

Was the NATO Invasion of Afghanistan Legal?

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RABIA KHAN, NOV 6 2013

Was the NATO Invasion of Afghanistan in 2001 Legal Under International Law?

Introduction

This essay sets out to analyse whether the invasion of Afghanistan in 2001 was legal under international law. Reference will primarily be made to the United Nations Charter and customary international law. Moralistic and pacifist arguments will not be heavily relied upon in this essay, as the aim here is to assess the conflict within a legal context. The work of legal scholars, academics, journalists and politicians will also be analysed in order to determine the legitimacy of the war.

A Brief History and Ethnography of Modern Afghanistan (1979 Onwards)

Afghanistan is a country with a population of approximately 30 million people^[1]. It is predominantly a Muslim country and is very ethnically diverse. The major ethnic groups in Afghanistan include the Pashtuns (who make up around half the population of Afghanistan), Tajiks, Hazaras, Uzbeks and Turkmen^[2].

The country was invaded in 1979 by the Soviet Union, after they believed that the Afghan elite was becoming increasingly close to the Americans and drifting away from the Soviets. The war began at a time when revolutions were taking place across Afghanistan^[3]. That war went on for just under 10 years, and resulted in the defeat of the Soviet Union and victory for the Taliban, and the Afghan resistance movement as a whole. The Taliban was an Afghan resistance movement that came into being during the Soviet invasion as a direct response to the invasion. It was funded by the US and Pakistan and was made up mainly of ethnic Pashtuns. The need for a resistance group was necessary in Afghanistan, as the Afghan army had been funded and trained by the Soviets and was in place to serve their interests.

After the Soviet invasion came to an end, Afghanistan continued to face an uncertain future and was still riddled with instability. This was due to the civil war that broke out in the country in the late 1980s which intensified in 1992, after the government of Afghan President Mohammad Najibullah was toppled^[4]. The war itself went on for over a decade and resulted in the deaths of approximately 400,000 Afghans^[5]. After the Taliban seized control of Kabul a group known as the Northern Alliance formed. This group consisted mainly of Afghan minorities of Central Asian descent and was funded primarily by Iran. But the Northern Alliance fell apart by late 2001, and was not in any way as powerful as the Taliban when it was in existence.

The Beginning of 'Operation Enduring Freedom'

The invasion of Afghanistan took place on the 7th of October 2001, and was called 'Operation Enduring Freedom' by the United States Government. The US Government claimed that the invasion was in retaliation to the 9/11 terrorist attacks in New York and Pennsylvania. The main reason the invasion took place was because the US felt that it could eradicate Al-Qaeda and its support network within the Taliban through military action. The US claimed that it needed to get troops on the ground in Afghanistan, as Afghanistan refused to comply when asked to hand over terrorists that had sought refuge there. These were terrorists that the US believed played a major role in the 9/11

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attacks.

However, it should be noted that no terrorist organisation claimed responsibility for the 9/11 attacks, even if some may have sympathised with the act itself. Yoram Dinstein in his book *War, Aggression and Self-Defence* incorrectly made the assertion that the Taliban had alluded to having conspired in implementing the attacks^[6]. In reality, the chief spokesperson of the Taliban at the time of the attacks, Wakeel Ahmed Mutawakeel^[7], and the Taliban ambassador to Pakistan, Mullah Abdul Salam Zaeef^[8], both condemned the attacks and did not claim responsibility for them on the part of the Taliban or Al Qaeda. This is also affirmed by Aijaz Ahmad in his book *Kraq, Afghanistan and the Imperialism of Our Time*, where he writes, 'it was in fact even more difficult to link the Taliban themselves with the events of 11 September; they denounced the attack immediately and promised in no uncertain terms to help find the culprits'.

What is a 'Terrorist'?

