

**GREAT POWER INTERVENTIONS IN THE MIDDLE EAST SINCE 1917:
THE DOOMED PURSUIT OF NATIONAL INTEREST IN VIOLATION OF
INTERNATIONAL LAW**

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IV. Afghanistan (1979-2011)*

I completely support Comrade Andropov's proposal to rule out such a measure as the deployment of our troops into Afghanistan...we must keep in mind that from a legal point of view too we would not be justified in sending troops. According to the UN Charter a country can appeal for assistance, and we could send troops, in case it is subject to external aggression. Afghanistan has not been subject to any aggression. This is an internal affair, a revolutionary internal conflict, a battle of one group of the population against another...¹³¹⁴

Our mission was to push the Soviets out of Afghanistan. We expected post-Soviet Afghanistan to be ugly...¹³¹⁵

We believe Moscow has made a firm decision to withdraw from Afghanistan...We cannot be confident of the new government's orientation toward the West; at best it will be ambivalent and at worst it may be actively hostile, especially toward the United States.¹³¹⁶

Prime Minister Margaret Thatcher said today that the use of retaliatory or preemptive strikes against another country to punish or prevent terrorism was 'against international law' and a policy that could lead to 'a much greater chaos'...Thatcher said, 'I believe one has to fight it by legal means.'¹³¹⁷

Arguments against a proactive military/covert operations oriented deterrent terrorism policy: Such a policy: (1) undermines the rule of law, violating the sovereignty of nations with whom we are not at war...¹³¹⁸

* Two articles based on this chapter have been/are to be published. An article on the Soviet invasion of Afghanistan and US support of the *mujahedeen* has been published in the *Polish Yearbook of International Law*, Vol. XXXI (2011), 107-164; the title of the article is: "Afghanistan's Civil War (1979-1989): Illegal and Failed Foreign Interventions". Furthermore, an article on the "war on terror", entitled "The War in Afghanistan- Was the use of force legal and/or wise?" has been accepted for publication in the *New Zealand Yearbook of International Law* 2011 (due in late 2012).

¹³¹⁴ Soviet Foreign Secretary Andrej Gromyko, at the *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1 (at 14); available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; a sentiment echoed by Soviet Prime Minister Kosygin at the same meeting (at 19).

¹³¹⁵ Robert M. Gates, *From the Shadows, The Ultimate Insider's Story of Five Presidents and How They Won the Cold War*, New York: Simon & Schuster Paperbacks, 1996 (this edition: 2006), 349; Gates, until recently US Defence Secretary, was Deputy Director of the CIA at the time of the Soviet invasion of Afghanistan.

¹³¹⁶ CIA, *Special National Intelligence Estimate*, 11/37/88, "USSR, Withdrawal from Afghanistan", March 1988, Key Judgements, The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, U.S. Analysis of the Soviet War in Afghanistan: Declassified*, Document 1 (page 14); available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/us2.html>; last accessed 26/10/2011.

¹³¹⁷ "Thatcher: Reprisal Strikes Illegal", Karen De Young, *The Washington Post*, 11/01/1986, A1.

¹³¹⁸ Congressional Research Service, Report for Congress, Raphael F. Perl, "Terrorism: U.S. Response to Bombings in Kenya and Tanzania: A New Policy Direction?", September 1, 1998, 4; available at: The National Security Archive, *Volume I: Terrorism and U.S. Policy*, Chapter II, Document 6; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/index1.html>; last accessed 26/10/2011.

Since 2001 NATO and ISAF forces have been engaged in a seemingly never-ending war in Afghanistan. Despite a plethora of new initiatives, aimed at stabilizing the deteriorating situation, it is not possible to estimate whether, or when the foreign troops can leave Afghanistan without an escalating civil war ensuing.

For Afghanistan and its people, the “War on Terror” is only the latest episode of a history during which the country has frequently provided the battleground for foreign powers and been torn apart by civil strife. At first sight this seems surprising, given the fact that Afghanistan has always been a desperately poor country with some, but not abundant, natural resources. Furthermore, the country suffers from an often inhospitable climate in many parts of the country, and a virtually insurmountable topography.

The close attention paid to the country is therefore hardly due to Afghanistan’s riches, but rather to the coincidence of its geographical location: Afghanistan is situated at the eastern most edge of the strategically important and resource-rich Middle East, and borders Central Asia, another strategic hub full of resources.¹³¹⁹ This has consequently meant that it has been Afghanistan’s fate to serve alternately as a buffer between, or as the actual battleground for rival powers. Even the creation of Afghanistan as a state can be traced back to an understanding reached by outside powers, Tsarist Russia and Britain, without much reference to the local population. Its borders were delineated by Russia and Britain, often against the express wishes of the

¹³¹⁹ David Ross, “Beyond the Soviet Invasion: Afghanistan and the Concept of Self-Determination”, U. Toronto Fac. L. Rev., Vol. 48, 1990, 92-116, 99; Thomas M. Cynkin, “Aftermath of the Saur Coup: Insurgency and Counterinsurgency in Afghanistan”, Fletcher F., Vol. 6, 1982, 269-298, 269; Milan Hauner, “The Soviet Geostrategic Dilemma” in *Afghanistan and the Soviet Union, Collision and Transformation*, Milan Hauner, Robert L. Canfield (eds.), Boulder: Westview Press, 1989, Ch. 7, 160-194, 161; Anthony Hyman, *Afghanistan Under Soviet Domination, 1964-1983*, 2nd ed., London: Macmillan Press Ltd., 1984, 3; Rice, *No Higher*, 312-313; referring to discussions within the US Administration shortly after 09/11, the former US Secretary of State states: “The immediate concern was to strip al Qaeda of its safe haven, but the strategic value of Afghanistan lay in its geography.”

Afghan rulers, and without any attention being paid as to the location and distribution of Afghanistan's various tribes.

Until India's independence in 1947, Anglo-Russian/Soviet confrontation in Asia always seemed a real possibility. The "Great Game" was initiated, an often intense Anglo-Russian struggle for influence in the region. Persia and Afghanistan were to become this rivalry's most important battlegrounds, although Persia itself, given the opportunity, was happy to interfere in Afghanistan's affairs. British apprehensions regarding Russian influence in Afghanistan, and possible Russian designs on India were to lead to repeated attempts at imposing a ruler on Afghanistan acceptable to Britain, and, finally, to the First and Second Anglo-Afghan Wars (1839-1842, and 1878-1880).

The First Anglo-Afghan War ended in disaster for the British.¹³²⁰ The Second Anglo-Afghan War was slightly more successful, albeit that was most likely due to the fact

¹³²⁰ David Loyn, *Butcher & Bolt, Two Hundred Years of Foreign Entanglement in Afghanistan*, London: Windmill Books, 2009, 68, 70-74; Angelo Rasanayagam, *Afghanistan, A Modern History*, 2nd ed., London: I. B. Taurus, 2005, xv; Henning Behrens, *Die Afghanistan-Intervention der UdSSR, Unabhängigkeit und Blockfreiheit oder Mongolisierung Afghanistans: Eine Herausforderung für das internationale Krisenmanagement*, München: tuduv-verlagsgesellschaft, 1982, 31; Captain H. W. Bellew, "British Relations with Afghanistan", *The Asiatic Quarterly Review*, New Series, Vol. I, 1890, reprinted in *Afghanistan*, Nancy Hatch Dupree (ed.), Buckhurst Hill: Susil Gupta, 1972, 30-73, 59-60; Louis Dupree, *Afghanistan*, 2nd ed., Princeton: Princeton University Press, 1980, 386-395; Rodric Braithwaite, *Afgantsy, The Russians in Afghanistan 1979-1989*, London: Profile Books, 2011, 25, 26; he concludes that "both wars" saw "spectacular" British "reverses", a "technical" military victory, followed by "salutary revenge". Both "victories", according to Braithwaite, nevertheless turned out to be "pyrrhic triumphs."

By declaring war on Afghanistan in 1838, Britain had, according to the Governor-General in India, Lord Auckland, followed a "course...strictly of ...self-defence" (Loyn, *Butcher*, 42). Later the *Secret Committee* of the *East India Company*, on the other hand, concluded that the Afghanistan campaign had been a "war of robbery... a new crime in the annals of nations- a secret war. It has been made by a people without their knowledge against another people who had committed no offence"(Extract from "*Report of the East India Committee on the Causes and Consequences of the Afghan War*"; written before the end of the war; quoted by Dupree, *Afghanistan*, 400-401; also by Loyn, *Butcher*, 26, 73); a verdict shared by Cpt. Bellew, in "British"; 32; writing in 1890, he comments: "Dost Muhammed -although he had committed no fault against the British, nor indeed given them any cause for offence- now became the bête noire of the Government of India."; the former British Ambassador to Moscow (1988-1992), Braithwaite, claims the British justification of the First Anglo-Afghan War was based on British "forgeries", "manufactured evidence", and "doctored" reports (*Afgantsy*, 25).

that the British had by then given up any hope of permanently ruling the country.¹³²¹

The British, however, did at least secure a treaty which allowed them to conduct Afghanistan's foreign affairs.¹³²² Britain was also the first, but by no means the last, foreign invader to learn a hard lesson: despite its poverty and its archaic structures, Afghanistan was a country that could not easily be occupied and pacified, even when the preceding military campaign had been swift and successful.

It took a third war, the Third Anglo-Afghan War in 1919, also referred to as the "War of Independence", for Afghanistan to achieve full independence.¹³²³ The Afghan Amir exploited Britain's weakness in the aftermath of the First World War, and launched an attack across the Durand Line, which had been imposed by the British as the dividing line between the Afghan and the British Indian administrations in 1893, and which still serves as the controversial Afghan-Pakistani border.¹³²⁴ Afghanistan, now fully

¹³²¹ On September 21, 1878, a British expeditionary force attempted to march through the Khyber Pass. Based on the anticipated Afghan refusal of passage, the Second Anglo-Afghan war was declared (Loyn, *Butcher*, 101; Rasanayagam, *Afghanistan*, 7; Bellew, "British", 46-48; Dupree, *Afghanistan*, 408-409); the former British Ambassador to Moscow, Braithwaite, has stated that the Second Anglo-Afghan War was launched by the British with a "brutality almost as cynical" [as during the First Anglo-Afghan War], and claims the war was a "consequence" of "British bullying" (*Afgantsy*, 25). Once again the British suffered catastrophic defeats, followed by reprisals (Loyn, *Butcher*, 110-114; Rasanayagam, *Afghanistan*, 8-9; Dupree, *Afghanistan*, 410-411; Braithwaite, *Afgantsy*, 25, 26; he concludes that "both wars" saw "spectacular" British "reverses", a "technical" military victory, followed by "salutary revenge". Both "victories", according to Braithwaite, nevertheless turned out to be "pyrrhic triumphs.").

¹³²² *Treaty of Gandamak*, Article 3; available at:

<http://www.khyber.org/pashtohistory/treaties/gandamakreaty.shtml>; last accessed 26/10/2011.

¹³²³ Loyn, *Butcher*, 169-170; Fromkin, *A Peace*, 421-422; Rasanayagam, *Afghanistan*, 19; Braithwaite, *Afgantsy*, 15, 26; Behrens, *Die Afghanistan*, 34; Susanne Koelbl, Olaf Ihlau, *Krieg am Hindukusch, Menschen und Mächte in Afghanistan*, Berlin: Pantheon Verlag, 2009, 18; Gerd Linde, "Afghanistan und der Nachbar im Norden" in *Die sowjetische Intervention in Afghanistan, Entstehung und Hintergründe einer weltpolitischen Krise*, Heinrich Vogel (ed.), Baden-Baden: Nomos Verlagsgesellschaft, 1980, 67-92, 71; Dupree, *Afghanistan*, 442-443.

¹³²⁴ Afghan President Karzai has only recently referred to the Durand Line as a "line of hatred that raised the wall between the two brothers"; see: "Pakistan's Ethnic Fault Line", Selig S. Harrison, *The Washington Post*, 11/05/2009; available at: <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/10/AR2009051001959.html>; last accessed 26/10/2011; the UK Ambassador to Kabul in 2008-2009 and again in 2010, Sherard Cowper-Coles, also confirms Karzai's refusal to officially recognize the Durand line as the official border (in: *Cables from Kabul, The inside story of the West's Afghanistan campaign*, London: Harper Press, 2011, at 69); Braithwaite, *Afgantsy*, 28.

independent, nevertheless, remained completely dependent on foreign assistance for its survival as a state.¹³²⁵

Following the Second World War, only the Soviet Union was prepared to offer the necessary support to Afghanistan, which in turn led to an increasing dependency on the USSR.¹³²⁶ Despite substantial Soviet assistance, the country, nevertheless, remained mired in poverty and prone to rebellions and conflicts with Pakistan. The monarchy having already been abolished in a coup in 1973, the Afghan communists were able to take power following the so-called *Saur Revolution* of 1978. Communist infighting and a radical reform programme initiated by the new government led to civil war. At first rejecting Afghan requests for a military intervention, the Soviet government changed its mind in late 1979: at Christmas the Soviet invasion of Afghanistan began.

¹³²⁵ The share of foreign aid as a “source of finance” for Afghan “state expenditure” rose from 18 % (1952) to 69 % (1972); Rasanayagam, *Afghanistan*, 54, 57; he approvingly quotes Bernard Rubin as stating that Afghanistan was a “rentier state” par excellence; Maley, *The Afghanistan*, 13 (in 1963, 49 % of state expenditure was financed by aid).

¹³²⁶ Between 1953 and 1973 the Soviet Union provided assistance to the tune of \$ 1.265 billion, other communist states provided a further \$ 110 million (Rasanayagam, *Afghanistan*, 56; William Maley, *The Afghanistan Wars*, 2nd. ed., Basingstoke: Palgrave Macmillan, 2009, 19 (he provides the same figures, but covering the whole period until 1979); Wolfgang Berner, “Der Kampf um Kabul: Lehren und Perspektiven“ in *Die sowjetische Intervention in Afghanistan, Entstehung und Gründe einer weltpolitischen Krise*, Heinrich Vogel (ed.), Baden-Baden: Nomos Verlagsgesellschaft, 1980, 319-366, 332; he also provides the same figures for the period up to 1978. He points out that Afghanistan was the fifth largest recipient of Soviet aid over all, being the largest recipient based on aid per head; Hans Bräker, “Die langfristigen Interessen der Sowjetunion in der Region Mittelost und die Islam-Frage in Zentralasien“ in *Die sowjetische Intervention in Afghanistan, Entstehung und Hintergründe einer weltpolitischen Krise*, Heinrich Vogel (ed.), Baden-Baden: Nomos Verlagsgesellschaft, 1980, 15-66, 26 (\$ 1.379 bn, period up to 1977); Astrid von Borcke, “Die sowjetische Interventionsentscheidung: Eine Fallstudie zum Verhältnis sowjetischer Außen- und Innenpolitik “ in *Die sowjetische Intervention in Afghanistan, Entstehung und Hintergründe einer weltpolitischen Krise*, Heinrich Bauer (ed.), Baden-Baden: Nomos Verlagsgesellschaft, 1980, 119-180, 143 (\$ 1.3 bn between 1954 and 1978); Hyman, *Afghanistan*, 33-34 (\$ 900 million between 1957 and 1972, 60 % of all civil aid); Helmut Hubel, *Die sowjetische Nah- und Mittelostpolitik, Bestimmungsfaktoren und Ziele sowie Ansatzpunkte für Konfliktregelungen zwischen Ost und West*, Bonn: Europa Union Verlag GmbH, 1982, 18 (\$ 1.29 bn between 1954 and 1979, and a further \$ 135 million from other East European states during that period). As early as 1954 the USSR also began dispatching military advisors and providing military equipment to Afghanistan (Loyn, *Butcher*, 183-184; Rasanayagam, *Afghanistan*, 33-34; according to him, Afghanistan received \$ 1,240 million in military aid from the Soviet Union between 1956 and 1978); Maley, *The Afghanistan*, 18-19 (\$ 1.25 bn between 1955 and 1979); Berner, “Der Kampf”, 331, 332 (he estimates Soviet military aid to have reached \$ 600 million by 1977); Hyman, *Afghanistan*, 29, 34 (military aid \$ 300 million between 1957 and 1972); Hubel, *Die sowjetische*, 24-25 (Soviet military exports to Afghanistan worth \$ 300 million between 1974-1978; 4000 Soviet military advisors in Afghanistan in 1979).

This would prove to be a costly miscalculation. Massively supported by the USA, Saudi Arabia, Pakistan, and also China, the Afghan rebels, who came to be known as the *mujahedeen*, proved to be invincible for the Soviets. Having lost thousands of men and spent billions of dollars, the Soviets withdrew from the country in 1989, having arguably experienced their “Vietnam”.

The Soviet invasion of Afghanistan was also the turning point in US-Afghan relations. Having more or less ignored Afghanistan for decades, the Soviet invasion of the country heralded intense American interest. Although covert support of the Afghan rebels had been authorized by US President Carter prior to the Soviet invasion, this support then escalated dramatically, culminating in 1987 at about \$ 600-700 million/year.

American joy at the Soviet defeat and the collapse of the communist government in Kabul in 1992 would, however, prove to be short-lived. Some of those “heroic” Afghan rebels the USA had supported came to power in 1996 in the guise of the Taliban. Arab insurgents, who had supported the *mujahedeen* during their battle with the Soviets, subsequently returned to Afghanistan, and became “guests” of the new Taliban government. Among them was the Saudi Arabian Osama bin Laden, who had by then created an effective terrorist organization called Al Qaeda. Bin Laden’s wrath was focused on the United States: he and his supporters planned and organized the terrorist attacks that brought down the twin towers of the WTC in New York on September 11, 2001.

Once the Taliban government had refused to extradite the terrorists to the USA, the next attack on Afghanistan followed in October 2001: the American-led “Operation *Enduring Freedom*”, which was meant to be the first military campaign in the “War

on Terror”. This campaign has yet to come to an end, its objectives and aims becoming increasingly hazy. Certainly, the terrorists who were originally supposed to be apprehended or eliminated appear -in large numbers- to have fled to neighbouring Pakistan, while the war in Afghanistan continues.

This chapter will demonstrate that none of these less than successful foreign interventions in Afghanistan since 1979 were justified under international law. Following a brief outline of the immediate historical background, the Soviet invasion of Afghanistan in late 1979 will be examined in depth. It will be explained that none of the official justifications put forward by the Soviet Union could be reconciled with international law. As civil war had erupted in Afghanistan, the Soviet Union could not claim a right of intervention, or counter-intervention on the basis of the Afghan government’s invitation. This was also not a case of collective self-defence under Article 51 UN Charter, or Article 4 of the Afghan-Soviet Friendship Treaty, as claimed by the Soviets, as no armed attack on Afghanistan (not to mention the Soviet Union) had taken place. Any justification based on the Brezhnev Doctrine was clearly contrary to the UN Charter, as the concept of a distinct, regional socialist international law, on which the doctrine was founded, could not be reconciled with it. Soviet justifications are further undermined by the facts: neither was there a request by the Afghan government for its own removal by Soviet troops, as subsequently occurred, nor was the Brezhnev Doctrine intended to apply to non-aligned states such as Afghanistan.

The legality of the massive US support for the *mujahedeen* will then be scrutinized. It will be argued that the “covert” CIA Operation in support of the Afghan insurgents was also contrary to international law. There had been no request by a legitimate

Afghan organ, which could have possibly justified action in collective self-defence. The USA could also not claim to be supporting a “war of national liberation”, as any military support of liberation groups had remained illegal under customary international law, ironically mainly due to consistent US-led, western opposition against any attempt to legalize it.

Next, the terrorist attacks of 9/11, and the US-led response will be examined. It will be demonstrated that Operation *Enduring Freedom* was illegal under international law. Even if it were accepted that “reprisals” against terrorists in foreign states may have become permissible under customary international law, which is contrary to the view taken here, the attack on Afghanistan and its aftermath were clearly not proportional, and therefore neither covered by the right of self-defence under the UN Charter, nor justified under customary international law.

The discussions surrounding the legality of the foreign interventions outlined above will be accompanied by an analysis of the intervenors’ motives for acting as they did. It will become evident that very rarely, if at all, was Afghanistan, or were the Afghans the issue at stake in the conflicts that repeatedly ravaged their country. Even more importantly for the argument made in this thesis, it will be shown that both the Soviet Union and the United States, instead of achieving their strategic goals, ended up paying a heavy price for their ill-advised interventions.

In its attempt to create stability on its borders and to halt what it viewed as American and Chinese encroachment on its sphere of interest, the USSR failed spectacularly. The communist government the Soviets set out to save was, in fact, to outlive the USSR itself. Some have argued that the costly fiasco in Afghanistan contributed to the downfall of the Soviet system.

On face of it, it would therefore seem that the USA, in its attempt to humiliate the USSR in Afghanistan, was successful in resorting to an illegal course of action by massively supporting the *mujahedeen* with sophisticated weapons and money. When subsequent events are taken into consideration, this assessment becomes extremely doubtful. Pakistan, a major US ally in this volatile region, became increasingly destabilized, not least due to the influx of *mujahedeen* and their Arab supporters. Furthermore, by supporting the Afghan rebels and their Arab partners, the US taxpayer later turned out to have also funded America's future enemies, who would go on to organize the massive terrorist attack of September 11, 2001.

This cataclysmic event in turn led to the "War on Terror", the first instalment of which was the large-scale attack on Afghanistan in October 2001. Though militarily extremely successful in the short term, there can be little doubt, that with the fighting continuing ten years later, this venture, too, has turned out be a costly mistake. Far from stabilizing Afghanistan, Operation *Enduring Freedom* has brought destabilized, nuclear-armed Pakistan, once again host to thousands of fleeing Taliban and Al Qaeda supporters, to the brink of becoming a failed state. Meanwhile, Iran, the USA's foremost regional enemy, has benefitted from ill-considered American policy choices regarding Iraq and Afghanistan. Not only has the chaos in both countries in the aftermath of western interventions helped Iran to regain its foothold among the sizeable Shiite populations in both countries, it has also seen two regimes it despised (Saddam Hussein and the Taliban) deposed by the USA.

Afghanistan is thus an illuminating example of where poor policy choices, taken in contravention of international law, can lead.

A. The Soviet invasion of Afghanistan in December 1979

1. Developments leading up to the invasion

By 1978 the regime of President Daoud, who had abolished the monarchy in 1973 with the help of Afghan communists,¹³²⁷ was crumbling. His foreign policy had come apart: Iran was in turmoil, and he had been forced to drop the issue of “Pashtunistan”. In 1976 he had met President Bhutto, and they had agreed to adopt a policy of non-interference in their respective internal affairs.¹³²⁸ Even more dangerously, discontent and unrest was spreading in Afghanistan itself, involving both communists and religious extremists.¹³²⁹

His attempts to create a one-party state,¹³³⁰ and his moves to get rid of his erstwhile communist allies,¹³³¹ led to unrest. Following the assassination of an important communist official in April 1978, there had been large demonstrations. In panic, Daoud decided to have all the leading communists arrested.¹³³² The military, very

¹³²⁷ Loyn, *Butcher*, 180-181; Steve Galster, “Afghanistan: The Making of U.S. Policy, 1973-1990” in *Volume II: Afghanistan: Lessons From the Last War, The September 11th Sourcebooks*, The National Security Archive: 2001, 1-28, 5-6; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/essay.html>; last accessed 26/10/2011; Rasanayagam, *Afghanistan*, 60-61; Maley, *The Afghanistan*, 15; Behrens, *Die Afghanistan*, 36; Braithwaite, *Afgantsy*, 31; Cynkin, “Aftermath”, 270.

¹³²⁸ Rasanayagam, *Afghanistan*, 64.

¹³²⁹ Loyn, *Butcher*, 182-183; Ross, “Beyond”, 101; Galster, “Afghanistan”, 6-7; Ulfkotte, *Kontinuität*, 302-303.

¹³³⁰ William Blum, *Killing Hope, US Military & CIA Interventions since WWII*, London: Zed Books Ltd., 2003, 339; W. Michael Reisman/ James Silk, “Which Law Applies to the Afghan Conflict?”, *AJIL*, Vol. 82, 1988, 459-486, 468; Galster, “Afghanistan”, 6; Rasanayagam, *Afghanistan*, 61-62, 65; Maley, *The Afghanistan*, 15-16; Linde, “Afghanistan”, 77; Hyman, *Afghanistan*, 66; Ahmed Rashid, *Descent Into Chaos, Pakistan, Afghanistan And The Threat To Global Security*, London: Penguin Books Ltd., 2009, 9; Braithwaite, *Afgantsy*, 31-32; Peter Tomsen, *The Wars of Afghanistan, Messianic Terrorism, Tribal Conflicts, and the Failures of Great Powers*, Philadelphia: Public Affairs, 2011, 107; Jonathan Steele, *Ghosts of Afghanistan, The Haunted Battleground*, London: Portobello Books, 2011, 66.

