



The legal basis for the invasion of Afghanistan

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The military campaign in Afghanistan was not specifically mandated by the UN, but was widely (although not universally) perceived to be a legitimate form of self-defence under the UN Charter. The ISAF force, of which British forces in Afghanistan form a part, is fully mandated by the UN.

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1 Summary

The military campaign in Afghanistan was not specifically mandated by the UN - there was no specific Security Council Resolution authorising the invasion - but was widely (although not universally) perceived to be a legitimate form of self-defence under the UN Charter.

Article 2(4) of the UN Charter prohibits the 'threat or use of force against the territorial integrity or political independence of any state'. The accepted exceptions to this are where a competent organ of the UN (almost always the Security Council) has authorised it, or where it is in self-defence under article 51 of the Charter.

As required in article 51, the US and the UK reported to the UN on the reasons for invoking the article to justify their military action. The Taliban Government of Afghanistan was considered an accomplice to the events of 9/11 and, therefore, a justifiable target for action. United Nations Security Council Resolutions had already been passed requiring the Taliban to stop giving sanctuary to al-Qaeda.

Humanitarian law requires any action to be proportionate. This means that the action must only be that which is necessary to repel any attack and prevent further attacks from happening, if there is a realistic chance of further attacks. It also requires civilian casualties to be minimised.

2 UN resolutions after 9/11

On 12 September 2001, following the attacks on New York, Washington and Pennsylvania, the UN Security Council adopted its Resolution 1368, the full text of which is included as an appendix. It condemned the attacks and stated that it "regards such acts, like any act of international terrorism, as a threat to international peace and security" and expressed "its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations." This is strong language in UN terms, and brings international terrorism into the ambit of Chapter VII of the UN Charter, under which the Security Council may authorise the use of force.

Article 3 of the Resolution clearly gives a general authorisation for action to bring the perpetrators to justice:

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

But the Resolution does not spell out what action or who is to take it. The Resolution also asserted the Security Council's primary responsibility for dealing with matters of international peace and security, but it did not impinge on the right of self-defence, which it in fact recognised in its preamble.

On 28 September another Security Council Resolution, 1373 (2001), was passed. The resolution set out the actions that all states must take against terrorism, such as freezing assets, or face sanctions. The text of Resolution 1373 can also be found in the annex. Like Resolution 1368, 1373 gives general authorisations: states are required to "take the

necessary steps to prevent the commission of terrorist acts” and to “cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts”. Again it reiterates the principle of self-defence and the requirement to act within the terms of the UN Charter and other international law, but does not specify how to implement its requirements or against whom.

The USA might conceivably have gained specific legal support from the Security Council for its action in Afghanistan, but in the end did not seek such a Resolution. Security Council Resolutions 1368 and 1373 simply state the broad general requirement to take action to combat international terrorism.

3 The self-defence justification of the invasion

The initial invasion of Afghanistan in October 2001 was therefore not conducted with the authorisation of a specific UN Security Council Resolution. Instead, the United States and the United Kingdom said that military action against Afghanistan was undertaken under the provisions of Article 51 of the UN Charter, which recognises ‘the inherent right of individual or collective self-defence’ if an armed attack occurs, and requires states to report such actions immediately.¹

On 7 October 2001 the USA and the UK reported to the United Nations Security Council that they had commenced the use of military force in self-defence. The US notification stated that

my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks [against the World Trade Center, the Pentagon and in Pennsylvania].²

It went on,

the attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.

In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. In carrying out these actions, the United States is committed to minimizing civilian casualties and damage to civilian property. In addition, the United States will continue its humanitarian efforts to alleviate the

¹ Article 51 reads: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

² Letter from Ambassador John Negroponte, Permanent Representative of the USA to the UN in New York, to the President of the Security Council, S/2001/946, 7 October 2001.

suffering of the people of Afghanistan. We are providing them with food, medicine and supplies.

The USA also reserved the right to take other actions:

we may find that our self-defence requires further actions with respect to other organizations and other States.