The US and UK governments claimed that they were engaging in a war with Afghanistan because the country was harbouring terrorists that were complicit in the attacks that befell the US on the 11th of September 2001. In order to determine whether terrorists had taken refuge in Afghanistan and if they were actively operating from there, a descriptive definition of what a terrorist or terrorism comprises is due. The CIA has its own definition of terrorism, namely that terrorism is a 'premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents.'^[9] Thus, with reference to the CIA's definition of terrorism, it can be deduced that anyone engaging in such activity is a terrorist.

Furthermore, in relation to the CIA's definition of terrorism, Al-Qaeda fit the common narrative of being a terrorist organisation, as it uses an ideology to justify the use of violence against innocent people. However, a small issue of technicality does arise here, as the CIA's definition does not account for motives for terrorism other than political. This issue should not be ignored as Al Qaeda uses a skewed religious ideology as the basis for its activities rather than a 'politically motivated' one. None the less, the suicide bombings carried out by Al Qaeda in Afghanistan and elsewhere in the region would suggest that such activity can only be the work of a terrorist organisation, thus labelling Al Qaeda as such is justified.

On the other hand, labelling the Taliban as a terrorist organisation is problematic. This is because the Taliban formed as a resistance group to the Soviet invasion of Afghanistan with funding from the US and Pakistan. Also, conflating Al Qaeda and the Taliban has caused more confusion to the matter, as low level infiltration of the Taliban by Al Qaeda does not mean that both organisations are one and the same. Furthermore, the ideology of the Taliban is based around the application of Sharia law within Afghanistan^[10], and it does not seek to follow Al Qaeda's practices. The Taliban continue to fight occupiers of their land and in the present context this applies to the NATO forces based there. Also unlike Al Qaeda, the Taliban are not active in terrorist attacks abroad, except in Pakistan due to the porous border between the two countries.

Substantive International Law on Self-Defence, the Use of Force and War

Initially, it was claimed that the invasion of Afghanistan was necessary on the grounds of self-defence, as a terrorist attack had taken place in the US and action was needed in order to prevent other such attacks. Afghanistan was specifically chosen since the US believed that terrorists were being harboured and trained there by Al Qaeda. Former American President George W. Bush affirmed this when he said, 'One by one we're going to find [Al Qaeda and the Taliban] and piece by piece we'll tear their terrorist network apart'^[11]. It seems that insufficient effort was made to pursue peaceful negotiations or to press for further dialogue, as President Bush went on to say that he gave the Taliban two weeks to hand over suspected terrorists^[12]. When this time frame is compared to that of other world conflicts, for example Israel-Palestine, we can note that it has taken a tremendous amount of time to broker deals. Conversely, it seems that the regime in Afghanistan was given hardly any time to comply or discuss its issues or reservations.

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Substantive law that was used to justify the need for the invasion includes Article 51^[13] of the UN Charter, which deals with the issue of self-defence. Bush announced, in a speech delivered after the first strike on Afghanistan, 'we have called up reserves to reinforce our military capability and strengthen the protection of our homeland.'^[14] It can be seen through this quote, and many others by George W. Bush, that the US believed its actions were justified on the grounds of self-defence. This justification was used because it was alleged that if Afghanistan was not contained, more terrorist attacks would occur in the US and elsewhere around the world.

However, the issue of self-defence could be raised by the Afghan people themselves, as resistance against NATO forces and their perceived aggression could in itself equate to individual self-defence, countering the collective, national self-defence that the US claimed. Furthermore, it should be noted that the terrorist attacks on 9/11 were not carried out by one state acting aggressively against the US; they were the actions of a terrorist organisation that had no direct links to the government of any state. This logic could also be used by Afghanistan to argue that the response of Afghans who subsequently joined resistance movements did so in retaliation to a pre-emptive strike by the US, as the 9/11 attacks cannot directly be traced back to Afghanistan. In relation to a state fighting a non-state actor, if it was necessary for the US to invade a country in order to eliminate Al Qaeda, then it can be argued that Saudi Arabia would have been a more logical choice than Afghanistan. This is because many reports over the years have suggested that Al Qaeda was formed, funded and trained by Saudi donations. This is affirmed by Wikileaks cables which mention this fact^[15].