¹³³¹ Blum, *Killing*, 339; Cynkin, “Aftermath”, 270, 272; Reisman/ Silk, “Which”, 467-468; Rasanayagam, *Afghanistan*, 64; Behrens, *Die Afghanistan*, 43-44; Linde, “Afghanistan”, 77; Ulfkotte, *Kontinuität*, 302; Hyman, *Afghanistan*, 66; Olivier Roy, *The Lessons of the Soviet/Afghan War*, Adelphi Papers 259, London: The International Institute for Strategic Studies, 1991, 10, 11; Braithwaite, *Afgantsy*, 31-32, 39-42; Tomsen, *The Wars*, 107, 111; Steele, *Ghosts*, 66.

¹³³² Blum, *Killing*, 339; Cynkin, “Aftermath”, 272; Galster, “Afghanistan”, 8; Rasanayagam, *Afghanistan*, 67; Maley, *The Afghanistan*, 22-23; Behrens, *Die Afghanistan*, 45; Linde, “Afghanistan”, 78; Berner, “Der Kampf”, 353-356; Ulfkotte, *Kontinuität*, 303; Hyman, *Afghanistan*, 75-76; Braithwaite, *Afgantsy*, 40-41; Tomsen, *The Wars*, 111.

much dominated by officers trained in the Soviet Union, and therefore often sympathetic to the communist cause,¹³³³ decided to depose and kill Daoud in a coup, which was later referred to as the *Saur Revolution*.¹³³⁴ Whether the Soviet Union instigated the coup is still contentious, but, based on the available information, that seems unlikely.¹³³⁵

The old divisions within the Afghan communist movement¹³³⁶ reemerged immediately on taking power.¹³³⁷ The more radical group, *Khalq*, emerged victorious

¹³³³ George Lenczowski, "The Soviet Union and the Persian Gulf: an encircling Strategy", *Int'l J.*, Vol. 37, 1981-1982, 307-327, 317; Rasanayagam, *Afghanistan*, 69; Maley, *The Afghanistan*, 23; Behrens, *Die Afghanistan*, 46; Berner, "Der Kampf", 332; he points out that by 1977 3700 Afghan officers had received their training in the USSR; Hubel, *Die sowjetische*, 24 (3725 Afghan officers trained in the USSR between 1955 and 1979, a further 285 trained in East European states); Rashid, *Descent*, 9; Steve Coll, *Ghost Wars, The Secret History of the CIA, Afghanistan And Bin Laden, From the Soviet Invasion to September 10, 2001*, London: Penguin Books Ltd., 2005, 39; Braithwaite, *Afgantsy*, 32.

¹³³⁴ Blum, *Killing*, 339; Galster, "Afghanistan", 8; Rasanayagam, *Afghanistan*, 69; Rashid, *Descent*, 9; Coll, *Ghost*, 39; Braithwaite, *Afgantsy*, 33, 37, 40-41; Tomsen, *The Wars*, 111-114.

¹³³⁵ Cyrus Vance, *Hard Choices*, New York: Simon and Schuster, 1983, 386; the US Secretary of State at the time acknowledges "there was room for doubt" regarding Soviet involvement in the coup; Braithwaite, *Afgantsy*, 37, 41-42; the former British Ambassador to Moscow (1988-1992) concludes that "reliable evidence that the Russians were behind the coup is lacking"; he also mentions that the Head of the KGB's external operations at the time of the coup even later always denied KGB involvement; Rasanayagam, *Afghanistan*, 70; he points out that the Soviet news agency TASS at first referred to the events in Afghanistan as a "coup d'état", not as a revolution, indicating unpreparedness; a point also made by Maley, *The Afghanistan*, 20, 23-24; Galster, "Afghanistan", 8; he claims that "U.S. Embassy officials in Kabul...detected no Soviet hand in the coup"; Tomsen, *The Wars*, 118-119; the US Special Envoy to the *mujahedeen* (1989-1992) also concludes that the Afghans had come to a "unilateral decision" to stage a coup, a move that, according to him, "alarmed" the Soviets; Berner, "Der Kampf", 333-334, 340-345, 356-357; he points out that relations between the Soviet and the Afghan communist parties were bad, and describes many instances when the Soviets provocatively slighted their Afghan counter-parts, events he describes as "being without precedent" as far as foreign communist parties are concerned (at 341); Ross, "Beyond", 109; Ulfkotte, *Kontinuität*, 303; Blum, *Killing*, 340; Linde, "Afghanistan", 81; he does not speculate, but does note that at first the Soviet Union "did not comment" on the coup in Afghanistan; Behrens, *Die Afghanistan*, 44-46; he, on the other hand, claims the Soviet Union was informed, and did, at least, not object; a view shared by von Borcke, "Die sowjetische", 133, 165; and Roy, *The Lessons*, 11; Bräker, "Die langfristigen", 17; he goes further, and claims the USSR at least supported, if not even organized, the coup. He argues that a military coup in Afghanistan was impossible, without the many Soviet military advisors knowing about and supporting it.

¹³³⁶ Rasanayagam, *Afghanistan*, 49-50; Maley, *The Afghanistan*, 19-20; Behrens, *Die Afghanistan*, 42-43; Hyman, *Afghanistan*, 58; Roy, *The Lessons*, 10-11; Beverley Male, *Revolutionary Afghanistan, A Reappraisal*, London: Croom Helm Ltd., 1982, 36-51; Koelbl, Ihlau, *Krieg*, 179; Steele, *Ghosts*, 67-69.

¹³³⁷ Ross, "Beyond", 101; Cynkin, "Aftermath", 273; Reisman/Silk, "Which", 468; Galster, "Afghanistan", 8; Rasanayagam, *Afghanistan*, 70-73; Maley, *The Afghanistan*, 24-25; Behrens, *Die Afghanistan*, 46-47; Linde, "Afghanistan", 83; Berner, "Der Kampf", 334-335; Hyman, *Afghanistan*, 81; Dupree, *Afghanistan*, 773; Rashid, *Descent*, 9; Braithwaite, *Afgantsy*, 38, 43; Tomsen, *The Wars*, 127-129.

from this power struggle with the more moderate *Parcham* faction.¹³³⁸ By the time of the Soviet invasion most of the *Parcham* leaders were living in exile.¹³³⁹

The new President, Taraki, and Amin, who would later become Prime Minister, embarked on a radical reform programme, which also entailed massive repression.¹³⁴⁰

Some reforms were well-intentioned, but not properly thought through. The land reform, for example, resulted in a collapse in agrarian production.¹³⁴¹ Other reforms were met with massive resistance, based on religious and tribal traditions, and led to rebellions across the country.¹³⁴²

Even supporters of the modernisation programme were alienated by the repression that accompanied it.¹³⁴³ The (still communist) Afghan government later officially admitted that the state had been directly responsible for the “disappearance” of at least

¹³³⁸ Cynkin, “Aftermath”, 273; Reisman/Silk, “Which”, 468; Rasanayagam, *Afghanistan*, 73; Maley, *The Afghanistan*, 24; Behrens, *Die Afghanistan*, 47; Hyman, *Afghanistan*, 81-82; Roy, *The Lessons*, 12; Dupree, *Afghanistan*, 773; Braithwaite, *Afgantsy*, 38.

¹³³⁹ Ross, “Beyond”, 103; Renate Johanna Matsson, “Politische und völkerrechtliche Aspekte der sowjetischen Invasion Afghanistans 1979/1980 und die Position der Sowjetunion”, *Österreichische Zeitschrift für Außenpolitik*, Vol. 21, 1981, 79-96, 87 (referring in particular to Karmal); Cynkin, “Aftermath”, 273; Reisman/Silk, “Which”, 468; Rasanayagam, *Afghanistan*, 73; Maley, *The Afghanistan*, 24; Dupree, *Afghanistan*, 774.

¹³⁴⁰ Loyn, *Butcher*, 184; Lenczowski, “The Soviet Union”, 317; Ross, “Beyond”, 102; Cynkin, “Aftermath”, 273-274; Reisman/Silk, “Which”, 468-469; Rasanayagam, *Afghanistan*, 74-79; Maley, *The Afghanistan*, 25-26; Behrens, *Die Afghanistan*, 46-47, 52-53; von Borcke, “Die sowjetische”, 166; Ulfkotte, *Kontinuität*, 309-310; Braithwaite, *Afgantsy*, 38, 43, 44; Tomsen, *The Wars*, 132-134.

¹³⁴¹ Loyn, *Butcher*, 184; Loyn points out that the expropriated land owners were often influential within their communities, especially the religious leaders, and were often able to instigate unrest; a point also made by Hyman, *Afghanistan*, 18; he also points out that the “village mullahs” were “very much on the side of the status quo”, as they often were landowners; Berner, “Der Kampf”, 336; Cynkin, “Aftermath”, 274, 275; Rasanayagam, *Afghanistan*, 75; Behrens, *Die Afghanistan*, 52-53; Ulfkotte, *Kontinuität*, 309-310; Hyman, *Afghanistan*, 87; Braithwaite, *Afgantsy*, 42; Tomsen, *The Wars*, 132-133; Steele, *Ghosts*, 71.

¹³⁴² Lenczowski, “The Soviet Union”, 317; Matsson, “Politische”, 83; Ross, “Beyond”, 102; Blum, *Killing*, 339, 341-342; Cynkin, “Aftermath”, 274, 275-276; Reisman/Silk, “Which”, 468-469; Galster, “Afghanistan”, 8-10; Rasanayagam, *Afghanistan*, 74-79; Behrens, *Die Afghanistan*, 47, 49, 52-53; Linde, “Afghanistan”, 83; von Borcke, “Die sowjetische”, 166; Berner, “Der Kampf”, 357; Ulfkotte, *Kontinuität*, 309-310.

¹³⁴³ In a post-invasion editorial the East German daily *Neues Deutschland* of December 29, 1979, Amin was accused of heading a “bloody regime”, and of having been responsible for the “terror caused by a reactionary clique”; reprinted in *Strategischer Überfall - das Beispiel Afghanistan, Quellenband- Teil 1*, Paul Bucherer-Dietschi, Albert Alexander Stahel, Jürg Stüssi-Lauterburg (eds.), Liestal: Grauwiller Offsetdruck, 1991, 247-248; Reisman/Silk, “Which”, 469; Maley, *The Afghanistan*, 28; Berner, “Der Kampf”, 357; Hyman, *Afghanistan*, 102, 110-111; Coll, *Ghost*, 39; Koelbl, Ihlau, *Krieg*, 179-180; Braithwaite, *Afgantsy*, 6, 44; Steele, *Ghosts*, 75.

12,000 people in the short period between April 1978 and late 1979,¹³⁴⁴ with some claiming the true number to be 50,000-100,000.¹³⁴⁵ These numbers do not include those killed in the internal unrest.

As released Politburo documents demonstrate, the Soviets were becoming increasingly worried about developments in Afghanistan. Although an Afghan-Soviet *Treaty of Friendship* was concluded on December 5, 1978, they viewed the *Khalq* leadership with distrust.¹³⁴⁶ They were increasingly alarmed by the scale of repression unleashed by the Afghan leaders, which was bound to result in the loss of the limited support they could still lay claim to, and by the reform programme itself, which the

¹³⁴⁴ In their Report to the Central Committee after the Soviet invasion Andropov, Gromyko, Ustinov, and Ponomarev state the following: "H. Amin has established a regime of personal dictatorship in the country...The scale of political repression was taking on increasingly mass proportions. Just during the period following the events of September 600 members of the PDPA,...were executed without trial or investigation."; *Report on Events in Afghanistan on Dec. 27-28, 1979*, 31/12/1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 42, Document 10); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 11, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; Rasanayagam, *Afghanistan*, 78; he refers to an Afghan government announcement of February 1980; Loyn, *Butcher*, 187; Loyn, however, attributes the admittance to Amin when he took over as President; Maley, *The Afghanistan*, 28; he also attributes the admission to Amin, but goes on to state that Amin himself had pursued his perceived enemies with "fanatical ferocity"; Ulfkotte, *Kontinuität*, 314; he also attributes the admission to Amin's government, but goes on to claim that Amin himself was responsible for the "disappearance" of a further 1000-4500 people between September and December 1979; Hyman, *Afghanistan*, 158; Braithwaite, *Afgantsy*, 75; Tomsen, *The Wars*, 161; Steele, *Ghosts*, 75.

¹³⁴⁵ Rasanayagam, *Afghanistan*, 78; Male, *Revolutionary*, 201; Braithwaite, *Afgantsy*, 76.

¹³⁴⁶ At the March (1979) Politburo Meeting Kirilenko summarized what he thought of the Afghan leadership: "We gave it everything. And what has come of it? It has come to nothing of any value" (at 15); Defence Secretary Ustinov declared that the "Afghan leadership is poorly handling very many matters" (at 20); Chief of the KGB Andropov added "Just what exactly is going on in Afghanistan? It has to do with leadership. The leadership does not recognize which forces support it...Educational matters have been poorly managed..." (at 20); *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; similarly, in a Report to the Central Committee of the Soviet Communist Party of June 28, 1979, by Gromyko, Ustinov, Andropov, and Ponomarev, it is said of Taraki and Amin that they "none too rarely make mistakes and commit violations of legality"; see also: Document 4; Reisman/Silk, "Which", 469; Berner, "Der Kampf", 336; Hyman, *Afghanistan*, 152; Coll, *Ghost*, 41; Braithwaite, *Afgantsy*, 38; Tomsen, *The Wars*, 131-134; Steele, *Ghosts*, 74-75.

Soviet leadership realized was “too much, too fast”.¹³⁴⁷ Both developments were blamed mainly on Amin.¹³⁴⁸

Things spiralled out of control in the spring of 1979.¹³⁴⁹ In February, the US Ambassador was killed during a botched rescue mission after he had been taken hostage by rebels.¹³⁵⁰ In March 1979 Herat erupted. Troops sent to the city deserted, and Soviet advisors living there were killed, together with their families.¹³⁵¹ During this upheaval there were repeated requests by both Taraki and Amin for a Soviet

¹³⁴⁷ At the March (1979) Politburo Meeting Kirilenko declared that Taraki must be told that “executions, torture and so forth cannot be applied on a massive scale” (at 7) and, referring to Taraki and Amin, said “it was they who executed innocent people for no reason” (at 15); Soviet Prime Minister Kosygin added “it seems to me that we must speak to Taraki and Amin about the mistakes they have permitted to occur during this time. In reality, even up to the present time, they have continued to execute people that do not agree with them; they have killed off almost all of the leaders” (at 6); even Chief of the KGB Andropov criticized that Taraki and Amin “execute their political opponents” (at 20); *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; in a “Report” to the Central Committee of the Soviet Communist Party, of April 1, 1979, Gromyko, Andropov, Ustinov, and Ponomarev state that the Afghan government was guilty of “crucial mistakes”, and that even the army -the “main pillar of the government’s support”- was affected by discontent due to “unjustified repression”; reprinted (incl. German translation) in *Sowjetische Geheimdokumente zum Afghanistankrieg (1978-1991)*, Pierre Allan et al. (eds.), Zürich: vdf Hochschulverlag, 1995, 89; Galster, “Afghanistan”, 11; Gerhard Wettig, “Die Afghanistan-Entscheidung Moskaus- Indiz für eine veränderte außen- und sicherheitspolitische Orientierung?” in *Die sowjetische Intervention in Afghanistan, Entstehung und Hintergründe einer weltpolitischen Krise*, Heinrich Bauer (ed.), Baden-Baden: Nomos Verlagsgesellschaft, 1980, 247-272, 262-263; Hyman, *Afghanistan*, 106-107; Braithwaite, *Afgantsy*, 6, 43-44; Tomsen, *The Wars*, 133-134; Steele, *Ghosts*, 73-75.

¹³⁴⁸ In their Report to the Central Committee after the Soviet invasion Andropov, Gromyko, Ustinov, and Ponomarev state the following: “H. Amin has established a regime of personal dictatorship in the country...The scale of political repression was taking on increasingly mass proportions.”; *Report on Events in Afghanistan on Dec. 27-28, 1979*, 31/12/1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 42, Document 10); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 11; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; Blum, *Killing*, 342; Cynkin, “Aftermath”, 277; Reisman/Silk, “Which”, 470; Galster, “Afghanistan”, 11-12; Behrens, *Die Afghanistan*, 53; von Borcke, “Die sowjetische”, 166; Wettig, “Die Afghanistan”, 260, 262-263; Berner, “Der Kampf”, 335, 336; Roy, *The Lessons*, 12; Koelbl, Ihlau, *Krieg*, 179-180; they describe Amin as “Afghanistan’s Stalin”; Braithwaite, *Afgantsy*, 59, 74, 75-76; Tomsen, *The Wars*, 147.

¹³⁴⁹ Blum, *Killing*, 341.

¹³⁵⁰ Matsson, “Poltische”, 84; Reisman/Silk, “Which“, 469; Galster, “Afghanistan“, 10; Rasanayagam, *Afghanistan*, 79; Ulfkotte, *Kontinuität*, 308-309; Tomsen, *The Wars*, 125-126.

¹³⁵¹ Loyn, *Butcher*, 185; Cynkin, “Aftermath”, 276; Reisman/Silk, “Which”, 469; Galster, “Afghanistan”, 10; Rasanayagam, *Afghanistan*, 79-80; Maley, *The Afghanistan*, 26-27; Behrens, *Die Afghanistan*, 49; Hyman, *Afghanistan*, 100-101; Roy, *The Lessons*, 12; Braithwaite, *Afgantsy*, 5, 6-7, 44-45; Tomsen, *The Wars*, 140.

military intervention.¹³⁵² Although there was some evidence of Chinese, Pakistani, and Iranian support for the rebels,¹³⁵³ the Soviet leaders concluded it was mainly an internal revolt they would and could not intervene in.¹³⁵⁴ Not only would such a move be illegal, but the risks were far too great.¹³⁵⁵ General Secretary Brezhnev summarized

¹³⁵² Soviet Prime Minister Kosygin, when reporting to the Politburo on a telephone conversation he had had with Taraki on March 17, 1979, states that Taraki “requests that we dispatch Tadzhiks to serve as crews for tanks and armoured cars, dressed in Afghan uniforms” (at 11); Foreign Secretary Gromyko reports of a similar request made by the then Afghan Foreign Secretary Amin (at 17); *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at:

<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; see also:

Document 2 (Transcript of Telephone Conversation between Kosygin and Taraki of March 18, 1979, during which the Afghan request is made); Loyn, *Butcher*, 186; he claims there were twenty requests; Blum, *Killing*, 341-342; Rasanayagam, *Afghanistan*, 87-88; Maley, *The Afghanistan*, 26-27; Julius Mader (writing for the GDR military publishers), *CIA-Operation Hindu Kush, Militärpolitik aktuell*, Berlin: Militärverlag der Deutschen Demokratischen Republik, 1988, 6; Mader claims there were eleven Afghan requests for Soviet intervention; Coll, *Ghost*, 42; Braithwaite, *Afgantsy*, 45-57, 62, 82; Tomsen, *The Wars*, 140-141; Steele, *Ghosts*, 75.

¹³⁵³ Gates, *From*, 131-134, 143-149; US Defence Secretary until recently, Gates was the Deputy Director of the CIA at the time. He outlines how the Pakistanis and Iranians were supporting the *mujahedeen* prior to the Soviet invasion, and asked for US support in that endeavour. Gates also points out that the CIA was looking at options of granting such support as of early 1979, and confirms that US President Carter authorized covert funding of the *mujahedeen* in July 1979; Coll, *Ghost*, 42-46; Braithwaite, *Afgantsy*, 50, 51.

¹³⁵⁴ Soviet Foreign Secretary Gromyko, at the *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1 (at 14); available at:

<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; a sentiment echoed by Soviet Prime Minister Kosygin at the same meeting (at 19); in a “Report” to the Central Committee of the Soviet Communist Party, of April 1, 1979, Gromyko, Andropov, Ustinov, and Ponomarev conclude that the anti-government “performances” were of a “predominately internal character” and that the involvement of Soviet troops would harm Soviet foreign policy goals and reveal the Afghan government’s weakness. They go on to suggest that measures have to be taken to combat external interference; reprinted (incl. German translation) in *Sowjetische Geheimdokumente zum Afghanistankrieg (1978-1991)*, Pierre Allan et al. (eds.), Zürich: vdf Hochschulverlag, 1995, 91, 99; Politburo Member Andrej Kirilenko (at 4, 9-10), Prime Minister Kosygin (at 6, 11, 14), Chief of the KGB Andropov (at 14) at the *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at:

<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; Loyn, *Butcher*, 186; Braithwaite, *Afgantsy*, 45-57; Steele, *Ghosts*, 75.

¹³⁵⁵ General Secretary Brezhnev (at 16), Prime Minister Kosygin (at 14), Chairman of the KGB Andropov (at 13, 14), Defence Secretary Ustinov (at 20) and Foreign Secretary Gromyko (at 13) at the *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at:

<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; Loyn, *Butcher*, 186; Braithwaite, *Afgantsy*, 45-57.

the situation as follows: "Their army is falling apart, and we are supposed to wage the war for them."¹³⁵⁶ However, the Soviets were prepared to offer material assistance.¹³⁵⁷

Herat was then to some extent brought under control, but the next few months made it plain that the situation was deteriorating. Afghan soldiers were deserting, and there were new outbreaks of unrest.¹³⁵⁸ There can be no doubt that, by this time already, civil war was raging in the country.¹³⁵⁹

Although there is no clear evidence for this, it seems likely that by September 1979 the Soviets had decided that Amin had to go.¹³⁶⁰ It is widely assumed that President Taraki and the Soviet leadership agreed the final steps for his removal during the former's stop-over in Moscow on a flight back from Havana in early September

¹³⁵⁶ General Secretary Brezhnev (at 20); *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; similarly, Prime Minister Kosygin told Taraki in Moscow on March 20, 1979: "I cannot understand why the questions of pilots and tank operators keeps coming up. This is a completely unexpected question for us. And I believe it is unlikely that socialist countries will agree to this. The question of sending people who would sit in your tanks and shoot at your people"; *Record of Meeting*, March 20, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 14, Document 26); NSA Document 3 (at 10).

¹³⁵⁷ Discussions and decisions taken at the *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1 (at 4-5); available at:

<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; Instructions to the USSR Ambassador in Kabul dated after June 28, 1979; he is told to inform the Afghan President about further aid the USSR had decided to grant the Afghans; reprinted (incl. German translation) in *Sowjetische Geheimdokumente zum Afghanistankrieg (1978-1991)*, Pierre Allan et al. (eds.), Zürich: vdf Hochschulverlag, 1995, 108-111; Rasanayagam, *Afghanistan*, 85-87; Braithwaite, *Afgantsy*, 49-50; Tomsen, *The Wars*, 141-142.

¹³⁵⁸ Loyn, *Butcher*, 186; Cynkin, "Aftermath", 276; Reisman/Silk, "Which", 470; Behrens, *Die Afghanistan*, 51; Linde, "Afghanistan", 84; Berner, "Der Kampf", 357; Braithwaite, *Afgantsy*, 7, 44, 53-54, 58, 76.

¹³⁵⁹ Braithwaite, *Afgantsy*, 84.

¹³⁶⁰ Cynkin, "Aftermath", 277; Rasanayagam, *Afghanistan*, 81-82; he mentions the fact that the Ambassador of the GDR in Kabul had informed the U.S. chargé d'affaires in July 1979 that Moscow believed the "departure of Prime Minister Hafizullah Amin" was essential; von Borcke, "Die sowjetische", 166; Wettig, "Die Afghanistan-Entscheidung", 260; Berner, "Der Kampf", 358; Hyman, *Afghanistan*, 154; Braithwaite, *Afgantsy*, 59; Tomsen, *The Wars*, 148-150, 159.

1979.¹³⁶¹ Amin seems to have realized this, as Taraki was arrested on his return from Moscow, and died a few days later.¹³⁶²

Amin was now Afghanistan's leader, a situation the Soviets officially recognized.¹³⁶³ Nevertheless, Afghan-Soviet relations immediately deteriorated on Amin's coming to power.¹³⁶⁴ He requested the replacement of the Soviet Ambassador to Kabul, a request the Soviets complied with.¹³⁶⁵ Furthermore, there is evidence that Amin established informal contacts with American representatives in the country.¹³⁶⁶

Afghanistan's internal situation seemed to deteriorate even further.¹³⁶⁷ Although preparations must have already been ongoing by then, on December 12, 1979, the Soviet Politburo decided they had no other choice but to overturn their earlier decision

¹³⁶¹ Cynkin, "Aftermath", 277; Galster, "Afghanistan", 12; Rasanayagam, *Afghanistan*, 81; Behrens, *Die Afghanistan*, 53; von Borcke, "Die sowjetische", 166; Hyman, *Afghanistan*, 154; Braithwaite, *Afgantsy*, 62; Tomsen, *The Wars*, 148-150, 159; Steele, *Ghosts*, 75.