The British notification stated that:

the United Kingdom has military assets engaged in operations against targets we know to be involved in the operation of terror against the United States of America, the United Kingdom and other countries around the world, as part of a wider international effort.

These forces have now been employed in exercise of the inherent right of individual and collective self-defence, recognised in Article 51, following the terrorist outrage of 11 September, to avert the continuing threat of attacks from the same source.³

It went on to state that:

this military action ... is directed against Usama Bin Laden's Al Qaida terrorist organisation and the Taliban regime that is supporting it.

The notification also mentioned the evidence that the British Government had presented to Parliament on the role of al-Qaeda, which

showed that Usama bin Laden and his Al Qaida terrorist organisation have the capability to execute major terrorist attacks, claimed credit for past attacks on United States targets, and have been engaged in a concerted campaign against the United States and its allies. One of their stated aims is the murder of US citizens and attacks on the United States' allies.⁴

It argued that "extreme care" had been exercised in the selection of targets in order to minimise the risk to civilians, and reiterated the point that the military actions were not "directed against the Afghan population, nor against Islam."

4 Humanitarian law

The use of force in self-defence must comply with the rules of humanitarian law, and is subject to two main considerations: necessity and proportionality.

The USA and UK argued that their action was necessary on a number of grounds. Al-Qaeda had the means and motivation to conduct further attacks, and, according to the Prime Minister,

there is nothing hidden about Bin Laden's agenda. He openly espouses the language of terror; has described terrorising Americans as 'a religious and logical obligation'; and

³ Letter from Stewart Eldon, Chargé d'Affaires, UK Mission to the UN in New York, to the President of the Security Council, S/2001/947, 7 October 2001.

⁴ The evidence, entitled *Responsibility for the Terrorist Atrocities in the United States*, 11 September 2001, is available from the Downing Street web site at <http://www.number-10.gov.uk/evidence.htm> and as Dep 01/1407, 4 October 2001. See also HC Deb 4 October 2001, cc671-75.

in February 1998 signed a fatwa stating that 'the killing of Americans and their civilian and military allies is a religious duty.'⁵

Mr bin Laden made a statement on 7 October 2001 in which he directed a comment at "the United States ... and its people:"

I swear by Almighty God who raised the heavens without pillars that neither the United States nor he who lives in the United States will enjoy security before we can see it as a reality in Palestine and before all the infidel armies leave the land of Mohammed, may God's peace and blessing be upon him.⁶

The problem here was that whereas the 11 September attacks had been carried out by al-Qaeda, the military target in Afghanistan was the Taleban. However, a series of UN Security Council Resolutions concerning Afghanistan⁷ provide for the possibility of establishing that the Taliban were indirectly responsible for al-Qaeda's attacks. The UN Security Council had insisted on several occasions that the Taliban stop providing sanctuary and training camps for international terrorists and al-Qaeda, take appropriate measures in order to ensure that the territory under its control was not used for the preparation of terrorist actions, and hand over Mr bin Laden to justice. In not complying with these demands and their obligations under international law to combat terrorism, the Taliban themselves became involved in international terrorism and clearly violated international law. In doing so, it has been argued, the Taliban became an accomplice of al-Qaeda, which made them too internationally responsible for the terrorist attacks of 11 September 2001 and others, and allowed the action in Afghanistan to be legitimate self-defence. This argument is also used to deal with the problem that in the traditional view of self-defence, the armed attack that precipitated it must be attributable to a state.⁸

Proportionality is judged in terms of the need to repel those attacks against which an act of self-defence is aimed. It may not be considered proportionate to retaliate in the same way as an initial attack, or to produce the same amount of damage. This explains the emphases on military operations targeted at the terrorist training camps and infrastructure which supported the al-Qaeda network, and on breaking the Taliban's capacity to control territory in which al-Qaeda might find sanctuary. This targeting was also relevant to the humanitarian laws of war, as was the more general statement that risk to civilians would be minimised.

5 ISAF Mandate

Although the initial invasion of Afghanistan was not mandated by a specific UN Security Council Resolution, relying on the justification of self-defence, the Security Council moved quickly to authorise a military operation to stabilise the country.