Legal scholar Olivier Corten states that there was 'nearly unanimous political opposition to the Taliban regime'^[16]. Nonetheless even though there was strong opposition to the Taliban by various international organisations and states, regime change is not itself a substantial enough reason to allow for an invasion of one country by another. Thus, this justification for intervention by the occupying forces would not be seen as credible or permissible under international law. Furthermore, the Taliban were initially welcomed by the majority of the Afghan population when they came to power as they worked to eradicate 'warlords and banditry'^[17]. That is why an alternative narrative came into existence after the invasion had been going on for a while, namely that the invasion of Afghanistan by NATO forces was a humanitarian mission. And that the mission's aim was to liberate the Afghan people and bring them democracy by eradicating the Taliban hold on the country.

Another important part of the Charter which needs to be mentioned is Article 2(3)^[18] which states that all disputes should be solved in a peaceful manner in order to ensure global peace and security. With this Article in mind, it seems that not enough effort was made to determine whether the objectives that the US wanted fulfilled by Afghanistan could be reached in such a manner. The threatening tone used by the former American President George W. Bush when addressing the issue, including that fact that he only gave the Taliban two weeks to hand over the suspected terrorists, suggests that this Article was ignored in its entirety.

The issue of a state using force against a non-state actor is a contentious and compelling area that also needs to be analysed^[19]. Even though the Taliban was the only form of government in Afghanistan at the time of the 9/11 attacks and the subsequent invasion of Afghanistan, Al Qaeda was not. Thus, the war in Afghanistan with the aim to eradicate a non-state actor could be seen as beyond the scope of necessity and proportionality. This is because Al Qaeda did not have the kind of influence and control that the Taliban did in Afghanistan, so invading the country in order to eradicate them could be seen in a legal context as disproportionate and therefore illegitimate.

Another key issue to consider here is the principle of state sovereignty. Afghanistan was primarily invaded due to the fact that people who the US considered to be terrorists linked to the 9/11 attacks and living in Afghanistan at the time were not handed over to the US. But it seems dialogue and diplomacy could have been pursued in order to reach an agreement, rather than rushing to the conclusion that an invasion was the only means for the US to achieve its objectives. This is because international law states that other means to resolve disputes should be looked to before considering the act of war. This is affirmed by Article 2(4) of the UN charter which states that 'all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' But due to the fact that the US government believed that it was acting to prevent further loss of civilian life by the perceived future threat of Al Qaeda, such objectives could be viewed as being humanitarian and not territorial or political, as

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was done in Kosovo, thus leading people to believe that such an operation was more legitimate than any other form of conflict^[20].

However, George W Bush only gave the Taliban two weeks to hand over terrorist operatives and it seems that no other forms of negotiations were engaged in, so not all that could be done to prevent war was undertaken by the US and other states that subsequently invaded Afghanistan. Noam Chomsky stated that Washington failed to recognise the opposition to Al Qaeda, which he argues was vast in the Muslim world^[21]. If the US had looked to work with such groups, the spread of Al Qaeda may have been better contained than it is at present. Furthermore, it could be argued that the Taliban was reluctant to give up these alleged terrorists for numerous reasons, one of the main ones being that it could have caused unrest in Afghanistan if it was not a move that the majority of the Afghan population supported. And given that Afghanistan had already suffered a bloody and devastating civil war, this was a serious issue that needed to be considered. Another issue to consider was the fact that declaring war on the basis of one terrorist attack could be seen as going against the principles of necessity and proportionality when looking to engage in war, even if a state is relying on self-defence as a justification for war^[22].