¹³⁶² Nicholas Rostow, "Law and the Use of Force by States: The Brezhnev Doctrine", *Yale J. World Public Ord.*, Vol. 7, 1980-1981, 209-243, 237; Loyn, *Butcher*, 186-187; Ross, "Beyond", 103; Blum, *Killing*, 342; Cynkin, "Aftermath", 277; Galster, "Afghanistan", 12; Maley, *The Afghanistan*, 28; Behrens, *Die Afghanistan*, 53-54; von Borcke, "Die sowjetische", 167; Wettig, "Die Afghanistan-Entscheidung", 260; Berner, "Der Kampf", 358; Hyman, *Afghanistan*, 154-155; Koelbl, Ihlau, *Krieg*, 180; Braithwaite, *Afgantsy*, 65-69, 72-73; Tomsen, *The Wars*, 159.

¹³⁶³ Behrens, *Die Afghanistan*, 54; Linde, "Afghanistan", 84; he briefly mentions a congratulatory telegram sent by Brezhnev and Kosygin to Amin upon his assuming the presidency; Braithwaite, *Afgantsy*, 69.

¹³⁶⁴ In a meeting between him and General Secretary Honecker of the GDR on October 4, 1979, General Secretary Brezhnev declared: "Frankly, we are not pleased by all of Amin's methods and actions. He is very power-driven. In the past he repeatedly revealed disproportionate harshness"; *Stenographic Minutes of Meeting between Sed CC General Secretary And Chairman of the State Council, Erich Honecker, And the General Secretary of the CC CPSU, Leonid Ilyich Brezhnev, October 4, 1979* (Source: Stiftung Archiv der Parteien und Massenorganisationen der ehemaligen DDR im Bundesarchiv, Berlin, DY30 JIV 2/2011342); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 5; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; Ross, "Beyond", 101; Cynkin, "Aftermath", 277; Reisman/Silk, "Which", 470; Rasanayagam, *Afghanistan*, 82, 89, 90-91; Maley, *The Afghanistan*, 28; von Borcke, "Die sowjetische", 167; Berner, "Der Kampf", 359; Ulfkotte, *Kontinuität*, 314; Male, *Revolutionary*, 199-200.

¹³⁶⁵ Maley, *The Afghanistan*, 28; Behrens, *Die Afghanistan*, 54; Linde, "Afghanistan", 85; Wettig, "Die Afghanistan-Entscheidung", 261; Roy, *The Lessons*, 12-13; Male, *Revolutionary*, 202-203; Tomsen, *The Wars*, 159.

¹³⁶⁶ Loyn, *Butcher*, 187; Wettig, "Die Afghanistan-Entscheidung", 261; Wettig, however, claims the contacts to the USA were established via Pakistan; Male, *Revolutionary*, 199-200; Tomsen, *The Wars*, 160-161; Braithwaite, *Afgantsy*, 71, 79; he claims Amin met the American chargé d'affaires in Kabul five times after February 1979.

¹³⁶⁷ Lenczowski, "The Soviet Union", 317; Matsson, "Politische", 84; Blum, *Killing*, 342; Cynkin, "Aftermath", 277; Reisman/Silk, "Which", 470-471; Rasanayagam, *Afghanistan*, 81-82; Linde, "Afghanistan", 85; Ulfkotte, *Kontinuität*, 313-314; Roy, *The Lessons*, 13; Braithwaite, *Afgantsy*, 76.

not to intervene.¹³⁶⁸ Christmas 1979 saw Soviet troops crossing the border into Afghanistan and landing at Bagram airfield. The Soviet invasion had begun.¹³⁶⁹

2. The legality of the Soviet invasion of Afghanistan

a) Official justifications

Faced with strong international condemnation, the Soviet Union was forced to articulate a legal justification for its move into Afghanistan. As the minutes of the meetings of the Central Committee of the Soviet Communist Party demonstrate, that was no easy task, since the Soviet leadership was well aware of the fact that reconciling the invasion with the UN Charter was difficult. Nevertheless, various official arguments were put forward to satisfy different audiences.

As far as the West and -to some extent- the non-aligned states were concerned, the Soviets relied on customary international law and the UN Charter. It was argued that Soviet troops had been sent to Afghanistan at the request of the Afghan

¹³⁶⁸ *Resolution of the CC CPSU, Concerning the situation in "A"*, 12/12/1979; (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 14, Document 31); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War. The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 9; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; also reprinted (incl. German translation) in *Sowjetische Geheimdokumente zum Afghanistankrieg (1978-1991)*, Pierre Allan et al. (eds.), Zürich: vdf Hochschulverlag, 1995, 126-127; Loyn, *Butcher*, 189; he claims that some members of the Politburo actually only signed the "decision" on December 26, 1979, after the invasion had already begun; apparently Brezhnev's foreign policy advisor heard of the invasion on the radio; Maley, *The Afghanistan*, 29; Braithwaite, *Afgantsy*, 77, 79; Tomsen, *The Wars*, 167.

¹³⁶⁹ The exact date of the beginning of the invasion is contentious, different sources provide different dates, ranging from December 22, 1979 to December 27, 1979; Loyn, *Butcher*, 189 (Dec. 22); Louise Doswald-Beck, "The Legal Validity of Military Intervention by the Invitation of the Government", *BYIL*, Vol. 56, 1985, 189-252, 203 fn. 69 (Dec. 25- Dec. 26); Rostow, "Law" (Dec. 27); W. Michael Reisman, "The Resistance in Afghanistan Is Engaged in a War of National Liberation", *AJIL*, Vol. 81, 1987, 906-909, 906 (Dec. 24); Ramses Amer, "The United Nations' Reactions to Foreign Military Interventions", *Journal of Peace Research*, Vol. 31, 1994, 425-444, 438 (Dec. 25-Dec. 26).

government,¹³⁷⁰ a move entirely consistent with the traditional right of every state to aid a foreign government in restoring order in the face of a rebellion, even more so, when that rebellion was supported by other foreign powers.¹³⁷¹ An early version of this justification was provided by the Soviet Defence Minister in his directive to commanders:

*Considering the military-political situation in the Middle East, the latest appeal of the government of Afghanistan has been favourably considered. The decision has been made to introduce several contingents of Soviet troops deployed in southern regions of the country to the territory of the Democratic Republic of Afghanistan in order to give international aid to the friendly Afghan people and also to create favourable conditions to interdict possible anti-Afghan actions from neighbouring countries [sic]...*¹³⁷²

As the Afghan rebellion was arguably supported and instigated from abroad, the Soviet actions were claimed to be consistent with Article 51 UN Charter and Article 4 of the 1978 Soviet-Afghan *Treaty of Friendship*. By supporting the legitimate Afghan government against the foreign-inspired and -supported rebels, the Soviet Union was simply exercising collective self-defence.¹³⁷³ Furthermore, the actions of these foreign

¹³⁷⁰ “Russia says military airlift was justified”, Michael Binyon, *The Times*, 29/12/1979, 1, 4; “UN votes for troop withdrawal”, *The Times*, 15/01/1980, 1; Doswald-Beck, “The Legal”, 231-233.

¹³⁷¹ *Yearbook of the United Nations for the Year 1980*, 297, 298 (for summarized statements by the Soviet representative at the UN and the new Afghan Foreign Minister before the Security Council); “Russia says military airlift was justified”, Michael Binyon, *The Times*, 29/12/1979, 1, 4; “UN votes for troop withdrawal”, *The Times*, 15/01/1980, 1; Doswald-Beck, “The Legal”, 231-233.

¹³⁷² Directive 312/12/001 of December 24, 1979; quoted by Braithwaite, *Afgantsy*, 85; and available at: http://legacy.wilsoncenter.org/va2/index.cfm?topic_id=1409&fuseaction=home.document&identifier=5034E02C-96B6-175C-944CF54E250A1889&sort=collection&item=Soviet%20Invasion%20of%20Afghanistan; last accessed 26/10/2011.

¹³⁷³ *Yearbook of the United Nations for the Year 1980*, 299 (Statement by the Soviet representative at the UN before the Security Council), 297 (Statement by the representative of the GDR before the Security Council); instructions to the Soviet Ambassador at the UN in New York ordering him to argue that the Soviet invasion was justified according to Article 51 UN Charter; instructions to the Soviet Ambassadors in Berlin, Warsaw, Budapest, Prague, Sofia, Havana, Ulan-Bator, and Hanoi; these Ambassadors were also instructed to inform the respective governments that the Soviet Union had acted at the request of the Afghan government, and in conformity with Article 51 UN Charter and the Afghan-Soviet Treaty of 1978; similar instructions were issued to the other Soviet Ambassadors (138-141); reprinted (incl. German translation) in *Sowjetische Geheimdokumente zum Afghanistankrieg (1978-1991)*, Pierre Allan et al. (eds.), Zürich: vdf Hochschulverlag, 1995, 132-137, 142-147 (UN); “Concerning the events in Afghanistan”, *Pravda*, 31/12/1979; in this *Pravda* article Soviet actions are justified as having been in accordance with numerous Afghan requests, Article 51 UN Charter, as well as Article 4 of the Afghan-Soviet Treaty of 1978; in an editorial in the East German daily *Neues Deutschland*, 29/12/1979, the Soviet actions are justified as collective self-defence under Article 51 UN Charter; both reprinted in *Strategischer Überfall - das Beispiel Afghanistan. Quellenband- Teil 1*, Paul Bucherer-Dietschi,

powers were also threatening the Soviet Union's borders, allowing the Soviets themselves to take defensive action.¹³⁷⁴

Elements of all these justifications can be found in Brezhnev's speech at the Soviet Communist Party Congress on February 23, 1981:

*Imperialism launched a real undeclared war against the Afghan revolution. This also created a direct threat to the security of our southern frontier. In the circumstances, we were compelled to render the military aid asked for by that friendly country. We will be prepared to withdraw with the agreement of the Afghan government. Before this is done, the infiltration of counterrevolutionary gangs into Afghanistan must be completely stopped... Dependable guarantees are required that there will be no new intervention.*¹³⁷⁵

Within the socialist block the Soviet invasion was also justified on the basis of the so-called Brezhnev Doctrine, which is now only of historical interest. To put it briefly, it was argued that, in relations between socialist states, a "regional", socialist version of international law took precedence over "general" international law, as exemplified by the UN Charter. The rules of socialist international law demanded the support of the proletarian class against any imperialistic attack, be it foreign or domestic.¹³⁷⁶

Albert Alexander Stahel, Jürg Stüssi-Lauterburg (eds.), Liestal: Grauwiller Offsetdruck, 1991, 247-248 (*Neues Deutschland*); 261-266 (*Pravda* and German translation); a view also, unsurprisingly, supported by Mader (writing for the GDR military publishers), *CIA-Operation*, 6; he also explicitly claims that the Soviet Union had acted in collective self-defence at the request of Afghanistan; Amer, "The United Nations", 438; Doswald-Beck, "The Legal", 233; Matsson, "Politische", 83, 85; Robert F. Turner, "Soviet Attitudes on the Permissibility of the Use of Force in International Relations" in *International Law and the Brezhnev Doctrine*, John Norton Moore, Robert F. Turner (eds.), Lanham: University Press of America, Inc., 1987, 43- 133, 105-106; Christine Gray, *International Law and the Use of Force*, 3rd ed., Oxford: Oxford University Press, 2008, 167.

¹³⁷⁴ *Yearbook of the United Nations for the Year 1980*, 299 (Statement by the Soviet representative at the UN before the Security Council); "Concerning the events in Afghanistan", *Pravda*, 31/12/1979; in the article it is pointed out that the Soviet Union had never made a secret of the fact that it would not allow Afghanistan to become a bridgehead for an "imperialistic" aggression against the USSR; reprinted in *Strategischer Überfall- das Beispiel Afghanistan, Quellenband- Teil 1*, Paul Bucherer-Dietschi, Albert Alexander Stahel, Jürg Stüssi-Lauterburg (eds.), Liestal: Grauwiller Offsetdruck, 1991, 261-266 (incl. German translation); "US help for Afghan rebels threatened Russia, Pravda says", Michael Binyon, *The Times*, 02/01/1980, 5; Rostow, "Law", 237; Matsson, "Politische", 86.

¹³⁷⁵ Leonid Brezhnev, Address to the 26th Soviet Communist Party Congress, February 23, 1981; translated by TASS; excerpts printed in *The New York Times*, "Excerpts From Address By Brezhnev To The Soviet Communist Party Congress", 24/02/1981, 6.

¹³⁷⁶ Instructions to the Soviet Ambassadors in Berlin, Warsaw, Budapest, Prague, Sofia, Havana, Ulan-Bator and Hanoi; the Ambassadors were instructed to inform the respective governments that the Soviet Union had also acted to "defend the revolution's achievements" against Amin's attempts at "liquidating" them; this particular

The Soviet Union therefore adopted the by now familiar Great Power strategy of trying to put forward a seemingly plausible justification for actions that the leading politicians knew to be hardly defensible in international law. Nevertheless, these justifications merit closer examination.

b) Intervention by invitation of the Afghan government

There is no doubt that by the time of the Soviet invasion in December 1979 Afghanistan was in a state of civil war. The Central Committee of the Soviet Communist Party had already come to this conclusion in the spring of 1979, when the Afghan government at first did not manage to re-assert control over Herat. The Afghan army was falling apart. In March 1979, the Afghan government had already requested Soviet military support, as the leading politicians there had come to the conclusion that they no longer had the resources to put the uprising down. Although the Soviet Union turned down this request, the Afghan situation was deemed dire by the Soviets. Once Herat had been brought back under control of the government, fighting broke out in other provinces. There can therefore be no doubt that the Soviet Union intervened in a civil war in Afghanistan, and did not merely aid a legitimate

justification was omitted in the instructions to the other Soviet Ambassadors (138-141); reprinted (incl. German translation) in *Sowjetische Geheimdokumente zum Afghanistankrieg (1978-1991)*, Pierre Allan et al. (eds.), Zürich: vdf Hochschulverlag, 1995, 132-137; Braithwaite, *Afgantsy*, 87; he claims Soviet soldiers were told "they were going to support the ordinary Afghan people against the counter-revolution"; in an editorial in the East German daily *Neues Deutschland* (29/12/1979) it is claimed that the Soviets had been guided by their "internationalist duty" when deciding to defend the Afghan people against "external aggression" and "internal counter-revolution"; "Concerning the events in Afghanistan", *Pravda*, 31/12/1979; in this article Soviet actions are also justified as having been in defence the "achievements of the April Revolution", as the revolution and its success had become the most important matter of concern for the Afghan people; both reprinted in *Strategischer Überfall - das Beispiel Afghanistan, Quellenband- Teil 1*, Paul Bucherer-Dietschi, Albert Alexander Stahel, Jürg Stüssi-Lauterburg (eds.), Liestal: Grauwiler Offsetdruck, 1991, 247-248 (*Neues Deutschland*); 261-266 (*Pravda* and German translation); "Russia says military airlift was justified", Michael Binyon, *The Times*, 29/12/1979, 1, 4; Matson, "Politische", 85; Helmut Dahm, "Afghanistan als Lehrstück der politischen und militärischen Doktrin Sowjetrußlands" in *Die sowjetische Intervention in Afghanistan, Entstehung und Hintergründe einer weltpolitischen Krise*, Heinrich Bauer (ed.), Baden-Baden: Nomos Verlagsgesellschaft, 1980, 181-246, 194-195.

government in restoring law and order following a small uprising (which may warrant a different legal evaluation).¹³⁷⁷

As far as the right of foreign states to intervene in civil wars is concerned, customary international law is the only source of legal rules which can be referred to. Rules on this subject matter, applicable to Afghanistan, have not been codified. As is often the case in customary international law, the rights of foreign powers in civil war situations have always been extremely controversial and remain so. Nearly every possible position has been adopted, although it will be argued that, by 1979, a consensus had developed on whether foreign powers are allowed to intervene in civil war situations or not.

At the outset it should, however, be noted that “intervention” in the context evaluated and discussed here is to be understood as an active engagement by a foreign state in a civil war situation in favour of one of the participants, and involving military support. This definition of “intervention” is in line with the British Foreign Office’s, as stated in 1984:

*However, in international law intervention is usually defined as forcible or dictatorial interference by a state in the affairs of another state, calculated to deprive that state of control of the matter in question. States perform many acts which affect other states but which are solely within their sovereign rights or are not dictatorial, and therefore do not violate the sovereign rights of other states.*¹³⁷⁸

Of course, as the Foreign Office points out, there are lesser means of “intervention” in a civil war, such as broadcasting propaganda from abroad, politically and

¹³⁷⁷ Article 3 e) of the *Definition of Aggression* (GA Resolution 3314 (XXIX)) implies that a state can legally send its troops onto another country’s territory at that country’s request, when it defines an act of aggression *inter alia* as follows (emphasis by author): “The use of armed forces which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement.”; Doswald-Beck, “The Legal”, 189; Christopher C. Joyner/ Michael A. Grimaldi, “The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention”, *Va. J. Int’l L.*, Vol. 25, 1984-1985, 621-689, 643-644.

¹³⁷⁸ “Is intervention ever justified?”, British Foreign Office, Foreign Policy Document No. 148 of July 1984; extracts reprinted in *BYIL*, Vol. 57, 1986, 614-624, 615.

diplomatically supporting one side in the conflict, or maintaining pre-conflict bilateral economic assistance.

The customary international law rules discussed here do not necessarily apply to these lesser forms of “intervention”, although in many cases the line between bilateral “assistance” and active military support may be blurred. However, in the case of the Soviet invasion of Afghanistan there can be no doubt that active military support of one side in a civil war was intended.

aa) Pre- WW II customary international law

Traditionally, there was widespread consensus on the right of foreign governments to intervene in civil wars. Probably derived from the concept that a state can act legitimately only through its government,¹³⁷⁹ it was seen as justified and legal to intervene in a foreign civil war if that intervention followed the request or invitation of the recognized government of the state concerned.¹³⁸⁰

¹³⁷⁹ *Permanent Court of International Justice, German Settlers in Poland*, Advisory Opinion, September 10, 1923, at 22: “States can act only by and through their agents and representatives”; Doswald-Beck, “The Legal”, 190; Tom J. Farer, “Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife”, *Harvard L. Rev.*, Vol. 82, 1968-1969, 511-541, 526; he also correctly points out that the “ruling classes” were anxious to protect each other from internal revolution; a point also made by Michel Krauss, “Internal Conflicts and Foreign States: In Search of the State of Law”, *Yale Stud. World Pub. Ord.*, Vol. 5, 1978-1979, 173-233, 180-181; Norman J. Padelford, “The International Non-Intervention Agreement and the Spanish Civil War”, *AJIL*, Vol. 31, 1937, 578-603, 586; he adds, that it was in the interest of “public law and authority” to differentiate between “established governments” and “unrecognized and irresponsible rebels”.

¹³⁸⁰ Sherle R. Schwenninger, “The 1980s: New Doctrines of Intervention or New Norms of Nonintervention?”, *Rutgers L. Rev.*, Vol. 33, 1980, 423-434, 428; Wolfgang Friedman, “Intervention, Civil War and the Role of International Law”, *Am. Soc’y Int’l L. Proc.*, Vol. 59, 1965, 67-75, 72; Evan Luard, “Superpowers and Regional Conflicts”, *Foreign Aff.*, Vol. 64, 1985-1986, 1006-1025, 1010; Ross R. Oglesby, “A Search for Legal Norms in Contemporary Situations of Civil Strife”, *Case W. Res. J. Int’l L.*, Vol. 30, 1970-1971, 30-44, 36-37; Tom J. Farer, “Intervention in Civil Wars: A Modest Proposal”, *Colum. L. Rev.*, Vol. 67, 1967, 266-279, 271; “Harnessing”, 511, 526-530; John Norton Moore, “Legal Standards for Interventions in Internal Conflicts”, *Ga. J. Int’l & Comp. L.*, Vol. 13, 1983, 191-199 194; James W. Garner, “Questions of International Law in the Spanish Civil War”, *AJIL*, Vol. 31, 1937, 66-73,68; Brownlie, *International Law*, 321-322; 327; Padelford, “The International”, 586; Philip C. Jessup, “The Spanish Rebellion and International Law”, *Foreign Aff.*, Vol. 15, 1936-1937, 260-279, 265.

Concurrently this meant that foreign intervention on the behalf of rebels was always deemed illegal, as such support was directed against the state's representatives and therefore, by implication against the state itself.¹³⁸¹ Woolsey, in 1874, summarized the legal situation as follows:

*No state is authorized to render assistance to provinces or colonies which are in revolt against the established government. For if the existence and sovereignty of a state is once recognized, nothing can be done to impair them;...On the other hand, there is nothing in the law of nations which forbids one nation to render assistance to the established government in the case of such revolt, if its assistance is invoked. This aid is no interference, and is given to keep up the present order of things, which international law takes under its protection.*¹³⁸²

Only when a rebellion had gained such force that it was granted "belligerent status", did a policy of neutrality become obligatory.¹³⁸³

This traditional view is reflected in the *Convention on the Rights and Duties of States in Event of Civil Strife*, applicable in the Americas, and concluded in 1928. Its Article 1 states *inter alia*:

The Contracting States bind themselves to observe the following rules with regard to civil strife in another one of them:...

Third: To forbid the traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied.

¹³⁸¹ Doswald-Beck, "The Legal", 190; Friedman, "Intervention", 69, 72; Farer, "Intervention", 271-272; "Harnessing", 511, 526-530; Moore, "Legal Standards", 194; Garner, "Questions", 67; Padelford, "The International", 586; Jessup, "The Spanish", 265.

¹³⁸² Woolsey, *Introduction*, 56 (§ 41).

¹³⁸³ Garner, "Questions", 70; Farer, "Harnessing", 511-512; Luard, "Superpowers", 1009-1010; Quincy Wright, "United States Intervention in the Lebanon", *AJIL*, Vol. 53, 1959, 112-125, 122; Oglesby, "A Search", 32; Doswald-Beck, "The Legal", 196-197; according to her, an insurgency must fulfil the following four criteria in order to achieve "belligerent" status: "1) existence of a civil war...; 2) occupation and ... administration of a substantial part of national territory by insurgents; 3) observance of the rules of warfare...4)...practical necessity for third states to define their attitude" (she is hereby relying on Oppenheim's definition); Rosalyn Higgins, "Intervention and International Law", in *Intervention in World Politics*, Hedley Bull (ed.), Oxford: Clarendon Press, 1984, Ch. 3, 29-44, 40; she concurs with requirements 1 and 2, but adds the requirement of an "organized fighting unit"; Krauss, "Internal", 187-190; relying on Section 8 of the 1900 *Règlement* passed by the *Institut de Droit International*, he views requirements 2 and 3 as essential; Jessup, "The Spanish", 270-273; he demands "a very considerable degree of organization and stability", and that the insurgents are "contending on more or less equal terms" with the government's forces.

Nevertheless, this widely-held view of the right of intervention was never uncontroversial. Notably Hall, as early as 1924, advocated a policy of non-intervention in civil wars, and argued that intervening on either side was illegal:

*Supposing the intervention to be directed against the existing government, independence is violated by an attempt to prevent the regular organ of the state from managing the state affairs in its own way. Supposing it is on the other hand to be directed against rebels, the fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently that there is a doubt as to which side would ultimately establish itself as the legal representative of the state.*¹³⁸⁴

Preceding him, Stowell, in 1921, had, despite acknowledging the prevalence of the majority view of permissible aid to a government, already concluded:

*For all these reasons, assistance for the purpose of suppressing insurrection, can no longer be justified as in accord with the approved practice of civilized states, and since it had been condemned in practice, assistance may properly be classified as unjustifiable.*¹³⁸⁵

Despite Hall and Stowell expressing a minority view at the time, the major powers' policies during the Spanish Civil War (1936-1939) did demonstrate a growing ambivalence on the part of foreign states as far as intervening in civil wars were concerned.¹³⁸⁶ Although the Spanish Republican Government was widely recognized as the legitimate government of Spain, it was agreed that outside powers should not intervene on either side in the government's fight against the fascist rebellion there.

¹³⁸⁴ William Edward Hall, *A Treatise on International Law*, 8th ed., Oxford: The Clarendon Press, 1924, 347 (§ 94).

¹³⁸⁵ Ellery C. Stowell, *Intervention in International Law*, Washington, D.C.: John Byrne & Co., 1921, 330-331, 332-340; he relies heavily on British state practice in response to the Holy Alliance of 1821 to support his view. However, he acknowledges that "even the British Government mildly interfered itself" (at 333). He also admits there were many historical precedents in state practice and some "older authorities", that support the opposite view (at 329-330); Brownlie, *International Law*, 322; Brownlie provides many examples of state practice that underline the pre-eminence of the traditional view in favour of intervening at a government's request.

¹³⁸⁶ Moore, "Legal Standards", 194.

