Carter's Call for Testing at Bombed Factory Site*, CHI. TRIB., Sept. 20, 1998, at 15.

¹⁰⁰ Bryan Bender, *Poor US Intelligence May Have Led to Sudan Strikes*, JANE'S DEFENCE WKLY., Sept. 2, 1998, at 4; Tim Weiner & James Risen, *Decision to Strike Factory in Sudan Based on Surmise Inferred from Evidence*, N.Y. TIMES, Sept. 21, 1998, at A1.

¹⁰¹ Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89, 104 (2001).

concluded that the United States was about to be attacked as of October 7, 2001, that would not necessarily mean that it was about to be attacked during the entire period of its military action against Afghanistan. If Afghanistan were responsible for the attacks anticipated as of October 7, 2001, it was less likely to be in a position to be responsible for future attacks after the taking of Kabul on November 13, 2001; the surrender of the last major Taliban troop concentrations at Kunduz on November 26, 2001; or the surrender by the Taliban government of the city of Kandahar on December 7, 2001.¹⁰²

VI. CONCLUSION

The United States suffered a devastating attack on September 11, 2001. However, the attack on Afghanistan was not a lawful response. To have a valid self-defense claim, the United States would have to satisfy each of the six indicated elements; on none of the six did it have a convincing argument. As of October 7, 2001, the United States was not experiencing an armed attack. It pursued the wrong target. It did not pursue methods short of armed force to protect itself and failed to approach the U.N. Security Council. It did not use force in a fashion calculated to protect itself. It used more force than was necessary.

While this conclusion may, to some, seem harsh on the United States, the countervailing considerations must be taken into account. Self-defense is a doctrine which, while critical to the international legal order, holds the potential to undermine the prohibition on the use of armed force between states. Unless self-defense is kept within appropriate bounds, the prohibition against use of force will become meaningless.

¹⁰² Michael R. Gordon, *Shifting Fronts, Rising Danger: The Afghanistan War Evolves*, N.Y. TIMES, Dec. 9, 2001, at A1.