According to Parliament briefing papers 'the initial invasion of Afghanistan in October 2001 was therefore not conducted with the authorisation of a specific UN Security Council Resolution'^[23]. However, the US and UK claimed that the attack was justified under Article 51 of the UN Charter, as military action against Afghanistan was undertaken with the provisions of Article 51 covering self-defence. This does raise questions about the authority of the UN and its scope as an international peace keeping body; if countries feel that they have the right to go to war without the UN's approval then what legitimacy and power does such an organisation actually hold? Furthermore, if states can act in such an aggressive manner without facing any repercussions then what is to say that another such costly and damaging war will not occur in the near future?

However, it should be noted that:

'International law must be clearly distinguished from the use of force for revenge or punishment; states, like persons, must not act as vigilantes. Second, in criminal law, self-defence may be invoked in the face of an imminent threat of death or grave bodily harm. In general, the threat must be immediate and the response must not be pushed beyond what is reasonably required to repel that threat. Therefore, in general, self-defence may not be invoked to justify physical retaliation to an attack a few weeks after it occurs.'^[24]

This is a key issue, as the rhetoric from the US government after 9/11 and just prior to the invasion made a direct correlation between the terrorist attacks on New York and the imminent action in Afghanistan. Furthermore, in relation to the retaliatory nature of the invasion, international law Professor Marjorie Cohn said that "[T]he bombings of Afghanistan by the United States and the United Kingdom are illegal."^[25] International law does not allow for a state to enter into war on the grounds of retaliation for a prior act. Furthermore, such a feeble reason for going to war could be used by countless other countries too, in order to justify an invasion that they perceive to be legitimate. One such example being that 'Iranians could have made the same argument to attack the United States after they overthrew the vicious Shah Reza Pahlavi in 1979 and he was given safe haven in the United States'^[26], as he was seen by the Islamic republic as a terrorist and enemy of Iran.

United Nations Security Council Resolutions

In the recent aftermath of 9/11, the United Nations Security Council drafted two resolutions in response to the attacks, which contained information as to what would constitute an appropriate response. The two resolutions adopted were resolution 1368 and resolution 1373, both of which dealt with 'threats to international peace and security caused by terrorist acts'. Neither of these two resolutions allowed for military action on the ground in Afghanistan as a result of the attacks, nor did either contain any aggressive language that could be used to justify military action. Furthermore, the latter resolution, although affirming that terrorism is an issue that needs to be dealt with and an issue for which the UN would support 'international efforts to root out terrorism', also goes on to say that it 'express[es] its strong support for the efforts of the Afghan people to establish a new and transitional administration leading to a formation of a government'^[27]. None of this alluded to the approval of any military force in Afghanistan by

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the US or any other NATO member.

Was 'Operation Enduring Freedom' Legal Under International Law?

An important fact that needs to be considered when assessing the legality of the war in Afghanistan is the fact that the 9/11 attacks were a one-off, isolated incident and were not part of a continuation of attacks on the US and American civilians. In relation to this point, was there really a need for such an aggressive response to the 9/11 attacks? It can indisputably be argued that this war was not legal under international law, as the criterion that needs to be fulfilled in order for a war to be conducted legally is UN Security Council authorisation. In this instance no such authorisation was given to the US, the UK or any other NATO member^[28].

Additionally, the US' claim in relation to Article 51 of the UN Charter which deals with self-defence, namely that it had a right to the use of force against Afghanistan after the 9/11 terrorist attacks, is unfounded. The notion of preventative self-defence or retaliatory self-defence has no basis under international law. The US' rationale as justification for the invasion has two major issues of contention, the first being that the country it wanted to attack was not the main base of Al Qaeda and the second being that the US is a sovereign state attempting to fight an organisation which has never claimed to have links to the Afghan establishment. Therefore, in accordance with the US' thought process, the country that should have been pursued was Saudi Arabia. As noted earlier, this is because Saudi Arabia was funding Al Qaeda and allowed for it to operate within its borders without any difficulties. Furthermore, Afghanistan had no direct link to 9/11 in the way that Saudi Arabia did, as none of the 9/11 terrorists were Afghan nationals but some were Saudi nationals.