In a letter addressed to American arms manufacturers, based on earlier, identical instructions to the American consulates in Spain, Acting US Secretary of State Phillips, in August 1936, declared that

*in conformity with its well established policy of non-interference with internal affairs in other countries, either in time of peace or in the event of civil strife, this government will, of course, scrupulously refrain from any interference whatsoever in the unfortunate Spanish situation.*¹³⁸⁷

In January 1937 Congress followed this up by passing the *Pittman Resolution*, whereby the previous American neutrality legislation of 1935 and 1936 was extended to cover civil wars.¹³⁸⁸ This policy, subsequently officially adopted by all the major powers, is often referred to as the *Spanish Non-intervention Agreement*.¹³⁸⁹

There can be no doubt that in practice this policy was not successful, as the Soviet Union and, to some extent, France, nevertheless tried to aid the Spanish Government, while Germany and Italy intervened massively on the fascist side.¹³⁹⁰ It must also not be overlooked that the policy of non-intervention was mainly an attempt to avoid a general European war, and not based on legal analyses.¹³⁹¹

Furthermore, the agreement proved to be controversial among international lawyers, with some explicitly arguing it was not only novel, but actually illegal in international law, for states to agree on ignoring a recognized government's request for assistance

¹³⁸⁷ "Phillip's Letter Made Public", *The New York Times*, 23/08/1936, 3.

¹³⁸⁸ Edwin Borchard, "'Neutrality' and Civil Wars", *AJIL*, Vol. 31, 1937, 304-306, 305.

¹³⁸⁹ The so-called "Spanish Non-intervention Agreement" was not a formal convention, but was based on an exchange of notes between, in the end, 27 different states. It was initiated by an exchange of notes between France and Britain in August 1936. These notes resulted in the "International Committee for the Application of the Agreement regarding Non-intervention in Spain" being set up in September 1936. The Committee was responsible for supervising the agreement's implementation; Padelford, "The International", 579-582; Jessup, "The Spanish", 268-270; Friedman, "Intervention", 70, 72; Wright, "United States", 122.

¹³⁹⁰ Friedman, "Intervention", 70, 72; Luard, "Superpowers", 1010; Wright, "United States", 122; Garner, "Questions", 66-67, 68.

¹³⁹¹ "Eden Hard At Work to Stave Off A War; Clash of Powers Now Over Spain Would Dash His Hopes of Mending European Quarrels in Fall", Ferdinand Kuhn Jr., *The New York Times*, 23/08/1936, E4; Wright, "United States", 122; Padelford, "The International", 578; Jessup, "The Spanish", 265-266.

in a civil war or, even worse, to prohibit individuals from exporting arms to that government.¹³⁹² Even some of the states officially participating in the Non-Intervention Agreement acknowledged it to be a “breach of principles of international law”;¹³⁹³ Turkey and Yugoslavia appended reservations to their notes, stating that the accord was “not to constitute a precedent”, or “result in even the implicit recognition of a principle that a government cannot render to a legal government, on the demand of the latter, aid in the struggle against rebellion.”¹³⁹⁴

Nevertheless, the fact that the major powers of the day obviously did believe it could be justified to ignore a government’s pleas for support in a civil war, without the opposing Spanish fascists ever being granted “belligerent status”, can be viewed as the beginning of a change in attitude towards the automatic primacy accorded to recognized governments in civil wars.

bb) Developments after WW II

Following WW II, intervening in a civil war at the request of the government became increasingly controversial. This was due to many factors.

¹³⁹² Brownlie, *International Law*, 324; he points out that the Spanish and Mexican governments “challenged” the international legality of the agreement (fn. 5); Borchard, “Neutrality”, 305-306; Garner, “Questions”, 66-71; Garner does not express an opinion, but expresses doubts as to the foreign powers’ attitude towards the recognized Spanish government; Padelford, “The International”, 586; he states that “to apply to unrecognized and irresponsible rebels the same principles that are applicable to sovereign states and established governments is to encourage rebellion and disorder and to weaken public law and authority. The law can not long afford to do this.”

¹³⁹³ Soviet representative Litvinov at the 17th Ordinary Session of the Assembly at the League of Nations (September 1936); on that occasion the Portuguese and, of course, the Spanish representatives also claimed the accord to be in violation of international law, although the Soviet and Portuguese representatives went on to justify this violation as a necessity, given the international situation; Padelford, “The International”, 585 (incl. fn. 21 and 22).

¹³⁹⁴ Padelford, “The International”, 581, 586.

(i) Non-use of the old rules

It was becoming increasingly evident that the old concept of responding to rebels by ignoring them until they had achieved “belligerent status”, suffered from only existing on paper.¹³⁹⁵ Since the US Civil War (1861-1865) no rebellion had ever been granted “belligerent status”, although there certainly had been numerous rebellions that had ended in a change of government.¹³⁹⁶ It was (and remains) therefore questionable whether the rules on insurgencies and belligerency can still be viewed as part of customary international law.¹³⁹⁷

(ii) Recognition of governments

Changing attitudes towards the status and legitimacy of a state’s government further undermined the value of a government’s request for outside intervention in a civil war. The recognition of governments as legitimate representatives of states became heavily politicized in some cases, while increasingly pragmatic in others.¹³⁹⁸ This, in turn, undermined the relevance of formal recognition by other states, when attempting to judge a government’s legitimacy.

On the one hand, the USA for many decades refused to accept the *de facto* situation in China. The US government did not recognize Mao Tse Tung’s government as the

¹³⁹⁵ Doswald-Beck, “The Legal”, 197; Higgins, “Intervention”, 41-42; Friedman, “Intervention”, 72-73; Oglesby, “A Search”, 32; Krauss, “Internal”, 203-204; he acknowledges this argument, but poses the question whether states’ behaviour during some crises (such as the Spanish Civil War) did not imply implicit recognition of the rebels as belligerents. As also acknowledged by him, state behaviour has, however, been notably erratic, as far as the treatment of insurgents is concerned, so that assuming a confirmation by implication of a rule not invoked hardly seems possible in this case.

¹³⁹⁶ Spain is one of the prime examples of this, as the rebels, under Franco’s leadership, did in the end overcome the Republican government; Doswald-Beck, “The Legal”, 197; Hershey, *Essentials*, 206-207; writing in 1927, the last example he can find is also the recognition, in 1861, of “the Southern Confederacy” during the American Civil War, although he claims the USA was close to recognizing the belligerent status of rebels in Cuba in 1869 and 1896, but lastly refrained from doing so.

¹³⁹⁷ Doswald-Beck, “The Legal”, 197.

¹³⁹⁸ For a detailed look at British policy on the recognition of governments, see: Stefan Talmon, “Recognition of Governments: An Analysis of the New British Policy and Practice”, BYIL, Vol. 63, 1992, 231-297.

representative of China, but instead insisted on recognizing the Taiwanese government as such. This was based on its more convenient ideological outlook, although there was no doubt that the latter was in control of no more than the small island of Taiwan, with no realistic prospect of that situation changing anytime soon.¹³⁹⁹

On the other hand, many other states tended to adopt an increasingly pragmatic evaluation of who was *de facto* in control of the state concerned, when deciding whom to deal with, thereby seemingly even willing to deal with foreign-imposed governments.¹⁴⁰⁰ Not only were the Soviet-imposed communist governments in Eastern Europe after 1945 universally recognized, but such recognition was even accorded to the Hungarian government, imposed subsequent to the failure of the uprising in 1956, albeit after a few years.¹⁴⁰¹

The recognition of a government therefore either deteriorated into a mere political statement, without any relation to the facts, or became so “realist”, that some recognized governments could hardly claim to be legitimate in any way.¹⁴⁰² By 1980

¹³⁹⁹ Wright, “United States”, 120-121; Friedman, “Intervention”, 71; Doswald-Beck, “The Legal”, 197-198; although not referring to China, she offers numerous other examples, such as the rapid recognition of the Adoula government in the Congo in 1961, despite it having no proper control over the country.

¹⁴⁰⁰ Doswald-Beck, “The Legal”, 194-195.

¹⁴⁰¹ Doswald-Beck, “The Legal”, 195.

¹⁴⁰² Farer, “Harnessing”, 526.

many governments, including the British,¹⁴⁰³ had consequently decided to abandon the custom of formally recognizing other governments.¹⁴⁰⁴

The increasing tendency to adopt a “realist” approach to foreign governments, and to judge them on the basis of their *de facto* control of the state, meant that Hall’s view, that a government that required outside support to stay in power should not be supported, became more acceptable. After all, a government requiring foreign intervention against its own people was *not* in control.¹⁴⁰⁵

(iii) Decolonisation, self-determination, and non-interference in internal affairs

The de-colonisation process was also raising doubts as to whether a colonial government could request foreign assistance in an attempt to suppress a movement fighting for self-determination.¹⁴⁰⁶ Furthermore, following the *Universal Declaration of Human Rights* and the increasing attention paid to human rights, the government’s treatment of its citizens began to be considered.¹⁴⁰⁷

It became doubtful, whether a racist or tyrannical regime, even if in *de facto* control, should be accorded with any kind of recognition.¹⁴⁰⁸ This development was to go so

¹⁴⁰³ On April 28, 1980, the British Foreign Secretary, Lord Carrington, declared before the House of Lords: “We have therefore concluded that there are practical advantages in following the policy of many other countries in not according recognition to Governments. Like them, we shall continue to decide the nature of our dealings with régimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so.”; see: Written Answers (Lords); Hansard, HL Deb 28 April 1980, Recognition of Governments: Policy and Practice, vol 480, cc1121-1122WA, c1122WA; available at: http://hansard.millbanksystems.com/written_answers/1980/apr/28/recognition-of-governments-policy-and-practice; accessed 31/07/2012; for a critical appraisal of this policy, see: Talmon, “Recognition”, 231-297.

¹⁴⁰⁴ Doswald-Beck, “The Legal”, 194-195.

¹⁴⁰⁵ Doswald-Beck, “The Legal”, 196; John A. Perkins, “The Right of Counterintervention”, Ga. J. Int’l & Comp. L., Vol. 17, 1987, 171-227, 190-191; Farer, “Intervention”, 272-273; Krauss, “Internal”, 209-210.

¹⁴⁰⁶ Doswald-Beck, “The Legal”, 200-201; she also, however, outlines the limited acceptance of the principle of self-determination when it conflicts with the *uti posseditis* principle (at 202-203).

¹⁴⁰⁷ Schwenninger, “The 1980s”, 429.

¹⁴⁰⁸ Schwenninger, “The 1980s”, 428; Doswald-Beck, “The Legal”, 195, 197; the non-recognition of Rhodesia and its government, following its unilateral declaration of independence, and the non-recognition of South Africa’s control over South West Africa (Namibia) being obvious examples.

far that by the 1970s, instead of the repressive governments, national liberation movements were sometimes recognized as the legitimate representatives of specific states by the UN General Assembly.¹⁴⁰⁹

These developments led to a situation, of which it would be fair to say that there was no consensus on what the international law rules on interventions in civil war were.¹⁴¹⁰ There were those who vehemently argued in favour of retaining the traditional legal rules, and those who strongly opposed just that. State practice also did not provide any guidelines, because interventions in civil war situations were routinely based on other, additional justifications.

Nevertheless, despite this confusion, regional treaties were concluded shortly after WW II that explicitly outlawed any kind of interference in the internal affairs of another country. Article 19 of the OAS Charter, concluded in 1948, stated:

*No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.*¹⁴¹¹

Similarly, Article 8 of the Warsaw Pact (1955) declared that

The Contracting Parties declare that they will act in a spirit of friendship and cooperation with a view to further developing and fostering economic and cultural

¹⁴⁰⁹ Resolution 2918 (1972) referring to the national liberation movements of Angola, Guinea-Bissau, Cape Verde, and Mozambique; Resolution 3111 (1973) referring to Namibia; Resolution 3113 (1973) referring once more to the Portuguese colonies; Resolution 3115 (1973) referring to Rhodesia; Resolution 3151 G (1973) referring to South Africa. It should, however, be noted that western states were much more hesitant to recognize national liberation movements as legitimate representatives of their countries. The UK, for example, explicitly refused to recognize SWAPO as the legitimate representative of Namibia (see: Talmon, "Recognition", 253-254).

¹⁴¹⁰ Friedman, "Intervention", 72-74; Luard, "Superpowers", 1010-1011; Brownlie, *International Law*, 327; he, writing in 1963, provides two possible "courses of action" in the case of civil war which contradict each other; Farer, "Intervention", 273-274; writing in 1967, he still describes the legal situation regarding interventions in civil wars as the "normless present"; and "Harnessing", 512; writing in 1969, he describes the legal situation in this area as a "free-for-all".

¹⁴¹¹ Article 19, *Charter of the Organisation of American States* (1948), 119 UNTS 47.

*intercourse with one another, each adhering to the principle of respect for the independence and sovereignty of the others and non-interference in their internal affairs.*¹⁴¹²

This -regionally adopted- principle of non-intervention was to develop into a general principle of international law at a universal, general level that was viewed as applicable also to civil war situations. Two almost simultaneous, arguably contradictory developments enabled that to happen.

Under the influence of negotiations which were to lead to the conclusion of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* in 1966, it became even more unacceptable to argue that it was legitimate to intervene in an internal conflict at the request of an autocratic government, in order to help suppress the revolting population.¹⁴¹³ This led to the widespread realization that distinctions had to be made between different kinds of government, which in turn meant that the concept of intervention in an internal conflict, simply at the request of the recognized government, became increasingly untenable. Developments in the area of human rights were finally to be so far-reaching that by the 1980s and 1990s many academics, and even some states, were, controversially, arguing that states had the right to intervene in foreign civil wars against the wishes of the recognized government in cases, where the population was suffering immensely (“humanitarian intervention”), or a non-democratic government was in place (“pro-democratic intervention”). This was justified by some on the basis

¹⁴¹² *The Warsaw Security Pact* (1955), *Treaty of Friendship, Cooperation and Mutual Assistance*; available at: http://avalon.law.yale.edu/20th_century/warsaw.asp; last accessed 26/10/2011.

¹⁴¹³ Josef Rohlik, “Some Remarks on Self-Defense and Intervention: A Reaction to Reading *Law and Civil War in the Modern World*”, *Ga. J. Int’l & Comp. L.*, Vol. 6, 1976, 395-415, 409-411.

that the state's population, not its government, was the "sovereign" protected in international law.¹⁴¹⁴

These developments in the sphere of civil and political rights and, more generally, in the field of human rights, were, however, still taking place against the backdrop of the de-colonisation process. Many new states, which had only just joined the United Nations, were extremely anxious to safeguard their new status as independent states against any attempt at encroachment.¹⁴¹⁵ The principle of self-determination, included in Article 1 (2) UN Charter, was the obvious anchor of any attempt to safeguard developing states' new-found independence in international law against external interference.¹⁴¹⁶ In this struggle the newly independent states were massively supported by the Soviet Union, as the concept of self-determination had, after all, already been outlined in some detail in Lenin's *Decree on Peace* of October 26, 1917.¹⁴¹⁷

¹⁴¹⁴ Doswald-Beck, "The Legal", 203-205; she refers to the US invasion of Grenada resulting in the overthrow of the unelected government there. During the debate in the UN Security Council the US representative claimed, *inter alia* that the US had intervened in order to "restore self-determination", which was apparently evidenced by a "free press, free trade unions and free elections". This interpretation of self-determination was, however, opposed by most states; Tom J. Farer, "Drawing the Right Line", *AJIL*, Vol. 81, 1987, 112-116, 115; Farer claims the UN had begun "locating sovereignty in the people"; Higgins, "Intervention", 38; she refers to the controversies surrounding the concept of "humanitarian intervention"; W. Michael Reisman, "Coercion And Self-Determination: Construing Charter Article 2 (4)", *AJIL*, Vol. 78, 1984, 642-645, 642-645; he was an early advocate of the right to "pro-democratic" intervention. As far as state practice is concerned, the NATO attack on Serbia in 1999 in order to protect Kosovars was argued by some states to be justified as a "humanitarian intervention"; see: "The Kosovo Air Campaign", NATO; available at: http://www.nato.int/cps/en/natolive/topics_49602.htm?selectedLocale=en; accessed 22/11/2011; President Bush Snr. mentioned the necessity "to defend democracy" as one of the reasons for the US invasion of Panama in 1989; see: "Fighting in Panama: The President; A Transcript of Bush's Address on the Decision to use Force in Panama"; *The New York Times*, 21/12/1989; available at: <http://www.nytimes.com/1989/12/21/world/fighting-panama-president-transcript-bush-s-address-decision-use-force-panama.html>; accessed 22/11/2011.

¹⁴¹⁵ Doswald-Beck, "The Legal", 209-211, 252; Perkins, "The Right", 189; Krauss, "Internal", 212-213.

¹⁴¹⁶ Schwenninger, "The 1980s", 428-429; Rohlik, "Some", 406; Perkins, "The Right", 185; Moore, "Legal Standards", 195, 196.

¹⁴¹⁷ *Decree on Peace*; delivered at the *Second All-Russia Congress of Soviets of Workers' and Soldiers' Deputies*, 26 October 1917, and published by *Izvestiia*, 27 October 1917; this decree can be found at: <http://www.historyguide.org/europe/decree.html>; and <http://www.firstworldwar.com/source/decreeonpeace.htm>; both last accessed 26/10/2011.

The progression of the *principle* of self-determination to a *right* of self-determination was confirmed by the two covenants, the ICCPR and the ICESCR;¹⁴¹⁸ common Article 1 states:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

This was a confirmation of the view already taken by the General Assembly in its 1960 Resolution on the *Granting of Independence to Colonial Countries and Peoples*.¹⁴¹⁹

In the mid-1960s the General Assembly began passing numerous resolutions by large majorities, in which the principle of non-interference in the domestic affairs of other states was frequently re-iterated.¹⁴²⁰ Although such prohibitions, as far as civil wars were concerned, were often directed at foreign support of rebel groups, the principle of non-interference came to be increasingly seen as a general rule, which could readily be interpreted as also prohibiting military interventions on behalf of beleaguered governments. Deciding who should govern was increasingly seen as a facet of a people's right of self-determination; a decision to be arrived at, if necessary, by civil war.¹⁴²¹

In 1965 the General Assembly passed the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty* by a 109:0:1 vote. *Inter alia*, it stated that

¹⁴¹⁸ Ross, "Beyond", 96.

¹⁴¹⁹ GA Resolution 1514 (1960), Article 2; Eckart Klein, "Nationale Befreiungskämpfe und Dekolonisierungs-Politik der Vereinten Nationen: Zu einigen Völkerrechtlichen Tendenzen", *ZaöRV*, 1976, 618-653, 641.

¹⁴²⁰ Schwenninger, "The 1980s", 428-429; Higgins, "Intervention", 37.

¹⁴²¹ Oscar Schachter, "The Right of States to Use Armed Force", *Mich. L. Rev.*, Vol. 82, 1983-1984, 1620-1646, 1645; Rohlik, "Some", 409-411.

1. *No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.*

2. *...Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.*¹⁴²²

These sentiments were reaffirmed in the 1970 General Assembly *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States*, which was passed without a vote:

*Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.*¹⁴²³

Although the Resolution as such was not legally binding, the fact it was passed by consensus, and explicitly referred to international law, allows the conclusion that states viewed the content of the Declaration as being reflective of their interpretation of the international legal rules.¹⁴²⁴ In its 1986 judgement in the *Nicaragua Case* the ICJ confirmed that the principle of non-intervention had become “part of customary international law.”¹⁴²⁵

¹⁴²² GA Resolution 2131 (XX) (1965; emphases by author). It should, however, be noted that the US representative stated that the USA regarded Resolution 2131 as a “statement of attitude and policy...not as a declaration or elaboration of the law governing non-intervention”; Robert Rosenstock, “The Declaration of Principles of International Law Concerning Friendly Relations: A Survey”, *AJIL*, Vol. 65, 1971, 713-735, 727.

¹⁴²³ GA Resolution 2625 (XXV) (1970).

¹⁴²⁴ This is also confirmed by the US attitude: while the US Representative had declared that Resolution 2131 (1965) was a mere policy statement, not a statement of law, he had explicitly mentioned the *Declaration* -finally passed in 1970, but being drafted since 1964- as having “the precise job of enunciating that law”, as far as non-intervention was concerned; Rosenstock, “The Declaration”, 714-715, 726-729; Perkins, “The Right”, 186, 188; Peter A. Pentz, “The Mujahidin Middleman: Pakistan’s Role in the Afghan Crisis and the International Rule of Non-Intervention”, *Dick. J. Int’l L.*, Vol. 6, 1987-1988, 377-401, 385-387.

¹⁴²⁵ ICJ, *Military and Paramilitary Activities in and against Nicaragua*, *Nicaragua v. USA*, Judgement (Merits), 27/06/1986, I.C.J. Rep. 1986, 14; paras. 202, 205.

Despite the 1981 *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States* reverting to exclusively focusing on the prohibition of aiding rebels,¹⁴²⁶ it is therefore justified to argue that, by the 1970s, a majority view had developed, according to which customary international law required states to refrain from intervening in other states' civil wars, whether at the request of the rebels, or at the request of the government.¹⁴²⁷ This is also reflected in the Resolution of the *Institut de Droit International* on the *Principle of Non-Intervention in Civil Wars*; its Article 2 (1) states:

*Third States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State.*¹⁴²⁸

Thus the increased focus on human rights on the one hand, and the renewed emphasis on national sovereignty, self-determination and freedom from outside interference on

¹⁴²⁶ GA Resolution 36/103 (1981). While the Resolution repeatedly stresses the ban on aiding insurgents in another state, it does not mention aid in support of governments at all. As far as the latter is concerned, the Resolution therefore seems inconclusive. However, as it does not repudiate or contradict the earlier resolutions, it cannot be claimed that it reflected a change in the international community's attitude to the principle of non-interference in civil wars. Furthermore, the Resolution's value in ascertaining *opinio juris* is diminished by the fact that it was passed by a 120:22:6 vote, the "no"-votes all having been cast by developed states; Doswald-Beck, "The Legal", 211-212.

¹⁴²⁷ Pentz, "The Mujahidin", 387-390; Perkins, "The Right", 183-195; Doswald-Beck, "The Legal", 250-252, esp. 252; Louis B. Sohn, "Gradations of Intervention in Internal Conflict", *Ga. J. Int'l & Comp. L.*, Vol. 13, 1983, 225-230, 226, 227; Schwenninger, "The 1980s", 429; he even claims that a "clear international consensus...against outside interference" had emerged; Gray, *International Law*, 81; she similarly argues that this position was "generally agreed"; Roger Fisher, "Intervention: Three Problems of Policy and Law", reprinted in *The Vietnam War and International Law*, Richard A. Falk (ed.), Princeton: Princeton University Press, 1968, 135-150, 137, 140, 145; John Quigley, "The Reagan Administration's Legacy to International Law", *Temple Int'l & Comp. L. J.*, Vol. 2, 1987-1988, 199-221, 204; Daniel G. Partan, "Legal Aspects of the Vietnam Conflict", reprinted in *The Vietnam War and International Law*, Richard A. Falk (ed.), Princeton: Princeton University Press, 1968, 201-236, 227; Schachter, "The Right", 1641; he obviously views this rule as uncontroversial; Rohlik, "Some", 406-407; Wright, "United States", 119-121; Wright claims that the rule of non-intervention in civil wars was already the "predominant view" when he was writing in 1959; Oglesby, "A Search", 38-39, 41; writing in 1970, he, however, claims that a new norm in favour of "bloc intervention" may be developing; Moore, "Legal Standards", 199; it should, however, be pointed out that, although Moore supports this majority view, the permissible exceptions allowed according to him are quite generous, mostly coinciding with US policies; Friedman, "Intervention", 72-74; he, however, only claims that, in international law, it is no longer possible to differentiate between support of a government and support of rebels, his implication being that both are no longer properly regulated by international law; Luard, "Superpowers", 1011; he seems to agree with Friedman.

¹⁴²⁸ *The Principle of Nonintervention in Civil Wars* (1975), *Institut de Droit International*; available at: http://www.idi-iil.org/idiE/resolutionsE/1975_wies_03_en.pdf; last accessed 26/10/2011.

the other, arguably to some extent aims mutually exclusive of each other,¹⁴²⁹ had, nevertheless, combined to reinforce the rule of non-interference in civil wars: firstly, human rights considerations had de-emphasized the government's role in international law; and, secondly, the right of self-determination was viewed as granting only the people the right to decide, free from outside interference, who should govern them, if necessary in a civil war.¹⁴³⁰

It must, however, be pointed out that although the rule of non-intervention had, by the 1970s, become the majority view, it was neither uncontroversial, nor was its practical application easy.¹⁴³¹

There were some who argued that the principle of non-intervention was a misnomer, because its adoption would actually amount to a fairly massive intervention.¹⁴³²

Taken to its extremes, a policy of non-intervention would not only be impracticable, but also oblige a state to end bilateral assistance programmes in support of another state, if it were possible to argue that their maintenance could influence the outcome of a civil war.¹⁴³³ Reducing or terminating such programmes, on the other hand, would obviously seriously weaken any government dependent on them, and therefore

¹⁴²⁹ Higgins, "Intervention", 30, 34-35.

¹⁴³⁰ Thus, the *American Bar Association's* Committee on Grenada stated in its 1984 Report: "In terms of the purposes and principles of the *United Nations Charter* and the *Rio Treaty*, it is difficult to square the commitment to sovereignty, political independence and self-determination with allowing foreign forces to decide which of the rival factions will prevail in an internal struggle for power"; Perkins, "The Right", 186.

