

## AFGHANISTAN AND SELF DEFENSE

John Quigley\*

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

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

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

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

\* Prof. John Quigley an expert on international human rights law, is Professor of Law Ohio State University, Quigley.2@osu.edu

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

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

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

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

### Armed Attack

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

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

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

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

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

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

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

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

#### **Afghanistan as Perpetrator**

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

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

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

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

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

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

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

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

Through Pakistan, the United States demanded the surrender of Al-Qaeda figures. Both before and after the start of the bombing, Afghanistan indicated willingness to discuss a surrender of bin Laden, but the US refused to talk to it. Afghanistan pressed for detailed evidence against particular individuals, but the United States declined to provide such evidence. No state can expect another to surrender persons suspected of criminal violations without providing detailed information. The fact that the United States has not seriously pursued the surrender of Al-Qaeda figures as a means of protecting itself casts doubt on its need to use force.

#### **UN Security Council**

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

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

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

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

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

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

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

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

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

The Security Council took no action on the US letter of

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

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

#### REFERENCES

1. UN Charter, art. 2(4).
2. UN Charter, art. 51.
3. UN Charter, art. 51.
4. "Caroline" case, in 2 Moore, Digest of International Law 412 (1906).
5. Mr. Webster (USA) to Mr. Fox (Britain), in 29 British and Foreign State Papers, 1129, at 1138 (1857).
6. 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, UN Document S/2001/946.
7. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625, UN General Assembly Official Records, 25th Session, Supplement No. 28 (A/8028).

8. UN General Assembly Resolution 41/38, UN General Assembly Official Records, 41st yr., Supplement No. 53, p. 34 UN Doc. A/41/53 (1987).
9. UN Security Council Official Records, 41st yr., 2682nd mtg., p. 43, UN Doc. S/PV. 2682 (1986).
10. UN General Assembly Resolution 3314, UN General Assembly Official Records, 29th Session, Supplement NO. 31, p. 42.
11. UN Security Council Resolution 1368, UN Document S/RES/1368.