The Repercussions of the War

It has now been established that the war with Afghanistan was illegal under international law. But the repercussions of such use of force, whether legal or illegal, are also issues of grave concern that should not be overlooked. The intervention in Kosovo in 1998 was hailed a successful Western intervention, as it supposedly reduced and subsequently ended the massacre of Kosovans by the Serbs. However, if due analysis is given to this intervention then it can be argued that this intervention was just as bloody and pointless in its aims as any other Western intervention before or after it. The intervention led to more violence being carried out by both Serbs and Kosovans towards one another, and as a result of the intervention there were ten thousand more civilian deaths^[29].

Aside from the civilian casualties and that of NATO troops, the war in Afghanistan has led to an increase in the number of internal and external refugees. It has also deeply polarised and radicalised many young Afghan men, due to all the violence they have witnessed and suffered. The scores of radicalised young men has worked against the US and UK in eradicating Al Qaeda, its proxies in the region and other terrorist organisation with similar ideologies. This is because use of force which inadvertently targets civilians has inevitably led to more men adopting the very ideology the West is trying to eradicate. And Al Qaeda's reach has now spread further afield to countries such as Somalia and Yemen since the war began^[30].

The intervention did nothing to solve poverty and caused more people to flee the country, creating more refugees. The invasion has also led to an increase in malnutrition due to the restriction on the availability of food packages^[31]. Furthermore, the war has increased the opium trade in Afghanistan which is something that was contained and reduced during the Taliban rule of Afghanistan^[32]. This is because more war lords who were previously incarcerated are back in control of various parts of the country.

Another repercussion of the war is that it has now gone across the border into Pakistan, a nuclear state. And this has led to the death of many innocent Pashtuns on the east of the Durand Line who have now fallen victim to American drones. This is because the US is now widening its operation, as the Taliban has gained more traction and operates within a far greater area of land. This is a very contentious issue and could be seen as an 'act of war', as the US is not at war with Pakistan but continues to act aggressively by using drones, which have killed civilians there^[33]. However, this same principle can be applied to Pakistan too, as they are not party to the war between the US and Afghanistan but as is claimed by the US are supporting and giving shelter to terrorists^[34].

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Another particularly severe issue in relation to war more generally is its cost. This is especially true of 'Operation Enduring Freedom', as this war is still on going and started over a decade ago. Its financial burden has been tremendous for the US and the UK. And since the withdrawal of troops will not occur until 2014, these costs will continue to rise, and will cost UK taxpayers £20 billion for the duration of the whole operation.^[35]

Conclusion

In conclusion, it can be argued that the NATO invasion of Afghanistan was not legal under international law. This is due to the fact that the UN resolutions that were drafted after the 9/11 attacks did not expressly permit an aggressive approach in tackling international terrorism. Furthermore, Article 2(3) and Article 2(4) of the UN Charter were not adhered to, as peaceful means to resolve the issue were not sufficiently considered and dialogue between the parties involved was not used as a means to end hostilities. Also, the assertion made by the US that it was acting on the grounds of self-defence under Article 51 of the Charter is deeply contentious. This is because in this case, one state was looking to invade another to eliminate a terrorist organisation that had no affiliation to any particular state. Lastly, the most crucial aspect here that proves that the invasion of Afghanistan was illegal under international law was the fact that the UN Security Council had not given authorisation for the invasion of Afghanistan, which would have been necessary in order for NATO to legally pursue Al Qaeda.

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- The term "terrorism" means premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents.

- The term "international terrorism" means terrorism involving the territory or the citizens of more than one country.

- The term "terrorist group" means any group that practices, or has significant subgroups that practice, international terrorism.' – 'Terrorism FAQs' (*Central Intelligence Agency*, 6 April 2007) <<https://www.cia.gov/news-information/cia-the-war-on-terrorism/terrorism-faqs.html>> accessed 24 December 2012

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