¹⁴³¹ Rostow, "Law", 223; writing in 1980-1981, he, for example, simply states that "international law always has recognized one State's right to appeal to another for military assistance against revolution"; Joyner/Grimaldi, "The United States", 642-643, 644; Michael J. Matheson, "Practical Considerations for the Development of Legal Standards for Intervention", *Ga. J. Int'l & Comp. L.*, Vol. 13, 1983, 205-209; Richard Ullman, "Reflections on Intervention", *Rev. Jur. U.P.R.*, Vol. 52, 1983, 127-139, 130-131; writing in 1983, he argues that the pre- WW II rules of international law on interventions still apply; Krauss, "Internal", 218-219.

¹⁴³² J. J. Lador-Lederer, "Intervention-A Historical Stocktaking", *Nordisk Tidsskrift Int'l Ret.*, Vol. 29, 1959, 127-141, 128, 131; Matheson, "Practical", 206-207; Ullman, "Reflections", 133-134; he puts forward a related argument by claiming that a rule of non-intervention would aid repressive regimes and undermine human rights. His argument, however, seems contradictory, given the fact that he also argues that the traditional rules in favour of supporting governments in civil wars still apply, and then proceeds to criticize the rule of non-intervention on the basis of it aiding repressive incumbents.

¹⁴³³ Perkins, "The Right", 195-196; Farer, "Intervention", 274-275; "Harnessing", 530-531; Moore, "Legal Standards", 195.

offer indirect assistance to the rebels.¹⁴³⁴ Furthermore, the rule of non-intervention simply ignored the fact that states were prone to intervene, when it was in their interest to do so.¹⁴³⁵ Some of the opponents of the rule of non-intervention therefore actually argued that customary international law should be adapted in such a way, so as to generally allow outside intervention in a civil war, as long as it was ensured that the conflict remained a truly internal one, and was not completely orchestrated from abroad.¹⁴³⁶

Despite some of these objections offering a valid criticism of the principle of non-intervention, advocates of the majority view correctly maintained that it was possible to differentiate between the continuation of bilateral aid programmes, compatible with a policy of non-intervention, and active support of the governmental side in an internal conflict.¹⁴³⁷ As far as military cooperation programmes were concerned, once civil war had erupted, the suspension of weapon deliveries and military advice was always possible and justified.¹⁴³⁸

Furthermore, the prohibition of interventions in civil wars, understood as active military support of one side in the conflict, which is the topic discussed here, has no bearing on bilateral non-military cooperation or aid programmes.

(iv) State practice

Beginning in the 1950s state practice, as far as interventions in internal uprisings are concerned, began to evidence changes in the pre-WW II rules on intervention.

¹⁴³⁴ Perkins, "The Right", 195-196; Matheson, "Practical", 206; Moore, "Legal Standards", 195.

¹⁴³⁵ Lador-Lederer, "Intervention", 136; Farer, "Intervention", 274-275; "Harnessing", 530.

¹⁴³⁶ Farer, "Intervention", 275-279, esp. at 276 (his "threshold" is the prohibition of foreign involvement in actual combat); and "Harnessing", 532-540; Krauss, "Internal", 220-221.

¹⁴³⁷ Perkins, "The Right", 196-197.

¹⁴³⁸ Perkins, "The Right", 196-197.

Interventions in internal conflicts were increasingly depicted as reactions to prior foreign interference by others.¹⁴³⁹

Soviet intervention in Hungary (1956)

The widely condemned Soviet invasion of Hungary in 1956 was justified on the basis of that government's request, however dubious that claim seemed.¹⁴⁴⁰ In its official Declaration of October 30, 1956, the USSR, however, also alluded to outside interference in Hungary:

*The Soviet government expresses confidence that the peoples of the socialist countries will not permit foreign and domestic reactionary forces to shake the foundations of the people's democratic system, a system established and strengthened by the self-sacrificing struggle and labor of the workers, peasants and intelligentsia of each country.*¹⁴⁴¹

During the subsequent Security Council and General Assembly debates on Hungary the USSR representative repeatedly accused the USA and Austria of actively supporting and "directing" the anti-government, "counter-revolutionary" protesters, and of attempting to "stab the Hungarian people in the back".¹⁴⁴² Some Soviet jurists consequently argued that Hungary and the Soviet Union had exercised their right of collective self-defence, in accordance with the UN Charter and the Warsaw Pact.¹⁴⁴³

¹⁴³⁹ Lador-Lederer, "Intervention", 132-133; Brownlie, *International Law*, 325-327.

¹⁴⁴⁰ Doswald-Beck, "The Legal", 213, 222-223; Kathryn Rider Schmelzter, "Soviet and American Attitudes Toward Intervention: The Dominican Republic, Hungary and Czechoslovakia", *Va. J. Int'l L.*, Vol. 11, 1970-1971, 97-124, 112; Rostow, "Law", 226-227; Sohn, "Gradations", 226.

¹⁴⁴¹ *Declaration by the Soviet Government on the Principles of Development and further Friendship and Cooperation between the Soviet Union and Other Socialist States*, October 30, 1956; available at: <http://www.fordham.edu/halsall/mod/1956soviet-coop1.html>; last accessed 26/10/2011 (emphasis by author); Rostow, "Law", 224-225; Turner, "Soviet", 89-90.

¹⁴⁴² Doswald-Beck, "The Legal", 223-224; Schmelzter, "Soviet", 112; Rostow, "Law", 227-228.

¹⁴⁴³ Schmelzter, "Soviet", 113 (citing Korovin); Lador-Lederer, "Intervention", 133; Turner, "Soviet", 91; Brownlie, *International Law*, 325; Gray, *International Law*, 167; in fn. 2 she, however, points out that the USSR

The highly contentious question of whether there was a valid request by the Hungarian government was actually not discussed in detail in the GA debate. Many states' representatives simply accused the Soviets of interfering in Hungary's internal affairs, an action not justified by the Warsaw Pact.¹⁴⁴⁴ The Soviet invasion of Hungary was subsequently condemned by the General Assembly in a vote passed by a large majority.¹⁴⁴⁵

British/American interventions in the Middle East (1958)

When, in 1958, the UK and the USA intervened in internal uprisings in Jordan and Lebanon, they claimed they had acted at the request of the legitimate government. However, both states went on to justify their interventions on the basis of prior foreign intervention in support of the rebels,¹⁴⁴⁶ thereby implicitly acknowledging that the respective government's request in itself was not sufficient. President Eisenhower declared:

*About two months ago a violent insurrection broke out in Lebanon...The revolt was encouraged by the official Cairo, Damascus, and Soviet radios...The insurrection was further supported by sizeable amounts of arms, ammunition, and money and by personnel infiltrated from Syria to fight against the lawful authorities.*¹⁴⁴⁷

officially only referred to the Warsaw Pact, but never directly claimed to be acting in collective self-defence in Hungary.

¹⁴⁴⁴ Doswald-Beck, "The Legal", 223-226; Schmeltzer, "Soviet", 114.

¹⁴⁴⁵ GA Resolution 1004 (1956); the resolution was passed by 50:15:8 votes. A draft resolution introduced into the Security Council by the USA was defeated by the Soviet veto. The General Assembly subsequently passed two further resolutions condemning the Soviet actions in Hungary (1005 and 1006 (both 1956).

¹⁴⁴⁶ Doswald-Beck, "The Legal", 214-216; Lador-Lederer, "Intervention", 133; Brownlie, *International Law*, 326; Gray, *International Law*, 95, 167, 174.

¹⁴⁴⁷ President Eisenhower, *A Message to Congress*, July 15, 1958; Wright, "United States", 112.

The two states were intent on avoiding the impression of interference in a purely internal struggle.¹⁴⁴⁸ The USA also asserted the necessity to protect American citizens in Lebanon.¹⁴⁴⁹ Although the respective government's request for intervention was never in doubt,¹⁴⁵⁰ many states, especially within the socialist bloc, opposed the Anglo-American military interventions.¹⁴⁵¹ In fact, these interventions arguably prompted the General Assembly to re-iterate the principle of "strict non-interference in each other's internal affairs."¹⁴⁵²

US invasion of the Dominican Republic (1965)

Similarly, when the United States invaded the Dominican Republic in 1965,¹⁴⁵³ it was mentioned that a request for assistance had been received from a government official,¹⁴⁵⁴ but that request was initially claimed to have related only to the protection of US nationals there.¹⁴⁵⁵ Later, when that justification became untenable due to the large number of American troops deployed to the country, collective self-defence, also on behalf of the OAS,¹⁴⁵⁶ against Cuban and Soviet attempts at installing a communist government was invoked.¹⁴⁵⁷ When justifying the invasion to the American public, President Johnson actually confirmed the thesis that -except for

¹⁴⁴⁸ Doswald-Beck, "The Legal", 213.

¹⁴⁴⁹ Wright, "United States", 112.

¹⁴⁵⁰ Doswald-Beck, "The Legal", 213, 214.

¹⁴⁵¹ Doswald-Beck, "The Legal", 216-217; Wright, "United States", 114; Gray, *International Law*, 95, 174, 176.

¹⁴⁵² GA Resolution 1237 (1958).

¹⁴⁵³ In 1963 a military junta had deposed the democratically elected government of the Dominican Republic. In April 1965 that junta was itself overthrown by supporters of the former President; civil war erupted.

¹⁴⁵⁴ Doswald-Beck, "The Legal", 213, 226-230; it should, however, be pointed out that the validity of any request by Dominican authorities was very much in doubt. In the Security Council debate the US delegate claimed a request had been received by "Dominican law enforcement and military officials"; Sohn, "Gradation", 227.

¹⁴⁵⁵ Doswald-Beck, "The Legal", 227; Schmeltzer, "Soviet", 105.

¹⁴⁵⁶ The OAS passed a resolution confirming the American view after the invasion had taken place (at its Tenth Meeting of Consultation); Schmeltzer, "Soviet", 106.

¹⁴⁵⁷ Doswald-Beck, "The Legal", 227-228; Schmeltzer, "Soviet", 105-106; Joyner/Grimaldi, "The United States", 679-680.

communist takeovers- “revolution in any country is a matter for that country to deal with.”¹⁴⁵⁸ Except for the UK and China (still represented by Taiwan), no state officially supported the US intervention on legal grounds at the UN.¹⁴⁵⁹

*US intervention in Vietnam (as of 1961, mainly as of 1965)*¹⁴⁶⁰

The United States’ escalating involvement in Vietnam’s civil war as of 1965 was also mainly justified on the basis of supporting the South Vietnamese government against alleged infiltration by North Vietnamese troops.¹⁴⁶¹ Furthermore, the Soviets were accused of being massively involved in the fighting in South Vietnam.¹⁴⁶² The USA therefore claimed to be exercising its, and South Vietnam’s right of self-defence.¹⁴⁶³

In an official justification of US involvement in Vietnam, the State Department, in 1966, declared:

In response to requests from the Government of South Viet-Nam, the United States has been assisting that country in defending itself against armed attack from the Communist North. This attack has taken the forms of externally supported subversion, clandestine supply of arms, infiltration of armed personnel, and most recently the sending of regular units of the North Vietnamese army into the South.

¹⁴⁵⁸ President Johnson, *Address to the Nation*, 02/05/1965; quoted by Quigley, “The Reagan”, 202.

¹⁴⁵⁹ Doswald-Beck, “The Legal”, 228-229.

¹⁴⁶⁰ The USA actually became involved earlier. First combat troops were sent in 1961. Even in 1964, however, the USA still took the view that the war had to be won by the Vietnamese people. That subsequently changed, so that direct American involvement is dated to 1965; Farer, “Intervention”, 276.

¹⁴⁶¹ A further complication arose in the Vietnam situation, because North and South Vietnam had never been recognized as separate states. American jurists therefore often went to extraordinary lengths in order to justify treating the North Vietnamese “infiltrators” as foreigners in South Vietnam. Furthermore, the fact that the majority of states did not view South Vietnam as an independent state (see also GA Res. 32/3 (1977) which referred to Vietnam’s “struggle for independence and national reunification” when admitting the state to the UN) also raised doubts, whether the South Vietnamese government could actually legitimately request an intervention; Doswald-Beck, “The Legal”, 213; Farer, “Intervention”, 273; Gray, *International Law*, 174, 177.

¹⁴⁶² Farer, “Intervention”, 277-278 (although he claims that Soviet involvement only commenced after the Americans had become massively involved).

¹⁴⁶³ Richard A. Falk, “Intervention and National Liberation”, in *Intervention in World Politics*, Hedley Bull (ed.), Oxford: Clarendon Press, 1984, Ch. 8, 119-133, 121; Gray, *International Law*, 167.

*International Law has long recognized the right of individual and collective self-defense against armed attack. South Viet-Nam and the United States are engaging in such collective defense...*¹⁴⁶⁴

US policies regarding Vietnam were, nevertheless, criticized by a large number of states.

Cuban intervention in Angola (as of 1975)

Although Cuba at first relied solely on the invitation of the government of the newly independent state of Angola to justify the presence of its troops during the civil war there, Angola preferred to rely on Article 51. It was claimed that South Africa's repeated armed attacks on Angola justified the use of force in collective self-defence.¹⁴⁶⁵

French and Libyan interventions in Chad (1981-1984)

Repeated French and Libyan interventions in Chad during repeated internal uprisings there provide further evidence for the proposition that the principle of non-intervention in civil wars was viewed as a rule of customary international law. When, in January 1981, following internal attempts to unseat the President there, Libyan troops were sent to Chad -at the request of Chad's government- in order to "preserve

¹⁴⁶⁴ "The Legality of United States Participation in the Defense of Viet-Nam", 04/03/1966; Dept. of State Bulletin, Vol. 54, 1966, 474; reprinted in AJIL, Vol. 60, 1966, 565-585, 565.

¹⁴⁶⁵ Gray, *International Law*, 168-169.

security” and, it was claimed, to prepare the eventual unification of the two states, the OAU nevertheless condemned the Libyan actions.¹⁴⁶⁶

Following the overthrow of the pro-Libyan government in Chad, French troops, already in the country, became re-involved in the ongoing internal conflict as of 1983. However, France at first refused to participate actively in the fighting, a fact officially criticized by the Chad government.¹⁴⁶⁷ Only when evidence of the active participation of Libyan troops in the fighting emerged, did French troops also intervene forcefully. At all times France claimed its troops would only fight Libyan troops, not the indigenous rebels,¹⁴⁶⁸ a distinction compatible with Article 51 UN Charter, but not with the traditional legal right of intervening in a civil war at the government’s request.¹⁴⁶⁹

US intervention in Grenada (1983)

The validity of the principle of non-intervention in civil wars is further confirmed by the events surrounding the US invasion of Grenada in 1983, actively supported by some Caribbean states, following the violent overthrow of the government there and subsequent unrest. Although a formal request by that island nation’s Governor General for a US intervention was mentioned by the USA,¹⁴⁷⁰ the USA’s official legal

¹⁴⁶⁶ Doswald-Beck, “The Legal”, 220-221; Gray, *International Law*, 96.

¹⁴⁶⁷ Doswald-Beck, “The Legal”, 221.

¹⁴⁶⁸ Doswald-Beck, “The Legal”, 221.

¹⁴⁶⁹ Doswald-Beck, “The Legal”, 221; Gray, *International Law*, 96-98, 167.

¹⁴⁷⁰ *Letter from the Legal Advisor of the Department of State*, Davis R. Robinson to Prof. Gordon, dated February 10, 1984; excerpts reprinted in AJIL, Vol. 78, 1984, 661-665; however, the timing of this request (often claimed to have been dated after the US forces had already been set in motion), and the difficult constitutional issue of whether the Governor General was, under Grenada’s domestic laws, empowered to make such a request against the actual government’s wishes meant that the validity of any request was very much in doubt; Doswald-Beck, “The Legal”, 213, 234-239; Quigley, “The Reagan”, 220; Schachter, “The Right”, 1641, 1644-1645.

justification emphasized its right to protect US nationals in Grenada, and collective self-defence.¹⁴⁷¹ The latter was the main justification for the USA's Caribbean supporters, although they also relied on the Governor-General's request.¹⁴⁷²

Nevertheless, it should be noted that the Legal Adviser to the State Department, when citing the Governor General's request, added the following statement, thereby at least indicating doubts as to the legality of intervention at the government's request during a civil war:

*Difficult legal issues may arise in determining what constitutes such lawful authority in a situation of factional strife involving contending factions with equivalent, colourable claims to authority. I would only point out that this was not such a case. The Governor General was not the leader of one contending faction in a civil war;...*¹⁴⁷³

The US invasion was condemned by the vast majority of states in the General Assembly,¹⁴⁷⁴ most of them asserting that the USA had violated the principle of non-interference in the internal affairs of another state.¹⁴⁷⁵

Conclusion on state practice

The developments just outlined indicate that certainly by the early 1970s a formal request by the recognized government of a state was no longer deemed sufficient to justify outside intervention in civil war situations, but that additional grounds for such an intervention had to be present. Significantly, states felt it necessary to provide such additional grounds in their legal justifications, no matter whether the existence of a

¹⁴⁷¹ Doswald-Beck, "The Legal", 236; Quigley, "The Reagan", 201-202,220; Schachter, "The Right", 1631; Amer, "The United Nations", 438.

¹⁴⁷² Doswald-Beck, "The Legal", 236-237; Quigley, "The Reagan", 201-202.

¹⁴⁷³ *Letter from the Legal Advisor of the Department of State*, Davis R. Robinson to Prof. Gordon, dated February 10, 1984; excerpts reprinted in AJIL, Vol. 78, 1984, 662.

¹⁴⁷⁴ GA Resolution 38/7 (1983), passed in a 108:9:27 vote.

¹⁴⁷⁵ Doswald-Beck, "The Legal", 238-239.

valid invitation by the foreign government was in doubt or not.¹⁴⁷⁶ Moreover, in cases where the claimed invitation seemed questionable, other states condemning the intervention rarely emphasized that fact, but instead mainly relied on the general principle of non-interference in the internal affairs of another country.

State practice evidences that, as early as the late 1950s, states intervening in civil wars unfailingly cited prior foreign support of rebels, and invoked Article 51 UN Charter. This seems to confirm widespread acceptance of a general rule of non-interference in civil wars in customary international law.¹⁴⁷⁷ Consequently, the British Foreign Office, in 1984, issued the following legal advice:

*International law does, however, place two major restrictions on the lawfulness of states providing outside assistance to other states. One is that any form of interference or assistance is prohibited ... when a civil war is taking place and control of the state's territory is divided between warring parties.*¹⁴⁷⁸

cc) Afghanistan

By December 1979, the Soviet Union could no longer claim to be legally entitled to intervene in the Afghan civil war, simply at the request of the Afghan Government. Although the Soviet Union's official justification may have been acceptable under customary international law prior to the Second World War, developments since then had, by the 1970s, led to the majority view that any intervention in a civil war was illegal.

¹⁴⁷⁶ Doswald-Beck, "The Legal", 214; Lador-Lederer, "Intervention", 132-133.

¹⁴⁷⁷ Doswald-Beck, "The Legal", 251-252; Gray, *International Law*, 81, 85-88; she points out that states also like to justify interventions in internal conflicts by negating the existence of a civil war (which would prohibit such intervention). In those cases states tend to claim that there was merely "domestic unrest below" that "threshold". Intervention at the respective government's request is then portrayed as legitimate aid to help restore order (she provides a number of examples). This state practice further confirms the existence, in international law, of the prohibition of intervention in a civil war, even at the government's request.

¹⁴⁷⁸ "Is intervention ever justified?", British Foreign Office, Foreign Policy Document No. 148 of July 1984; extracts reprinted in BYIL, Vol. 57, 1986, 614-624, 616.

This assessment is confirmed by both the Soviet Foreign Secretary's and the Soviet Prime Minister's attitude: they had both, in March 1979, internally deemed a Soviet intervention in Afghanistan's civil war at that government's request to be illegal under international law.¹⁴⁷⁹ Subsequent to the Soviet Union's invasion, the USSR's actions were widely and overwhelmingly condemned by other states.¹⁴⁸⁰

The General Assembly, in its Resolution on Afghanistan, chose to re-affirm the principle of non-intervention:

Reaffirming the inalienable right of all peoples to determine their own future and to choose their own form of government free from outside interference...

Recognizing the urgent need for immediate termination of foreign armed intervention in Afghanistan so as to enable its people to determine their own destiny without outside interference or coercion...

1. Reaffirms that respect for the sovereignty, territorial integrity and political independence of every State is a fundamental principle of the Charter of the United Nations, any violation of which under any pretext is contrary to its aims and purposes;

2. Strongly deplores the recent armed intervention in Afghanistan, which is inconsistent with this principle...

4. Calls for the immediate, unconditional and total withdrawal of the foreign troops from Afghanistan in order to enable its people to determine their own form of government and choose their economic, political and social systems free from outside intervention, subversion, coercion or constraint of any kind whatsoever...¹⁴⁸¹

¹⁴⁷⁹ Soviet Prime Minister Kosygin reported to the Politburo that he had replied to Taraki's request for a Soviet intervention in March 1979 by telling him that such a move "would be direct aggression on the part of the U.S.S.R. against Afghanistan" (at 19); Soviet Foreign Secretary Andrej Gromyko (at 14; already quoted above), at the *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011.

¹⁴⁸⁰ GA Resolution ES-6/2 (1980); passed in a 104:18:18 vote.

¹⁴⁸¹ GA Resolution ES-6/2 (1980).

In the ensuing debates many states that condemned the Soviet invasion did not address the controversial validity of the Afghan government's request in detail,¹⁴⁸² but instead stressed that the USSR had intervened in an internal conflict, which should be resolved by the Afghan people.¹⁴⁸³ Venezuela's representative spoke for many states when he stated that the conflict in Afghanistan was "part of an internal process to determine the political future of the country" and "should not be interfered with by external actions of the type denounced here."¹⁴⁸⁴

Thus the Soviet invasion of Afghanistan and international reaction to it actually served to confirm the existence, in customary international law, of the prohibition of intervention in civil wars on any side.

c) Right of counter-intervention at the request of the Afghan government

Based on the prior intervention by other states, including the USA, Pakistan, and Iran, in Afghanistan's civil war,¹⁴⁸⁵ it could be argued that the Soviet Union was not asserting a right of intervention in a civil war at the request of the government, but, by

¹⁴⁸² The question as to whether there had been a valid Afghan request prior to the Soviet invasion will be discussed later; doubts were certainly raised at the UN; Matsson, "Politische", 87.

¹⁴⁸³ Japan, Egypt, Norway, the Netherlands, Jamaica, Zambia, Yugoslavia, Tunisia, Australia, West Germany, Senegal, Sweden, Nigeria, Bangladesh, Austria, Ivory Coast, Bahrain, Oman, Morocco; in addition further states made the same point, but also disputed the Afghan government's request: Pakistan, Singapore, Spain, Liberia, Portugal, Panama, and France.

¹⁴⁸⁴ UN Doc. S/PV.2188 (1980), paras. 31-32; available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL8/000/60/PDF/NL800060.pdf?OpenElement>; accessed 20/11/2011.

¹⁴⁸⁵ Zbigniew Brzezinski, Carter's National Security Advisor at the time of the Soviet invasion of Afghanistan, "Oui, la CIA est entrée en Afghanistan avant les Russes..."; Interview given to Vincent Jauvert, *Le Nouvel Observateur* (No. 1732), 15/01/1998, 76; was available at: <http://hebdo.nouvelobs.com/hebdo/parution/p19980115/articles/a19460-.html>; accessed 07/02/2010 (no longer available online); an English translation is still available at: <http://www.globalresearch.ca/articles/BRZ110A.html>; accessed 26/10/2011; Gates, *From*, 143-149; Gates, US Defence Secretary until recently, was Deputy Director of the CIA at the time. He points out that the CIA was looking at options for granting such support as of early 1979, and confirms that US President Carter authorized covert funding of the *mujahedeen* in July 1979; Loyn, *Butcher*, 191 (although he claims US support of the *mujahedeen* was only initiated in 1980); Doswald-Beck, "The Legal", 232.

alleging prior foreign intervention on behalf of the rebels, was claiming a right of counter-intervention in support of the Afghan government.