Security Council Resolution (UNSCR) 1386 of December 2001 laid down the initial mandate for a 5,000-strong International Security Assistance Force (ISAF) to deploy to the region in and immediately around Kabul, in order to provide security and to assist in the reconstruction of the country under Chapter VII of the UN Charter.⁹

⁵ HC Deb 4 October 2001, c672.

⁶ Statement on the Qatari *al-Jazeera* satellite television channel.

⁷ See for example Resolution 1267 of 15 October 1999

⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, 9 July 2004 at para 139, and *Democratic Republic of Congo v Uganda*

⁹ UN Security Council, [Security Council resolution 1386 \(2001\)](#) on the situation in Afghanistan, 20 December 2001

While UN-mandated, the ISAF force is not deployed under leadership of the UN. In November 2001 the UN Secretary General's Special Representative for Afghanistan, Lakhdar Brahimi, proposed, as part of his wider submission that led to the Bonn Agreement, that a new security force for Afghanistan be established. However, he also suggested that a UN peacekeeping force could not be recommended, partly because of the time it would take to form and partly because:

UN peacekeepers have proven most successful when deployed to implement an existing political settlement among willing parties - not to serve as a substitute for one. Any security force established in the absence of a credible cease-fire agreement or political settlement, whether constituted by Afghans, international personnel, or both, could quickly find itself in the role of combatant. This is not a role for 'Blue Helmets.'¹⁰

Until August 2003, when NATO assumed command, the ISAF operation was conducted as a UN-mandated coalition of the willing.

Since UNSCR 1386, the UN Security Council has adopted several resolutions extending the deployment of ISAF, including UNSCR 1510 in October 2003 which expanded the ISAF mandate to cover the whole of Afghanistan and thereby lay the groundwork for ISAF commanders to expand operations beyond Kabul.

UN Security Council Resolution 1890 (2009) currently authorises the presence of ISAF until 13 October 2010.¹¹

A detailed Military Technical Agreement agreed between the ISAF Commander and the Afghan Transitional Authority in January 2002 provides additional guidance for ISAF operations.

6 Conclusion

Despite the problems outlined above, the UN and many states seemed to accept that the attacks on Afghanistan were legitimate self-defence. In a [speech on 8 October 2001](#), the Secretary General of the UN, Kofi Annan, stopped short of endorsing the air strikes but nor did he condemn them, acknowledging that states have a right to individual and collective self-defence.

The ISAF operation has a full mandate in the form of Security Council Resolutions.

¹⁰ United Nations, [Briefing to the Security Council Lakhdar Brahimi Special Representative of the Secretary-General for Afghanistan](#), 13 November 2001

¹¹ UN Security Council, [Security Council Resolution 1890 \(2009\)](#) on the situation in Afghanistan, 8 October 2009

Resolution 1368 (2001)

**Adopted by the Security Council at its 4370th meeting,
on 12 September 2001**

The Security Council,
Reaffirming the principles and purposes of the Charter of the United Nations,

Determined to combat by all means threats to international peace and security caused by terrorist acts,

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

1. *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security;
2. *Expresses* its deepest sympathy and condolences to the victims and their families and to the people and Government of the United States of America;
3. *Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;
4. *Calls also* on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999;
5. *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations;
6. *Decides* to remain seized of the matter.

Resolution 1373 (2001)

**Adopted by the Security Council at its 4385th meeting,
on 28 September 2001**

The Security Council,

Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001,

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

Acting under Chapter VII of the Charter of the United Nations, 1.

Decides that all States shall:

- (a) Prevent and suppress the financing of terrorist acts;
- (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

- (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. *Decides also* that all States shall:

- (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
- (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
- (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
- (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;
- (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3. *Calls upon* all States to:

- (a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;
- (b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;
- (c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;
- (d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;
- (e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

- (f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;
- (g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

4. *Notes* with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard *emphasizes* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

5. *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

7. *Directs* the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;

8. *Expresses* its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;

9. *Decides* to remain seized of this matter.