Even among those supportive of the majority view just outlined, some argue that customary international law does entitle foreign states to claim a right of counter-intervention when prior foreign intervention in an internal conflict has taken place.¹⁴⁸⁶

It is argued that to dispute the right of counter-intervention would be tantamount to condoning the violation of international law committed by the state guilty of the prior interference.¹⁴⁸⁷ As far as state practice is concerned this view is supposedly confirmed by the incidents outlined above, because in those cases states justified their intervention on the basis of prior foreign intervention on the rebels' side.¹⁴⁸⁸

This line of argument, however, has major weaknesses. Contrary to what its supporters claim, state practice does not confirm that a right of counter-intervention exists in customary international law. Never has a state officially relied on such a

¹⁴⁸⁶ Schachter, "The Right", 1641-1644; Perkins, "The Right", 171-183, 197-205; Gray, *International Law*, 81, 92; Sohn, "Gradations", 229-230; "Is intervention ever justified?", British Foreign Office, Foreign Policy Document No. 148 of July 1984; extracts reprinted in BYIL, Vol. 57, 1986, 614-624, 616; having categorically stated that "any interference or assistance is prohibited...when a civil war is taking place", the legal advice issued by the British Foreign office, nevertheless, goes on to claim that it is "widely accepted that outside interference in favour of one party to the struggle permits counter-intervention on behalf of the other." The two examples of this "principle" cited by the Foreign Office (the Spanish Civil War and Angola, both examined in the main text) are unconvincing precedents, in order to evidence the existence of a right of counter-intervention distinct from Article 51, for the reasons given in the main text; Partan, "Legal", 228-229; although he acknowledges that it would be the "better result" to view intervention and counter-intervention as unlawful, he believes counter-intervention to be permissible self-defence under the UN Charter; he does not explain this assertion; Lloyd N. Cutler, "The Right to Intervene", *Foreign Aff.*, Vol. 64, 1985-1986, 96-112, 102, 106-111; he, however, limits the right of counter-intervention to supporting the "democratic side" in a civil war (whether that would be the rebel or governmental side). Besides being wholly impractical (who would be able to judge the democratic credentials of the respective rivals, especially on the insurgent side?) it seems obvious this theory, outlined by Cutler in 1985, is meant to justify multiple American interventions, while condemning similar Soviet actions. This becomes evident when he claims US support of the Afghan rebels to be justified although "their commitment to...democratic government ...may require further demonstration" (at 108). There is also no evidence of state practice or *opinio juris* in support of Cutler's argument.

¹⁴⁸⁷ Schachter, "The Right", 1642; Perkins, "The Right", 171-180; Pentz, "The Mujahidin", 394.

¹⁴⁸⁸ Perkins, "The Right", 180-183.

justification.¹⁴⁸⁹ When a state has intervened in a civil war-like situation, and justified this on the basis of prior foreign intervention, that state has invariably relied on Article 51 UN Charter, and claimed a right of collective self-defence against external aggression.¹⁴⁹⁰ This was also the line the Soviet Union took in Afghanistan, as will be explained shortly.¹⁴⁹¹ State practice therefore indicates that a customary international law right of counter-intervention distinct from Article 51 does not exist, as it has not been invoked, which in turn evidences a lack of supportive *opinio juris*.

The argument is flawed in other respects as well. Having concluded that customary international law requires states to adhere to the principle of non-interference in civil wars, allowing a right of counter-intervention would obviously undermine that same rule.

¹⁴⁸⁹ Gray, *International Law*, 92-98; Gray seems to disagree. However, she is only able to provide two examples where she explicitly claims that intervention in a civil war took place without the intervenor claiming to be acting under Article 51; neither is convincing. As far as the 1974 Turkish intervention in Cyprus in response to prior Greek intervention is concerned, it is uncertain whether the situation in Cyprus could at that time be described as a "civil war". Furthermore, Turkey -in its justification- did not rely on a right of counter-intervention, but on rights allegedly granted to it in the 1960 *Treaty of Guarantee*. Anyway, as she herself acknowledges, the action was condemned in a 117:0 vote in the General Assembly (Resolution 3213 (1974)), despite the prior Greek intervention not being in serious doubt. Her second example concerns the repeated French and Libyan interventions in Chad where she claims that both states sometimes referred to Article 51 and sometimes only referred to prior foreign involvement in the civil war there. However, since both states did intermittently invoke Article 51, it seems too far-reaching to conclude they did not do so implicitly, when not explicitly referring to the Article. Furthermore Libya's -intermittent- reliance on the government of Chad's invitation was condemned by the OAU.

¹⁴⁹⁰ Lador-Lederer, "Intervention", 132-133; Doswald-Beck, "The Legal", 214-216 (UK as far as Jordan in 1958, the USA as far as Lebanon in 1958 was concerned, explicitly supported by France, as far as this legal justification was concerned); Gray, *International Law*, 95, 96-98, 167, 168-169 (UK as far as Jordan, USA as far as Lebanon, and Vietnam as of 1961, USSR as far as Hungary in 1956, and Czechoslovakia in 1968, Angola in relation to the presence of Cuban troops there as of 1975, and -intermittently- France and Libya as far as Chad between 1981-1984 were concerned); as far as the US involvement in Vietnam and its reliance on Article 51 are concerned, see also: "The Legality of United States Participation in the Defense of Viet-Nam", 04/03/1966; Dept. of State Bulletin Vol. 54, 1966, 474; reprinted in AJIL, Vol. 60, 1966, 565-585, 565; Wright, "United States", 112-113; Friedman, "Intervention", 71; Schachter, "The Right", 1641-1644.; Schachter argues that a right of counter-intervention exists. He then, however, goes on to argue that the prior foreign intervention might serve to justify the counter-intervention on the basis of "collective self-defence" (at 1642), and confirms the USA relied on Article 51, as far as Nicaragua was concerned (at 1643). No examples of state practice confirming a "right of counter-intervention" are provided; Sohn, "Gradations", 229-230; he seems to view the right of counter-intervention not as a distinct right, but generally as a case of collective self-defence under Article 51.

¹⁴⁹¹ Gray, *International Law*, 167.

When intervening on behalf of a government, it is reasonable to assume that prior interference in favour of the rebels could always be claimed. After all, it will be more than likely that rebels would need to resort to markets outside of their home state, in order to obtain material and weapons. Similarly, rebels are invariably supported by some expatriate communities. To claim that states, that tolerate those communities' behaviour or the purchase of weapons on their territory, were, in fact, actively supporting the rebel cause is only a small step.¹⁴⁹²

When intervening on behalf of rebels that claim could obviously be advanced even more easily. Any government that is faced with civil strife is bound to have previously engaged in bilateral relations with other states that result in beneficial financial transactions, perhaps even in military advice. Justifying an intervention on behalf of rebel movements, based on such previous foreign support of a government, would consequently always be possible.¹⁴⁹³ A right of counter-intervention would therefore mean that intervention could ultimately always be justified.¹⁴⁹⁴

For that very reason, a right of counter-intervention, for it to have any practical application, would in reality necessitate a return to the traditional international law rules, which only allowed intervention in support of a government. This is also confirmed by state practice.¹⁴⁹⁵ States have invariably relied on Article 51 when

¹⁴⁹² Schachter, "The Right", 1641.

¹⁴⁹³ Schachter, "The Right", 1642.

¹⁴⁹⁴ Rohlik, "Some", 414-415; Wright, "United States", 115; Fisher, "Intervention", 139-140, 142-143; John Norton Moore, "Legal Standards", 196-197, 198; "Panel One: General Discussion", Ga. J. Int'l & Comp. L., Vol. 13, 1983, 231-241, 231, 232, 234-235; he adopts an ambivalent position. Moore seems to be arguing that there is no right of counter-intervention in favour of insurgents. As far as governments are concerned, counter-intervention can be permissible if the requirements of Article 51 are met. This seems to support the argument put forward here; Moore's actual understanding of Article 51 would, however, in reality result in a broad right of counter-intervention in favour of governments (he, for example, views "communist" support of rebels in El Salvador as justifying US intervention on behalf of the government under Article 51).

¹⁴⁹⁵ Joyner/Grimaldi, "The United States", 647-649; they actually spell out this consequence. They argue a right of counter-intervention based on prior foreign involvement in a civil war exists, but then go on to point out that "counter-interventionary aid to insurgents" is never legal, whatever the circumstances; Gray, *International Law*,

justifying their intervention in civil war situations on the basis of alleged prior foreign involvement. It automatically follows that this means states have never intervened on behalf of rebel groups, and legally justified this on the basis of prior foreign support of the government. A right of counter-intervention would therefore grant the government the kind of supremacy in a civil war the principle of non-interference was meant to eradicate.

When states have in practice resorted to supporting rebel movements, this has never been justified on the basis of a foreign state's support of a government. Most often such support was only offered covertly, in an attempt to avoid having to provide a legal justification at all.¹⁴⁹⁶ When the cover-up became untenable, either individual or collective self-defence on behalf of third states, or, in the case of interventions by socialist states, the right of supporting national liberation movements, were invoked.

So when the USA intervened on behalf of the Nicaraguan Contra rebels in the 1980s, this was officially justified as collective self-defence in support of El Salvador and Honduras against Nicaraguan support for rebels there.¹⁴⁹⁷ Politically speaking, the Reagan Administration did refer to Soviet and Cuban support for the Nicaraguan Government, but this argument was never used in a legal context.¹⁴⁹⁸ Already in 1961, when the USA had massively supported and organized the disastrous attempt by exiled Cubans to overthrow Castro,¹⁴⁹⁹ the USA did not claim that Soviet support for Castro justified US intervention. In fact, US involvement was denied even at a time

92; she makes a similar point; Perkins, "The Right", 221-224, disagrees; he argues that "illegal intervention in support of a government" justifies "counter-intervention in support of insurgents"; he, however, fails to provide any examples of state practice or expressed *opinio juris* in support of his argument.

¹⁴⁹⁶ Gray, *International Law*, 106.

¹⁴⁹⁷ Anthony Clark Arend, "International Law and the Recourse to Force: A Shift in Paradigms", *Stan. J. Int'l L. J.*, Vol. 27, 1990-1991, 1-47, 13; Quigley, "The Reagan", 202; Schachter, "The Right", 1643; Falk, "Intervention", 125-126; Gray, *International Law*, 76; Gray, *International Law*, 106.

¹⁴⁹⁸ Schachter, "The Right", 1642, 1643; Gray, *International Law*, 76.

¹⁴⁹⁹ The famous "Bay-of-Pigs incident"; Luard, "Superpowers", 1015.

when the episode had already become hugely embarrassing for Kennedy's new Administration.¹⁵⁰⁰ Although Cuba was at that time definitely no longer in a state of civil war, the US denials do indicate that resorting to a right of counter-intervention as a plausible justification was not considered a viable option.

Similarly, South Africa justified its massive interference, as of the mid-1970s, in Angola's and Mozambique's civil wars, and its support of the opposition there (UNITA and RENAMO), on the basis of self-defence. The support afforded to the two governments by Cuba and the USSR was not part of South Africa's legal arguments.¹⁵⁰¹ There is therefore no evidence of a customary international law right of counter-intervention in civil wars, distinct from Article 51, nor should there be.

Notwithstanding the arguments just outlined, even supporters of the existence of a right of counter-intervention could, however, not overcome the factual obstacles to assuming such a right on the part of the Soviets in the Afghan situation. Although there can be little doubt that there was some external, that is mainly Pakistani and Iranian, but also, by December 1979, some American, support of the Afghan rebels, there is no doubt that any such support was still very limited, and certainly could not in any way match Soviet support of the Afghan government prior to the invasion. Furthermore, even the internal Soviet analysis came to the conclusion that the uprising was of indigenous origin, and not orchestrated from abroad. Lastly, the massive Soviet invasion of Afghanistan could certainly not be claimed to be proportional in relation to the external aid the Afghan rebels were receiving at that time.¹⁵⁰²

¹⁵⁰⁰ James B. Reston, "The Press, the President and Foreign Policy", *Foreign Aff.*, Vol. 44, 1965-1966, 553-563, 565; Hans J. Morgenthau, "To Intervene or Not to Intervene", *Foreign Aff.* Vol. 45, 1966-1967, 425-436, 431.

¹⁵⁰¹ Gray, *International Law*, 107-110.

¹⁵⁰² As far as the requirement of "proportionality" is concerned, if a "right of counter-intervention" is accepted: Schachter, "The Right", 1644; also Partan, "Legal", 228-229.

The Afghanistan situation is thus also a showcase for demonstrating that rejecting a right of intervention in customary international law, while nevertheless supporting a right of counter-intervention, as some scholars do, is impractical: were the Pakistanis, Iranians, and Americans acting on the basis of a right of counter-intervention, due to the prior massive Soviet support of the Afghan government, or were the Soviets entitled to intervene precisely because of that prior external intervention on behalf of the rebels?

It must therefore be concluded that the Soviet Union could not claim to be acting in accordance with a customary international law right of counter-intervention, as such a right did not exist. Even if it existed the true facts would not have justified Soviet actions. This is lastly also confirmed by the fact that, despite the Soviet Politburo in March 1979 extensively discussing the external support the rebels were receiving,¹⁵⁰³ Foreign Secretary Gromyko and Prime Minister Kosygin nevertheless believed a Soviet invasion to be illegal under international law.¹⁵⁰⁴

¹⁵⁰³ Soviet Foreign Secretary Gromyko declared that the events in Herat were “being directed by the hand of the U.S.A. China, Pakistan, and Iran are playing a role here that is not at all far behind” (at 17); *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011.

¹⁵⁰⁴ Soviet Prime Minister Kosygin (at 19); Foreign Secretary Andrej Gromyko (at 14); *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011.

d) Collective self-defence (Article 51), Article 4 Treaty of Friendship

When justifying the Soviet invasion, the Soviet Union claimed it was acting in accordance with Article 51 UN Charter, allowing collective self-defence, and Article 4 of the Afghan-Soviet *Treaty of Friendship* which stated:

The High Contracting Parties, acting in the spirit of the traditions of friendship and good-neighbourliness and in the spirit of the Charter of the United Nations, shall consult with each other and shall, by agreement, take the necessary steps to safeguard the security, independence and territorial integrity of the two countries...

In the past there was some controversy over the rights granted to states under Article 51, as far as collective self-defence is concerned. Notably Bowett held the view that collective self-defence according to Article 51 UN Charter was only justified when all states that claimed to be acting in collective self-defence, could also claim a right to individual self-defence.¹⁵⁰⁵ This view has been rejected by a majority of writers who argue that, under Article 51, a state can aid another state that has been attacked, without having been subject to an armed attack itself, a proposition confirmed by state practice.¹⁵⁰⁶ This discussion is, however, only relevant, if the Soviet Union itself could not claim to have been subject to an “armed attack” in relation to Afghanistan.

aa) “Armed attack” on the USSR

As the author has explained previously,¹⁵⁰⁷ the use of force in self-defence can only be justified on the basis of an ongoing armed attack on the state concerned. The Soviet Union at no point explicitly claimed that an armed attack on the Soviet Union was taking place. In various Soviet statements there are, however, indications that the

¹⁵⁰⁵ Derek William Bowett “Collective Self-Defence under the Charter of the United Nations”, BYIL, Vol. 32, 1955-1956, 130-161, 137-141, esp. at 139-140 (his second requirement for justified collective self-defence was “an agreement between participating states”).

¹⁵⁰⁶ Schachter, “The Right”, 1638-139.

¹⁵⁰⁷ For more details, see: Chapter III.

USSR's invasion of Afghanistan was of a defensive nature. It was sometimes claimed that external support of the Afghan rebels was directed against the Soviet Union, and threatened the security and stability of its borders.¹⁵⁰⁸

Except for long-term strategic goals, which will be discussed later, there is, however, no evidence that Pakistani, Iranian, or US support of the Afghan rebels was in any way directed against the USSR, or its borders, in a way which could justify the assumption an "armed attack" on it was taking place. In fact, prior to the Soviet Union's invasion, there were no incidents directed against Soviet territory.

As far as the killing of Soviet citizens in March 1979 was concerned, the USSR never justified the invasion as a mission to protect its nationals.¹⁵⁰⁹ In any case, the USSR had always opposed the legality of that justification for military intervention.¹⁵¹⁰

Only if it were accepted that an attack on a state's strategic interests justified the use of force in self-defence could the Soviet Union possibly have claimed that external support for the Afghan rebels was hurting its vital interests. However, there is no doubt that such an expansive view of the right of self-defence is overwhelmingly rejected. Certainly, elements of such "sphere of interest" thinking had been evident in the Soviet Union's justifications for its invasions of Hungary and Czechoslovakia.

¹⁵⁰⁸ This view is, for example, supported by Mader; writing for the GDR military publishers in 1988, he claims the US involvement in Afghanistan was only a cover for organizing an attack on the Soviet Union, which he claims was the true American goal (*CIA-Operation*, 12).

¹⁵⁰⁹ Braithwaite, *Afgantsy*, 45; the former British Ambassador to Moscow (1988-1992) also claims that the killing of Soviet citizens in Herat appears "to have had no influence on the decisions which the Soviet government then took."

¹⁵¹⁰ Schmeltzer, "Soviet", 107; she points out the Soviets opposed the US invasion of the Dominican Republic in 1965 *inter alia* on the ground that the forcible rescue of nationals abroad was "forbidden" by "international law and the UN Charter." In 1969 the USSR presented a draft resolution on the *Definition of Aggression*, according to which any justification of the use of force based on "any danger which may threaten the life or property of aliens" was to be explicitly outlawed, see: Soviet Draft *Definition of Aggression*, Art. 2 A (c); UN Doc. A/AC.134/L.12; GAOR 24th Sess. (1969), Suppl. No. 20 (A/7620), para. 9; Moore, "The 'Brezhnev'", 18-21, 20.

The repeated references to the Commonwealth of socialist states, where foreign interference would not be tolerated, point in that direction.¹⁵¹¹

The USA, too, tended to claim a right to forcefully protect its strategic interests. In 1823 US President Monroe had announced the so-called *Monroe Doctrine*:

*That we should consider any attempt on the part of the allied powers, to extend their system to any portion of this hemisphere as dangerous to our peace and security...that we could not view any interposition for the purpose of oppressing or controlling in any manner their destiny by any European Power, in any other light than as an unfriendly disposition towards the United States.*¹⁵¹²

Writing in 1874, Theodore Woolsey expressed some reservations as to the legality of the Doctrine. He questioned whether the United States really had the right to block Russian colonization of an area distant from the United States, after the USA had invoked the Doctrine in a dispute over the Pacific boundary between Russia and the USA.¹⁵¹³

The *Johnson Doctrine* of 1965¹⁵¹⁴ and the *Carter Doctrine* of 1980 (in reaction to the Soviet invasion of Afghanistan) are further notable examples of the American view of the world, which seemed to delineate it into “spheres of interest”.¹⁵¹⁵ In his *State of the Union Address*, Carter had declared:

Let our position be absolutely clear: An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital

¹⁵¹¹ Schmeltzer, “Soviet”, 115-116; Luard, “Superpowers”, 1007-1008, 1014-1015.

¹⁵¹² “Monroe Doctrine; December 2, 1823”; available at: http://avalon.law.yale.edu/19th_century/monroe.asp; last accessed 26/10/2011.

¹⁵¹³ Woolsey, *Introduction*, 70 (§ 47).

¹⁵¹⁴ In his Address to the Nation on May 2, 1965, Johnson declared -in respect of the American invasion of the Dominican Republic- that: “Revolution in any country is a matter for that country to deal with. It becomes a matter calling for hemispheric action only...when the object is the establishment of a communist dictatorship.”; Quigley, “The Reagan”, 202.

¹⁵¹⁵ Schweninger, “The 1980s”, 423, 431; Oglesby, “A Search”, 38.

*interests of the United States of America, and such an assault will be repelled by any means necessary, including military force.*¹⁵¹⁶

However, it has never been seriously argued that these political statements by US Presidents reflected international law, or provided any kind of legal justification for the use of force under Article 51 UN Charter.¹⁵¹⁷ The Soviet Union would, of course, have been the main opponent of any attempt by the USA to modify international law in order to accommodate these doctrines. The Soviet Union could therefore not claim to have been the object of an “armed attack”, so that a brief discussion of the meaning of “collective self-defence” under Article 51 UN Charter must follow.

bb) Collective self-defence

As already briefly mentioned, Bowett held the view that Article 51 only granted states the right to use force in “collective” self-defence, when each of the states acting could individually lay claim to a right of self-defence.¹⁵¹⁸ At first glance Bowett’s view seems paradoxical, given his expansive view of states’ rights, as far as individual self-defence is concerned. Bowett took the view that the much more generous pre-Charter customary international law on individual self-defence had not been modified by the Charter.¹⁵¹⁹ Regarding collective self-defence he, however, took a different view.

¹⁵¹⁶ *State of the Union Address 1980* by President Jimmy Carter, 23/01/1980; available at: <http://www.iimmvcarterlibrary.gov/documents/speeches/su80jec.phtml>; accessed 26/10/2011.

¹⁵¹⁷ Schmeltzer, “Soviet”, 119-120; Schwenninger, “The 1980s”, 431; Joyner/Grimaldi, “The United States”, 659, 668-670; Rohlik, “Some”, 402; Friedman, “Intervention”, 69-70; Wright, “United States”, 117.

¹⁵¹⁸ Bowett, “Collective”, 139-140.

¹⁵¹⁹ Bowett’s approach was to argue that Articles 2 (4), 51 UN Charter as such did not regulate customary international law on self-defence as it stood in 1945: “We must presuppose that rights formerly belonging to member states continue except in so far as obligations inconsistent with those existing rights are assumed under the Charter...it is, therefore, fallacious to assume that members have only those rights which general international law accords them except and in so far as they have surrendered them under the Charter.” This theory is based on the assumption that the ban on the use of force in Article 2 (4) UN Charter did not apply to self-defence. When the Charter was drafted, the delegates were united in their belief that the use of force in self-defence was justified and thereby not subject to the ban. Therefore the customary international law rules on self-defence had not been curtailed by Article 2 (4) UN Charter. Article 51 UN Charter was not really necessary, and was only included at the behest of members of various regional security pacts. Furthermore, Article 51 UN

Bowett's argument was based on his basic view that the UN Charter could only limit, but not create states' rights in international law.¹⁵²⁰ Since states solely coming to the aid of a state that invoked the right of self-defence could themselves not claim to be acting in self-defence, they could only justify their actions on the basis of protecting international peace.¹⁵²¹ In contrast to the situation under the *Covenant of the League of Nations*, such actions were, however, no longer permissible under the Charter, because collective security had become the UN's responsibility.¹⁵²² The Charter had outlawed unilateral assessments by one state as to whether another state's claim of self-defence was justified.¹⁵²³ Collective self-defence under Article 51 therefore merely granted those states that had been attacked the right to act in concert when using force.¹⁵²⁴

This view of collective self-defence has, however, been overwhelmingly rejected and has not been confirmed by state practice.¹⁵²⁵ Bowett's main legal argument fails to convince. Although Bowett is correct when he points out that the UN Charter is based on the premise that issues of collective security should be dealt with by the UN, it does not follow that a state invoking collective self-defence, without itself having been subject to an "armed attack", automatically violates that principle. The right to

Charter only applied "if an armed attack occurred." The other cases of rightful self-defence under customary international law had not been regulated under the Charter and therefore remained intact (see: Bowie, *Self-Defence*, 184-193, 184-185 (quote)).

¹⁵²⁰ Bowett, "Collective", 131-132.

¹⁵²¹ Bowett, "Collective", 137.

¹⁵²² Bowett, "Collective", 138-141.

¹⁵²³ Bowett, "Collective", 138-141.

¹⁵²⁴ Bowett, "Collective", 138-141; there is an indication that there is still some support for Bowett's view of collective self-defence, see: ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. USA, Judgement (Merits), 27/06/1986, ICJ Reports 1986, 14, 105; Dissenting Opinion Judge Jennings (at 545). Judge Jennings states the following: "But there is another objection to this way of looking at collective self-defence... The assisting State surely must, by going to the victim State's assistance, be also, and in addition to other requirements, in some measure defending itself. There should even in "collective self-defence" be some real element of self involved with the notion of defence."

¹⁵²⁵ Schachter, "The Right", 1638-1639; Rohlik, "Some", 423-424; Wright, "United States", 118-119; Perkins, "The Right", 206-207.

use force in -individual or collective- self-defence under Article 51 can, after all, only be invoked until such a time as “the Security Council has taken measures necessary to maintain international peace and security”. Based on the Charter therefore, the right to use force in -individual or collective- self-defence is limited to the time-span necessary for the UN’s collective security system to intercede.

Furthermore, as Bowett himself argues in another context,¹⁵²⁶ Article 51 was included at the behest of Latin American states that wanted to safeguard the continued validity of their regional defence arrangements laid down in the *Act of Chapultepec* of 1945.¹⁵²⁷ This regional arrangement, generally acknowledged to be intimately connected to Article 51, however, explicitly mentions the following “principle”:

*That any attempt on the part of a non-American State against the integrity or inviolability of the territory, the sovereignty or the political independence of an American State shall be considered as an act of aggression against all the American States;....*¹⁵²⁸

and includes the following “declaration”:

*That every attack of a State against the integrity or the inviolability of the territory, or against the sovereignty or political independence of an American State, shall, conformably to Part III hereof, be considered as an act of aggression against the other States which sign this Act.*¹⁵²⁹

These statements suggest an expansive view of collective self-defence.¹⁵³⁰ Bowett’s premise, as far as his interpretation of Article 51 is concerned, is therefore unconvincing.

There would, furthermore, have been no need to mention “collective” self-defence in Article 51 at all, if only the already permitted, coordinated, multiple, individual self-

¹⁵²⁶ Bowett, *Self-Defence*, 182-184; he explicitly refers to the *Act of Chapultepec* in the context of explaining his views on the “origin” of Article 51 (at 183).

¹⁵²⁷ Perkins, “The Right”, 206.

¹⁵²⁸ “Principle” j), Preamble, *Act of Chapultepec*.

¹⁵²⁹ Article 3, *Part I, Declaration, Act of Chapultepec*.

¹⁵³⁰ Schachter, “The Right”, 1639; Perkins, “The Right”, 206.

defence had been meant. The way Article 51 is phrased (“individual or collective self-defence...if an armed attack occurs against a Member of the United Nations”)¹⁵³¹ provides another indication that “collective” self-defence is also possible if only one member state has been attacked.

State practice also confirms the view that collective self-defence is justified under Article 51, when other states come to the aid of a state that has suffered an armed attack.¹⁵³² Mutual defence treaties, like the *Rio Treaty*,¹⁵³³ the NATO Treaty,¹⁵³⁴ or the Warsaw Pact¹⁵³⁵ regularly assume(d) that an attack on one member state of the organisation was sufficient to justify the use of force in self-defence against the aggressor by all member states.¹⁵³⁶ Bowett, accordingly, has evident difficulties in trying to interpret these collective security treaties in such a way as to be in conformity with his view of collective self-defence.¹⁵³⁷ Furthermore, states that have in the past invoked a right of collective self-defence have rarely, if at all, been the

¹⁵³¹ Emphasis by author.

¹⁵³² Schachter, “The Right”, 1639; Rohlik, “Some”, 423-424; Wright, “United States”, 118-119.

¹⁵³³ Article 3 (1), *Inter-American Treaty of Reciprocal Assistance* (1947).

¹⁵³⁴ Article 5, *The North Atlantic Treaty* (1949).

¹⁵³⁵ Article 4, *Treaty of Friendship, Co-operation and Mutual Assistance* (1955).

¹⁵³⁶ Schachter, “The Right”, 1639.

¹⁵³⁷ Bowett, “Collective”, 149-157; he concludes that -depending on the interpretation given by member states to the security arrangements in such regional treaties- they could be in violation of their “overriding obligations” under the UN Charter if they acted without being able to claim the right of individual self-defence (at 153); ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. USA, Judgement (Merits), 27/06/1986, ICJ Reports 1986, 14, 105; Judge Jennings, Dissenting Opinion, at 545-546; he has similar difficulties with his view of collective self-defence: “The assisting State surely must, by going to the victim State’s assistance, be also, and in addition to other requirements, in some measure defending itself... This is presumably also the philosophy which underlies mutual security arrangements... By such a system of collective security, the security of each member State is meant to be involved with the security of the others; not merely as a result of a contractual arrangement but by the real consequences of the system and its organization.” The problem with this argument is that it is not sufficiently reflective of reality. As even Bowett acknowledged (at 152), there are many constellations in which the collective security treaties would be applicable, but when it could simply not be argued that the interests of all the member states were somehow threatened (his example was a limited attack on Greece by a “northern neighbour” which could not be claimed to threaten Norway, Canada or the USA, despite all of these states being NATO members).

object of an armed attack, but have claimed they were aiding another state in its defence against external aggression.¹⁵³⁸

It must therefore be assumed that collective self-defence under Article 51 allows a state that has not been attacked to use force in support of the defence of an attacked state, insofar as the other criteria of the article have been met.

cc) “Armed attack” on Afghanistan

Even though the USSR could therefore have basically relied on Article 51, in order to justify actions in defence of Afghanistan, without having been attacked itself, the Soviet justification, nevertheless, cannot be reconciled with any reasonable understanding of collective self-defence.

There is no evidence of an armed attack on Afghanistan. Even though there is evidence of foreign support for the Afghan rebels, there is absolutely no indication that foreign troops had entered the country prior to the Soviet invasion. The external support consisted mainly of material support (money and weapons), and, especially in the case of Pakistan, the provision of shelter for those rebels that managed to cross the border.

Despite this external support, there can, however, be no doubt that the insurgency in Afghanistan had indigenous origins, and was mainly organized by Afghans living in Afghanistan. In internal discussions this was also acknowledged by the Soviet leaders

¹⁵³⁸ Schachter, “The Right”, 1639; Rohlik, “Some”, 423-424.

who, in March 1979, came to the conclusion the Soviets could not intervene because, in Afghanistan, one part of the population was fighting against another part.¹⁵³⁹

That material support of indigenous rebels by other states does not amount to an “armed attack”, when that support is not so far-reaching as to justify treating the rebel groups as the extended arm of the foreign state, has also been confirmed by the ICJ in the *Nicaragua Case*.¹⁵⁴⁰ There can be no doubt that foreign support of the rebels did, certainly at that stage, not reach that level.¹⁵⁴¹

The Soviet claim that foreign support for the rebels amounted to an “aggression”, as defined in Article 3 g of the *Definition of Aggression*,¹⁵⁴² does not merit any other conclusion. The decision whether an “armed attack” has occurred necessitates an independent evaluation.¹⁵⁴³

Since there had been no “armed attack” on Afghanistan, the Soviet Union could not claim to be acting in “collective” self-defence under Article 51 UN Charter.¹⁵⁴⁴

¹⁵³⁹ Chief of the KGB Andropov declared: “To deploy our troops would mean to wage war against the people, to crush the people, to shoot at the people. We will look like aggressors, and we cannot permit that to occur;” (at 21); a sentiment echoed by Soviet Foreign Secretary Gromyko (at 14), at the *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War. The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011.

¹⁵⁴⁰ ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Judgement (Merits), 27/06/1986, I.C.J. Rep. 1986, 14, para. 195; the ICJ declared (emphasis by author): “But the Court does not believe that the concept of “armed attack” includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States...”; Farer, “Drawing”, 113; Perkins, “The Right”, 207-208; Gray, *International Law*, 174-177.

¹⁵⁴¹ However, subsequent to the Soviet invasion, there were efforts to create the impression that the rebellion in Afghanistan was completely orchestrated from abroad: Mader, writing for the GDR military publishers in 1988, for example, goes to extraordinary lengths in trying to prove that the “counter-revolution” was organized by the USA, Pakistan, Iran, the UK, some Arab states, and Western Germany, with only a few thousand Afghans actually supporting the rebellion (*CIA-Operation*, 5-6, 17-19, 29-39, 41-53, 68-75).

¹⁵⁴² GA Resolution 3314 (1974).

¹⁵⁴³ Article 6 of the *Definition of Aggression* (GA Resolution 3314 (1974)); Matsson, “Politische”, 89.

¹⁵⁴⁴ Matsson, “Politische”, 90; Behrens, *Die Afghanistan*, 67; Berner, “Der Kampf”, 324; Ulfkotte, *Kontinuität*, 321-322.

As the civil war obviously was an internal uprising, the USSR could also not rely on Article 4 of the Afghan-Soviet *Treaty of Friendship*, as there can be no doubt that any support given under Article 4 could only be justified against external threats.¹⁵⁴⁵ This is confirmed by Article 1 of the Treaty which states:

*The High Contracting Parties solemnly declare their determination to consolidate and deepen the unshakable friendship between the two countries and to develop co-operation in all fields on the basis of equality of rights, respect for national sovereignty and territorial integrity and non-interference in each other's internal affairs.*¹⁵⁴⁶

Besides that, any use of force authorized by a bilateral treaty, but in violation of the UN Charter, would be invalid (Article 103).¹⁵⁴⁷ By confirming, in the preamble of the treaty, “their fidelity to the purposes and principles of the Charter of the United Nations”, the two state parties made obvious that this had anyway not been their intention.

e) Conclusion on the Soviet legal justifications and factual problems

As far as the official Soviet justifications for the Afghan invasion, put forward at the UN and in the western media, are concerned, it must be concluded that none of them could be reconciled with international law as it stood in late 1979.

Developments since WW II had, by 1979, led to a modification of customary international law, as far as the legality of foreign interventions in civil wars was concerned. Intervening in such a conflict at the recognized government’s request -

¹⁵⁴⁵ Turner, “Soviet”, 106; Berner, “Der Kampf”, 324.

¹⁵⁴⁶ Emphasis by author.

¹⁵⁴⁷ Article 103 of the UN Charter reads: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

overwhelmingly viewed as legal under international law prior to WW II- became increasingly less acceptable, the more the de-colonization process moved forward, and the right of self-determination and human rights became significant. By the 1970s, despite some controversy remaining, a majority view had developed, which held that customary international law demanded the adoption of a policy of non-intervention in such conflicts. State practice had already been moving in that direction since the mid-1950s: states intervening in civil conflicts at the government's request routinely provided additional justifications for their actions. The Soviet Union could therefore not claim to be justified in its invasion of Afghanistan on the basis of that country's government's request -a view confirmed by the overwhelming condemnation of the Soviet move within the international community.

The USSR could also not rely on a right of counter-intervention. In contrast to what some academics have claimed, such a right has not developed under customary international law. No state has ever claimed its intervention in a foreign conflict was justified on that basis. Furthermore, accepting a right of counter-intervention would be, as has been explained, impractical and contradictory, as it would result in the return to a right of intervention in favour of the government. Lastly, the Soviet Union did not rely on this alleged right. The Soviet Union's claim to be acting in collective self-defence under Article 51 and Article 4 of the Afghan-Soviet *Treaty of Friendship* can also not be reconciled with international law. No armed attack, the decisive prerequisite of using force in self-defence, had occurred, against either the USSR or Afghanistan.

The official Soviet legal arguments therefore fail to convince. The USSR's actions violated Article 2 (4) UN Charter, and Article 1 of the Afghan-Soviet *Treaty of Friendship*, which explicitly banned any interference in Afghanistan's internal affairs.

But even advocates of the Soviet legal position had one insurmountable obstacle to overcome: the facts on the ground could not be stretched to fit the official Soviet justifications. All the Soviet justifications discussed so far had one common prerequisite: an official request by the Afghan government for Soviet intervention.

It goes without saying that an intervention (or counter-intervention) in a civil war at the government's request requires just such a request.¹⁵⁴⁸ This, however, also applies in the case of collective self-defence. A state cannot defend another state against an armed attack, irrespective of that state's wishes.¹⁵⁴⁹ Although this is disputed by some international lawyers, this view has been confirmed by the ICJ in the *Nicaragua*¹⁵⁵⁰ and the *Oil Platforms*¹⁵⁵¹ Cases, and by state practice.¹⁵⁵² In 1956 Norway, a member of NATO, informed the Soviet Union that American troops could only defend the country at its request. Similarly, the Soviet Union, when invoking the Warsaw Pact to justify its invasion of Hungary, acknowledged the necessity of a prior request by the Hungarian government.¹⁵⁵³ As far as the Americas are concerned, the 1947 *Inter-*

¹⁵⁴⁸ Rohlik, "Some", 426.

¹⁵⁴⁹ Rohlik, "Some", 426; Wright, "United States", 118-119; Turner, "Soviet", 106; Gray, *International Law*, 184-187; a point also made by Mader (writing for the GDR military publishers), *CIA-Operation*, 6. He explicitly claims the Soviet Union's actions were justified on the basis of collective self-defence, following "eleven" requests by the Afghan government.

¹⁵⁵⁰ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. USA, Judgement, 27/06/1986, I.C.J. Reports 1986, 105, para. 199.

¹⁵⁵¹ ICJ, *Case Concerning Oil Platforms*, Iran v. USA, Judgement, 06/11/2003, I.C.J. Reports 2003, 161, para.

51.

¹⁵⁵² Gray, *International Law*, 186-187.

¹⁵⁵³ Wright, "United States", 118-119.

American Treaty of Reciprocal Assistance explicitly requires the “request of the State or States directly attacked” before other states can resort to defensive actions.¹⁵⁵⁴

The contrary arguments, based on the fact that Article 51 and most regional security treaties do not explicitly mention a state’s request as a prerequisite, or that such a requirement was “formalistic”,¹⁵⁵⁵ are unconvincing. Just as a sovereign state can decide to merge with another state, it can also decide not to defend itself against an armed attack. Allowing another state to intervene, notwithstanding the lack of a request, would severely undermine the attacked state’s sovereignty, and would, in fact, lead to the supremacy of the intervening state’s government’s will over the attacked state’s government’s decision -a clearly unacceptable state of affairs, given the principle of sovereign equality. Therefore collective self-defence can only be justified when the intervening state has been asked for support by the attacked state.

The Soviet invasion of Afghanistan, however, is unlikely to have been preceded by a valid request by the recognized Afghan government.¹⁵⁵⁶ As has already been outlined, Amin had taken power as President of Afghanistan in September 1979, a state of

¹⁵⁵⁴ Article 3 (2), *Inter-American Treaty of Reciprocal Assistance* (1947).

¹⁵⁵⁵ Fred L. Morrison, “Legal Issues in the Nicaragua Opinion”, *AJIL*, Vol. 81, 1987, 160-166, 163; Frederic Kirgis, “The Jurisprudence of the Court in the Nicaragua Decision”, *Am. Soc’y Int’l L. Proc.*, Vol. 81, 1987, 258-259, 258; he suggests the requirement of a request was introduced by the ICJ, because the majority of judges had not been convinced by their own arguments regarding the phrase “armed attack”; John Norton Moore, “The Nicaragua Case and the Deterioration of World Order”, *AJIL*, Vol. 81, 1987, 151-159, 155; Moore describes the ICJ’s view as “formalistic”; ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, *Nicaragua v. USA*, Judgement (Merits), 27/06/1986, *I.C.J. Reports* 1986, 14, 105; Dissenting Opinion Judge Jennings, at 544-545; he describes the court’s view, regarding the necessity of a request by the victim state, as perhaps “sometimes unrealistic”. He does, however, not dispute that the “victim State must both be in real need of assistance and must want it”; Judge Schwebel makes a similar point in his Dissenting Opinion (at para. 191). He states, in relation to the majority view: “and the only kind of request for assistance that appears to count is one formally and publicly made. But where is it written that, where one State covertly promotes the subversion of another by multiple means tantamount to an armed attack, the latter may not informally and quietly seek foreign assistance?”; Judges Jennings’ and Schwebel’s reading of the ICJ’s judgement seems to reflect an exaggerated interpretation of the court’s “request” requirement, especially as the additional- requirements Judge Schwebel complains about were not actually mentioned by the ICJ; see also: Gray, *International Law*, 185-186.

¹⁵⁵⁶ Reisman/Silk, “Which”, 481-483, 485-486; Behrens, *Die Afghanistan*, 66; Vance, *Hard*, 388.

affairs officially recognized by the Soviet Union.¹⁵⁵⁷ Although there had been previous Afghan requests for a Soviet intervention by both Taraki and Amin, the Soviets never produced a coherent version of events to substantiate their claim of a similar request in December 1979.¹⁵⁵⁸ It should, however, be noted that the former British Ambassador to Moscow, Braithwaite, claims that Amin had asked for the dispatch of Soviet troops “up to the very last minute”, that he had been informed of the Soviet troop deployment commencing in late December 1979, and was, in fact, in a “state of euphoria” at the prospect.¹⁵⁵⁹

Nevertheless, the only official request of late December 1979 that has become known to the outside world was the request by the newly installed President Karmal, which was broadcast on December 28, 1979,¹⁵⁶⁰ at a time when the Soviet invasion had been ongoing for a couple of days.¹⁵⁶¹ The Americans even claimed that Karmal’s request had been broadcast from a Soviet Central Asian republic, indicating that Karmal had not even returned from his Soviet exile at the time he made his request.¹⁵⁶²

¹⁵⁵⁷ Reisman/Silk, “Which”, 470-471.

¹⁵⁵⁸ Von Borcke, “Die sowjetische”, 136; Berner, “Der Kampf”, 324-326; he lists all the different versions of events provided to the media by Soviet and Afghan officials, as far as the Afghan request is concerned, and concludes that the claim the Afghan government had requested the Soviet invasion was “absurd”.

¹⁵⁵⁹ Braithwaite, *Afgantsy*, 82, 87, 95; Braithwaite also points out that Afghan troops did not at any stage fight the Soviet troops once the invasion commenced, and that the Afghan population initially welcomed the Soviet invasion (at 88, 107-108); Tomsen, *The Wars*, 163-165, 169-170; the US Special Envoy to the *mujahedeen* (1989-1992) concurs with this version of events. He claims Amin again asked for a Soviet troop deployment on December 6, 1979, and was told that Moscow had now “accepted his recommendation”. When warned by colleagues on December 26, 1979, that Soviet troops were “arriving in quantities exceeding the agreement”, Amin is reputed to have replied “So what, the more they come, the better for us.”

¹⁵⁶⁰ The request, broadcast by Kabul radio on Dec. 28, 1979, was reprinted in the *Pravda* of December 29, and in the East German daily *Neues Deutschland* of December 29, 1979 (German translation); both can be found in *Strategischer Überfall-das Beispiel Afghanistan, Quellenband- Teil I*, Paul Bucherer-Dietschi, Albert Alexander Stahel, Jürg Stüssi-Lauterburg (eds.), Liestal: Grauwiler Offsetdruck, 1991, 244, 245.

¹⁵⁶¹ The exact dates vary from author to author; Loyn, *Butcher*, 189 (invasion Dec. 22; Afghan request Dec. 27); Doswald-Beck, “The Legal”, 231 (invasion Dec. 25/26; Afghan request December 28); Rostow, “Law”, 237 (invasion Dec. 27; Afghan request Dec. 28); Reisman, “The Resistance”, 906 (invasion Dec. 24; Afghan request Dec. 27); Amer, “The United Nations”, 438 (invasion Dec. 25/26; Afghan request Dec. 27); Maley, *The Afghanistan*, 29-30 (invasion Dec. 24; Afghan request Dec. 27); Turner, “Soviet”, 104 (invasion Dec. 24-27; Afghan request Dec. 28); Hyman, *Afghanistan*, 159, 165 (invasion Dec. 24; Afghan request Dec. 27).

¹⁵⁶² Reisman, “The Resistance”, 906; Reisman/Silk, “Which”, 472; Matsson, “Politische”, 87; Cynkin, “Aftermath”, 278; Pentz, “The Mujahidin”, 380; Maley, *The Afghanistan*, 30; Hyman, *Afghanistan*, 165.

The Soviet version of events is further undermined by the fact that there was severe fighting around the presidential palace in Kabul, once the Soviets had entered the capital, which does not fit easily with a government requesting just such an intervention.¹⁵⁶³ The fact that President Amin was killed during the Soviet invasion, apparently by Soviet troops,¹⁵⁶⁴ and that he was later accused of having been a CIA-agent by both the Soviet press,¹⁵⁶⁵ and the new Afghan government,¹⁵⁶⁶ robs the Soviet claim of a request of an Afghan governmental request for the Soviet invasion of credibility.¹⁵⁶⁷ Even taking Braithwaite's contrary assertions, as far as Amin's request for Soviet intervention is concerned, into account, it can be safely assumed he did not request his own removal from office by force.¹⁵⁶⁸

There remains, however, one further possible legal justification for the Soviet invasion that did not require the Afghan government's consent: the Brezhnev Doctrine.¹⁵⁶⁹ Although the Soviet Union did not refer to it at the UN, the Brezhnev

¹⁵⁶³ Loyn, *Butcher*, 189; Reisman, "The Resistance", 906; Reisman/Silk, "Which", 472, 482; Blum, *Killing*, 342; John Norton Moore, "The 'Brezhnev Doctrine' and the Radical Regime Assault on the Legal Order", in *International Law and the Brezhnev Doctrine*, John Morton Moore, Robert F. Turner (eds.), Lanham: University Press of America, Inc., 1987, 1-41, 23; Turner, "Soviet", 104.

¹⁵⁶⁴ Loyn, *Butcher*, 189; Rostow, "Law", 237; Reisman, "The Resistance", 906; Reisman/Silk, "Which", 474; Blum, *Killing*, 342; Rasanayagam, *Afghanistan*, 91; Maley, *The Afghanistan*, 30; Moore, "The 'Brezhnev'", 23; Ulfkotte, *Kontinuität*, 315; Gates, *From*, 133; Rashid, *Descent*, 9; Braithwaite, *Afgantsy*, 92-100; Tomsen, *The Wars*, 175.

¹⁵⁶⁵ In an article entitled "Karmal Babraks's appeal" in the *Pravda* of December 30, 1979, Amin was accused of having been a "spy for American imperialism"; a German translation of the article was published in the East German daily *Neues Deutschland* of December 30, 1979; both reprinted in *Strategischer Überfall-das Beispiel Afghanistan, Quellenband- Teil 1*, Paul Bucherer-Dietschi, Albert Alexander Stahel, Jürg Stüssi-Lauterburg (eds.), Liestal: Grauwiller Offsetdruck, 1991, 249-252; Doswald-Beck, "The Legal", 231; Lenczowski, "The Soviet Union", 314, 318; Blum, *Killing*, 342-343; Braithwaite, *Afgantsy*, 40, 71, 77-79; the former British Ambassador to Moscow even lends some credence to the accusation that Amin really did work for the CIA. According to Braithwaite, Amin had admitted being contacted by the CIA while studying in the USA, but had claimed to have "needed money" and only been "stringing" them "along". Even the US Ambassador to Kabul, Dubbs, is believed to have asked his CIA Chief of Station whether the allegations against Amin were true. Braithwaite also claims that the Soviet leadership tended to believe the CIA-allegations; Steele, *Ghosts*, 77, 80-81.

¹⁵⁶⁶ Pentz, "The Mujahidin", 380; von Borcke, "Die sowjetische", 137; Berner, "Der Kampf", 345, 348, 361-362.

¹⁵⁶⁷ Amer, "The United Nations", 438; Matsson, "Politische", 85, 87-88; Behrens, *Die Afghanistan*, 66; Linde, "Afghanistan", 86; Roy, *The Lessons*, 14.

¹⁵⁶⁸ Braithwaite, *Afgantsy*, 92-100.

¹⁵⁶⁹ Soviet General Secretary Brezhnev was the first major Soviet politician to officially outline the main arguments in support of the intervention in Czechoslovakia in 1968 on the basis of the defence of socialism. His

Doctrine was referred to in socialist countries, especially in the media there, as a possible justification for Soviet actions in Afghanistan.¹⁵⁷⁰

As the Brezhnev Doctrine is now only of historical interest this particular concept of a distinct “socialist international law” will not be examined here.¹⁵⁷¹ Suffice to say at this point that the Brezhnev Doctrine was neither reconcilable with the UN Charter,¹⁵⁷² nor applicable to a non-aligned state such as Afghanistan.¹⁵⁷³

speech at the Fifth Congress of the *Polish United Workers' Party* on November 12, 1968, led to the identification of this Soviet legal justification with his person (Schmeltzer in “Soviet”, 103-104; Romaniacki, “Sources”, 528; Turner, “Soviet”, 83, 102) The ground-breaking argument as to the legality of the Soviet invasion had, however, actually been developed by Sergej Kovalev in an article entitled “Sovereignty and the Internationalist Obligations of Socialist Countries”, which was published in the *Pravda* on September 25, 1968 (an English translation of the Article, commissioned by *The New York Times*, is available at: “Pravda Article Justifying Intervention in Czechoslovakia”, I.L.M., Vol. 7, 1968, 1323-1325; see also: Romaniacki, “Sources”, 527, 529; Rostow, “Law”, 234-236; Moore, “The ‘Brezhnev’”, 9-13; Turner, “Soviet”, 83, 101-102).

¹⁵⁷⁰ Loyn. *Butcher*, 190.

¹⁵⁷¹ To put it briefly, adherents to the Brezhnev Doctrine argued that, while “general” international law -as developed since the end of WW II- governed the relations between the “blocs”, a distinct “socialist international law” had also developed that governed the relations between socialist states, Socialist international law was based on the concept of socialist or proletarian internationalism, and allowed socialist states to intervene in each other’s affairs in order to protect the revolution against counter-revolutionary forces (especially in those cases where the socialist state’s government itself was guilty of counter-revolutionary conduct). The author has explained the concept in more detail in: Patrick Terry, “Afghanistan’s Civil War (1979-1989): Illegal and Failed Foreign Interventions”, *Polish Yearbook of International Law*, Vol. XXXI (2011), 107-164, 141-145; for further details, see: John N. Hazard, “Renewed Emphasis Upon A Socialist International Law”, *AJIL*, Vol. 65, 1971, 142-148; W. E. Butler, “‘Socialist International Law’ or ‘Socialist Principles of International Relations’?”, *AJIL*, Vol. 65, 1971, 796-800; W. W. Kulski, “The Soviet Interpretation of International Law”, *AJIL*, Vol. 49, 1955, 518- 534; George E. Glos, “The Theory and Practice of Soviet International Law”, *International Lawyer*, Vol. 16, 1982, 279-300; Chris Osakwe, “Socialist International Law Revisited”, *AJIL*, Vol. 66, 1972, 596-600; Vratislav Pechota, “The Contemporary Marxist Theory of International Law”, *Am. Soc’y Int’l L. Proc.*, Vol. 75, 1981, 149-155; G.I. Tunkin, “The Contemporary Theory of Soviet International Law”, *Current Legal Problems*, Vol. 31, 1978, 177-188.

¹⁵⁷² There can be no doubt that the Brezhnev Doctrine as outlined in the footnote above was not compatible with the UN Charter. The use of force in support of the “international proletariat” could not be reconciled with the ban on the use of force in Article 2 (4) and certainly not with the right of self-defence under Article 51. The 1968 invasion of Czechoslovakia also clearly demonstrated that the Brezhnev Doctrine amounted to a complete rejection of the concepts of sovereign equality and political independence, as understood in Article 2 (1), because the intervention took place not only against the “counter-revolutionary” government’s wishes but, most likely, against the wishes of the vast majority of Czechoslovakians, thereby violating their right of self-determination. The differentiation between “local” and “general” international law made by some Soviet jurists is also untenable. As far as the UN Charter is concerned, any regional agreement that contravenes its provisions cannot be applied (Article 103). This assessment is confirmed by the fact that the Brezhnev Doctrine cannot be found in any form in any of the treaties concluded between socialist states, which contradicts the notion that a “local” international law had developed (Butler, “‘Socialist’”, 799-800; Romaniacki, “Sources”, 538-539; Rostow, “Law”, 236, 240-241; Moore, “Legal Standards”, 197; and “The ‘Brezhnev’”, 18; Schmeltzer, “Soviet”, 104; Turner, “Soviet”, 86).

¹⁵⁷³ The whole concept of the Brezhnev Doctrine was based on the premise that a “local” international law had developed, which applied only between the socialist states, that is, the states belonging to the socialist bloc. It was generally agreed that the concept was therefore only to apply within the Warsaw Pact, sometimes also

By invading Afghanistan the Soviet Union had undoubtedly committed a serious violation of Article 2 (4) UN Charter.¹⁵⁷⁴

3. Soviet motives

Why had the Soviets committed this clear violation of international law? This question becomes even more interesting, when it is remembered that the Soviet Union had rejected earlier, frequent requests by the Afghan government for a Soviet intervention. Having, in March 1979, internally acknowledged that invading Afghanistan at that government's request would be a mistake, and illegal under international law, it seems paradoxical that the USSR nevertheless decided to take this course of action at a time when there was most likely no such request.

There can be no absolute certainty as to why the Soviet leaders changed their minds between March 1979 and December 1979, as only few internal Soviet documents relating to Afghanistan have been released which cover the decision-making process between the summer of 1979 and December 12, 1979.¹⁵⁷⁵ The document dated December 12, 1979, which is generally believed to be the final decision by the Soviet leaders to give the go-ahead to the invasion, has been released. However, that

referred to as the "commonwealth of socialist states" (David Binder, "Brezhnev Doctrine Said to be Extended", *The New York Times*, 10/02/1980, 10; Rostow, "Law", 233); Rostow also quotes from a letter sent by the Soviet Politburo to the Central Committee of the Czech Communist Party, dated July 15, 1968, pointing out that "the frontiers of the socialist world have moved to the centre of Europe, to the Elbe and the Bohemian Forest. And we shall never agree to these historic gains of socialism and the independence and security of our peoples being placed in jeopardy"; Mattson, "Politische", 91-95; Turner, "Soviet", 107-113; von Borcke, "Die sowjetische", 128; for the contrary view, see: Romaniacki ("Sources", 536-537), and Berner ("Der Kampf", 365); they both argue that the Brezhnev Doctrine was sufficiently vague as to justify interventions anywhere where socialist governments were in place).

¹⁵⁷⁴ Mattson, "Politische", 95; John Norton Moore, "Panel One: General Discussion", *Ga. J. Int'l & Comp. L.*, Vol. 13, 1983, 231-241, 236; Behrens, *Die Afghanistan*, 67.

¹⁵⁷⁵ Braithwaite, *Afgantsy*, 76, 79 (referring to a meeting of Soviet leaders on December 8, 1979, and to the "crucial" meeting on December 12, 1979).

document does not give any reasons, but essentially only refers to "A." and includes the signatures of all the Politburo members.¹⁵⁷⁶

Considering the extent of Soviet support for Afghanistan over the decades since WW II, it seems very likely that one of the driving forces behind the Soviet intervention was the fear of losing the USSR's "investment".¹⁵⁷⁷ In March 1979 Soviet Foreign Secretary Gromyko had already declared:

*...under no circumstances must we lose Afghanistan...if we lose Afghanistan now and it turns against the Soviet Union, this will result in a sharp setback to our foreign policy...*¹⁵⁷⁸

The Soviets had spent heavily on improving Afghanistan's infrastructure, and on aiding its economic development. This massive infusion of cash, military aid, and military advisors was threatening to become a colossal waste of resources, should the civil war result in a rebel victory, which seemed increasingly possible.¹⁵⁷⁹ Although that danger had already been present at the time of the Soviet refusal to directly aid

¹⁵⁷⁶ *Resolution of the CC CPSU, Concerning the situation in "A"*, 12/12/1979; (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 14, Document 31); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 9; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; Braithwaite, *Afgantsy*, 77-79.

¹⁵⁷⁷ In a meeting between him and General Secretary Honecker of the GDR on October 4, 1979, General Secretary Brezhnev declared: "We have given Afghanistan more than a little economic support. We have sent our advisers there, civilian as well as military, and have supplied them with significant amounts of weapons and military equipment"; *Stenographic Minutes of Meeting between Sed CC General Secretary And Chairman of the State Council, Erich Honecker, And the General Secretary of the CC CPSU, Leonid Ilyich Brezhnev, October 4, 1979* (Source: Stiftung Archiv der Parteien und Massenorganisationen der ehemaligen DDR im Bundesarchiv, Berlin, DY30 JIV 2/2011342); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 5; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; Braithwaite, *Afgantsy*, 47; Steele, *Ghosts*, 64.

¹⁵⁷⁸ Soviet Foreign Secretary Andrej Gromyko, at the *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1 (at 3); available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; accessed 11/02/2010.

¹⁵⁷⁹ Behrens, *Die Afghanistan*, 57; von Borcke, "Die sowjetische", 120, 132-133; Wettig, "Die Afghanistan-Entscheidung", 259; Berner, "Der Kampf", 336; Ulfkotte, *Kontinuität*, 315-316; Hyman, *Afghanistan*, 166; Gabriella Grasselli, *British and American Responses to the Soviet Invasion of Afghanistan*, Aldershot: Dartmouth Publishing Company Ltd., 1996, 133; Roy, *The Lessons*, 13; Steele, *Ghosts*, 64.

the government in March 1979, circumstances in the country had deteriorated since then.¹⁵⁸⁰ In March, the Afghan government had at least been able to reassert control over Herat. It was becoming increasingly unlikely that the steadily depleting ranks of the Afghan army would be able to repeat such a feat.

The events must also be seen in the context of a breakdown in relations with the new Afghan government under President Amin, which took power in September 1979.¹⁵⁸¹ The Soviet leadership had always been distrustful of Amin, whom they partly blamed for the unrest in Afghanistan. Amin was seen as the driving force behind the massive repression of the Afghan population, and the radical reform programme, which was alienating large sections of the population.¹⁵⁸² Therefore it is generally believed that the Soviets had concluded that he, by then Prime Minister, had to be removed from office.

The Soviet's favourite Afghan politician was the leader of the more moderate communist group, Parcham, and the future President of Afghanistan, Babrak Karmal, who was living in exile in Moscow.¹⁵⁸³ Amin seems to have been well aware of Soviet attempts to get rid of him. He prevented that happening by ousting Taraki, and declaring himself President of Afghanistan. Although the USSR felt obliged to officially recognize the new Afghan government, bilateral relations subsequently

¹⁵⁸⁰ Loyn, *Butcher*, 186-187; Ross, "Beyond", 103.

¹⁵⁸¹ Ross, "Beyond", 101; Blum, *Killing*, 342-343; Reisman/Silk, "Which", 470-471; Berner, "Der Kampf", 336, 359; Ulfkotte, *Kontinuität*, 315; Hyman, *Afghanistan*, 166; Tomsen, *The Wars*, 147-150, 159.

¹⁵⁸² In a meeting between him and General Secretary Honecker of the GDR on October 4, 1979, General Secretary Brezhnev declared: "Frankly, we are not pleased by all of Amin's methods and actions. He is very power-driven. In the past he repeatedly revealed disproportionate harshness"; *Stenographic Minutes of Meeting between Sed CC General Secretary And Chairman of the State Council, Erich Honecker, And the General Secretary of the CC CPSU, Leonid Ilyich Brezhnev, October 4, 1979* (Source: Stiftung Archiv der Parteien und Massenorganisationen der ehemaligen DDR im Bundesarchiv, Berlin, DY30 JIV 2/2011342); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 5; available at:

<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; Blum, *Killing*, 342-343; Rasanayagam, *Afghanistan*, 81-82; Male, *Revolutionary*, 199-200; Braithwaite, *Afgantsy*, 59; Tomsen, *The Wars*, 147-150.

¹⁵⁸³ Berner, "Der Kampf", 352.

deteriorated sharply.¹⁵⁸⁴ Amin then chose a path of confrontation with the USSR.¹⁵⁸⁵

Indeed, it seems that Amin, who had studied in the USA, had taken up contact with the US embassy in Kabul in order to discuss the possibility of improving relations.¹⁵⁸⁶

The Soviet Union was thus confronted with a lose-lose situation in Afghanistan: on the one hand there were, in Soviet eyes, reactionary rebel groups that might just be able to topple the Afghan government, and, on the other hand, there was an Afghan government, whose friendly intentions towards the USSR were more than doubtful.

As the Soviet Union had adopted an attitude similar to that of the United States, as far as neighbouring states were concerned, by viewing them as being in respective “spheres of interest”, the situation in Afghanistan was intolerable. Just as the *Johnson*

¹⁵⁸⁴ In fact, according to Braithwaite’s account of Gromyko’s recollections on the decision to intervene in Afghanistan, Gromyko claimed that Amin’s murder of Taraki was decisive; especially Brezhnev had apparently been greatly disturbed by the murder (*Afgantsy*, 80); Lenczowski, “The Soviet Union”, 314; Rasanayagam, *Afghanistan*, 89; Wettig, “Die Afghanistan-Entscheidung”, 261.

¹⁵⁸⁵ In a Report of October 29, 1979 by Gromyko, Andropov, Ustinov, and Ponomarev to the Central Committee of the Soviet Communist Party Amin is accused of planning the “execution of a group of Politburo members...who are subject to fictitious accusations”, and of intending to “conduct a more ‘balanced policy’ in relation to Western powers.” (Source: the book “The Tragedy and Valour of the Afghan Veteran” by Soviet General A.A. Liakhovskii, Moscow: GPI, 1995, 102); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 6; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; Reisman/Silk, “Which”, 471; Rasanayagam, *Afghanistan*, 90-91; Berner, “Der Kampf”, 321.

¹⁵⁸⁶ In their Report to the Central Committee after the Soviet invasion Andropov, Gromyko, Ustinov, and Ponomarev state the following: “At the same time, efforts were made to mend relations with America as part of the ‘more balanced foreign policy strategy’ adopted by H. Amin. H. Amin held a series of confidential meetings with the America chargé d’affaires in Kabul.”; *Report on Events in Afghanistan on Dec. 27-28, 1979*, 31/12/1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 42, Document 10); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 11, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; in an earlier Report of October 29, 1979 by Gromyko, Andropov, Ustinov, and Ponomarev to the Central Committee it had already been claimed that “representatives of the USA, on the basis of their contacts with the Afghans, are coming to a conclusion about the possibility of a change in the political line of Afghanistan in a direction which is pleasing to Washington.” (Source: the book “The Tragedy and Valour of the Afghan Veteran” by Soviet General A. A. Liakhovskii, Moscow: GPI, 1995, 102); NSA Document 6; similar accusations are to be found in a *Personal Memorandum from Andropov to Brezhnev* from early December 1979 (Source: APREF, from notes taken by A.F. Dobrynin and provided to the Norwegian Nobel Institute); NSA Document 7; Blum, *Killing*, 343; Wettig, “Die Afghanistan-Entscheidung”, 261; Male, *Revolutionary*, 199-200; Coll, *Ghost*, 47-48; Tomsen, *The Wars*, 160-161; Braithwaite, *Afgantsy*, 40, 71, 77-79; the former British Ambassador to Moscow even lends some credence to the accusation that Amin really did work for the CIA. According to Braithwaite, Amin had admitted being contacted by the CIA while studying in the USA, but had claimed to have “needed money”, and only been “stringing” them “along”. Even the US Ambassador to Kabul, Dubbs, is believed to have asked his CIA Chief of Station, whether the allegations against Amin were true. Braithwaite also claims that the Soviet leadership tended to believe the CIA-allegations; Steele, *Ghosts*, 77, 80-81.

Doctrine had spelt out that “communist infiltration” of the Caribbean, Latin and South America would not be tolerated, the Soviet Union took the view that it could not accept a pro-western Afghanistan.¹⁵⁸⁷

This “sphere of interest” thinking may have also led Soviet leaders to under-estimate the risks involved. It has sometimes been argued that the Soviet leadership was caught off-guard by the ferocious international criticism that followed the invasion, having apparently assumed that the invasion of Afghanistan would, in the end, be accepted, because the country was in the Soviet “sphere of interest”.¹⁵⁸⁸ This misunderstanding was probably compounded by the USA’s troubles in Iran during 1979, which might have led the Soviet leaders to assume that President Carter was too distracted to react forcefully to the Soviet invasion.¹⁵⁸⁹

Furthermore, it seems the Soviet leadership was unnerved by the religious nature of the Afghan uprising.¹⁵⁹⁰ Having only just experienced the successful Islamic Revolution in Iran, the Soviets were anxious not to see another Islamic uprising cruise to victory just on their border, even more so when early hopes of a rapprochement

¹⁵⁸⁷ Zalmay Khalilzad, “The war in Afghanistan”, *Int’l J.*, Vol. 41, 1985-1986, 271-299, 293; Matsson, “Politische”, 81-82; Berner, “Der Kampf”, 363; Behrens, *Die Afghanistan*, 83; he also refers to a Brezhnev speech in 1976, in which he said, referring to the American-supported 1973 putsch against the elected, communist President of that country, that “another Chile” should not be allowed to happen; von Borcke, “Die sowjetische”, 126-128, 156, 168; she also repeatedly refers to Soviet warnings, prior to the invasion of Afghanistan, that a “second Chile” had to be avoided at all costs, if necessary “by the use of force”; Dahm, “Afghanistan”, 205, he also refers to the Chile experience as providing impetus to the Soviet view that the “revolution had to be defended at all costs”; Wettig, “Die Afghanistan-Entscheidung”, 259-260, 261-262, 265; he also refers to Chile as a lesson for the Soviets; Steele, *Ghosts*, 64.

¹⁵⁸⁸ Matsson, “Politische”, 95-96; Linde, “Afghanistan”, 91; von Borcke, “Die sowjetische”, 120, 140, 170; Wettig, “Die Afghanistan-Entscheidung”, 267-268; Hubel, *Die sowjetische*, 49; Berner, “Der Kampf”, 334; as he points out, Soviet misperceptions may well have also been due to the muted western reaction to the communist take-over in Afghanistan in April 1978.

¹⁵⁸⁹ Matsson, “Politische”, 80; Behrens, *Die Afghanistan*, 64; von Borcke, “Die sowjetische”, 170, 172; Wettig, “Die Afghanistan-Entscheidung”, 264, 265; Ulfkotte, *Kontinuität*, 316; Hyman, *Afghanistan*, 168.

¹⁵⁹⁰ Schwenninger, “The 1980s”, 425-426; Matsson, “Politische”, 80-81; Rasanayagam, *Afghanistan*, 83; Behrens, *Die Afghanistan*, 79-80; Hauner, “The Soviet”, 161, 186-187; Bräker, “Die langfristigen”, 55-66; von Borcke, “Die sowjetische”, 137; Hubel, *Die sowjetische*, 13-15; Dupree, *Afghanistan*, 777; Vance, *Hard*, 388; Tomsen, *The Wars*, 162.

with Iran after the Shah's fall had proved elusive.¹⁵⁹¹ After all, the Central Asian Republics of the Soviet Union, and some areas within Russia itself, notably Chechnya, Dagestan, and Ingushetia, were essentially Muslim, and it was difficult to predict what effect the success of Islamic movements on the Soviet Union's borders might have on the indigenous Muslim population. It was perhaps possible that the resurgence of Islam could destabilize the Soviet Union itself.¹⁵⁹² Preventing an Islamic regime in Afghanistan therefore became a strategically defensive measure.¹⁵⁹³

China was probably also another important factor. Since their fall-out in the 1960s, China was perceived by the USSR as a possible enemy, certainly as a competitor. Following the US-Chinese rapprochement under Nixon in the early 1970s, the USSR was becoming increasingly apprehensive, as far as any possible encirclement strategy on the part of its adversaries was concerned.¹⁵⁹⁴ "Losing" Afghanistan might

¹⁵⁹¹ In a meeting between him and General Secretary Honecker of the GDR on October 4, 1979, General Secretary Brezhnev declared: "Tendencies of a not particularly positive character have lately surfaced in Iran...Our initiatives with regard to the development of good neighbourly relations with Iran are currently not getting any practical results in Tehran..."; *Stenographic Minutes of Meeting between Sed CC General Secretary And Chairman of the State Council, Erich Honecker, And the General Secretary of the CC CPSU, Leonid Ilyich Brezhnev, October 4, 1979* (Source: Stiftung Archiv der Parteien und Massenorganisationen der ehemaligen DDR im Bundesarchiv, Berlin, DY30 JIV 2/2011342); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 5; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; In a "Report" to the Central Committee of the Soviet Communist Party, of April 1, 1979, Gromyko, Andropov, Ustinov, and Ponomarev warn that the "events in Iran" were motivating the Afghan rebels, and were encouraging "religious fanaticism" in the whole "Muslim east"; reprinted (incl. German translation) in *Sowjetische Geheimdokumente zum Afghanistankrieg (1978-1991)*, Pierre Allan et al. (eds.), Zürich: vdf Hochschulverlag, 1995, 84-85; Karen Dawisha, "The U.S.S.R. in the Middle East: Superpower in Eclipse?", *Foreign Aff.*, Vol. 61, 1982-1983, 438-452, 446-447; Matsson, "Politische", 81; Rasanayagam, *Afghanistan*, 83; Bräker, "Die langfristigen", 53; Wettig, "Die Afghanistan-Entscheidung", 258-259; Ulfkotte, *Kontinuität*, 322-323; Hubel, *Die sowjetische*, 30-31.

¹⁵⁹² Bräker, "Die langfristigen", 55-66; Wettig, "Die Afghanistan-Entscheidung", 259; Ulfkotte, *Kontinuität*, 316-317; Hubel, *Die sowjetische*, 13-15; Dupree, *Afghanistan*, 777; Vance, *Hard*, 388; Braithwaite, *Afgantsy*, 78; Tomsen, *The Wars*, 162.

¹⁵⁹³ Loyn, *Butcher*, 190; Matsson, "Politische", 80-81; Behrens, *Die Afghanistan*, 79-80, 83; Hauner, "The Soviet", 182-187; Bräker, "Die langfristigen", 65-66; Berner, "Der Kampf", 363; Ulfkotte, *Kontinuität*, 316; Hubel, *Die sowjetische*, 46-47; Roy, *The Lessons*, 13-14; Anthony Hyman, *Afghan Resistance: Danger from Disunity*, Conflict Studies No. 161, London: The Institute for the Study of Conflict, 1984, 15.

¹⁵⁹⁴ Matsson, "Politische", 82-83; Henry Trofimenko, "The Third World And the U.S.-Soviet Competition: A Soviet View", *Foreign Aff.*, Vol. 59, 1980-1981, 1021-1040, 1031-1032; he, a Soviet expert on Soviet-American relations writing in 1981, accuses the USA of playing the "China card", in order "to bring pressure to bear on the U.S.S.R."; Rasanayagam, *Afghanistan*, 83; von Borcke, "Die sowjetische", 138, 163-164, 175;

encourage US-Chinese attempts to emasculate Soviet power in the region.¹⁵⁹⁵ At the 26th Congress of the Soviet Communist Party in February 1981 Brezhnev declared:

*But, unfortunately, there are no grounds yet to speak of any changes for the better in China's foreign policy. As before, it is aimed at aggravating the international situation and is aligned with the policy of the imperialist powers. The simple reason behind the readiness of the United States, Japan, and a number of NATO countries to expand their military and political ties with China is to use its hostility to the Soviet Union and the socialist community in their own imperialist interests.*¹⁵⁹⁶

It has also been argued that the Soviet Union's decision to invade Afghanistan was mainly a strategic move to increase pressure on the West. By invading Afghanistan, it was argued, the Soviet Union had gained a strategic foothold, from which it could easily threaten the Strait of Hormuz, and the Persian Gulf, thereby endangering the West's oil supply.¹⁵⁹⁷ Combined with Soviet military bases in the Democratic Republic of Yemen and in Ethiopia, the Soviets could swiftly cut off oil supplies in the event of a crisis.¹⁵⁹⁸ Furthermore, having occupied Afghanistan, the Soviet Union could now directly threaten Pakistan, a reliable ally of the West, and perhaps exploit

Wettig, "Die Afghanistan-Entscheidung", 258, 266; Grasselli, *British*, 133; Hubel, *Die sowjetische*, 49-50; Coll, *Ghost*, 49; Vance, *Hard*, 388; Tomsen, *The Wars*, 162.

¹⁵⁹⁵ In a meeting between him and General Secretary Honecker of the GDR on October 4, 1979, General Secretary Brezhnev declared: "...Washington is increasingly playing its Chinese card. The American-Chinese rapprochement, one can state, has taken on a demonstrative character...Such a line...encourages Peking to new adventures..."; *Stenographic Minutes of Meeting between Sed CC General Secretary And Chairman of the State Council, Erich Honecker, And the General Secretary of the CC CPSU, Leonid Ilyich Brezhnev, October 4, 1979* (Source: Stiftung Archiv der Parteien und Massenorganisationen der ehemaligen DDR im Bundesarchiv, Berlin, DY30 JIV 2/2011342); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 5; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; Braithwaite, *Afgantsy*, 77-79; Braithwaite describes Soviet worries that the USA was attempting to create a "New Great Ottoman Empire" on their doorstep, and was perhaps even contemplating, in the long run, to deploy missiles in Afghanistan directed against the Soviet Union.

¹⁵⁹⁶ Leonid Brezhnev, Address to the 26th Soviet Communist Party Congress, February 23, 1981; translated by TASS; excerpts printed in *The New York Times*, "Excerpts From Address By Brezhnev To The Soviet Communist Party Congress", 24/02/1981, 6.

¹⁵⁹⁷ Schweninger, "The 1980s", 424; John C. Campbell, "The Middle East: A House of Containment Built on Shifting Sands", *Foreign Aff.*, Vol. 60, 1981-1982, 593-628, 598-599; Lenczowski, "The Soviet Union", 310, 319; Matsson, "Politische", 79-80; Hauner, "The Soviet", 175-176; von Borcke, "Die sowjetische", 161; Wettig, "Die Afghanistan-Entscheidung", 263, 264; Berner, "Der Kampf", 319; Hubel, *Die sowjetische*, 7-8; Roy, *The Lessons*, 8, 14-15; Vance, *Hard*, 388.

¹⁵⁹⁸ Lenczowski, "The Soviet Union", 314-316; Hauner, "The Soviet", 176-179; Wettig, "Die Afghanistan-Entscheidung", 263, 269; Cowper-Coles, *Cables*, 55.

the post-revolutionary turmoil in Iran.¹⁵⁹⁹ These fears in the West led to the development of the so-called *Carter Doctrine*, announced in January 1980, according to which any threat to the USA's interests in the Persian Gulf would, if necessary, be met by force.

Although there can be no doubt that the Soviet Union would exploit any strategic advantage gained by invading Afghanistan it does not seem likely that the strategic considerations just outlined actually played a major role in Soviet decision-making.¹⁶⁰⁰ After all, earlier Afghan requests for an intervention had been rejected, although these alleged strategic advantages for the USSR were already attainable in March 1979. Furthermore, we know the Soviets took the decision to intervene reluctantly.¹⁶⁰¹ And lastly, the Soviet leadership -although certainly vastly underestimating the true costs of the conflict in Afghanistan- had been warned, and was aware that the invasion of Afghanistan would be difficult and costly.¹⁶⁰² Some, even within the American Administration, therefore argued that the realisation of the above strategic goals would probably become less, rather than more likely following the Soviet invasion of Afghanistan, because the Soviets would be tied down for some time.¹⁶⁰³

¹⁵⁹⁹ Khalilzad, "The war", 293; Campbell, "The Middle East", 599-600; Lenczowski, "The Soviet Union", 320-323; Wettig, "Die Afghanistan-Entscheidung", 268; Grasselli, *British*, 121; Roy, *The Lessons*, 13, 14; Dupree, *Afghanistan*, 777-778; Vance, *Hard*, 388.

¹⁶⁰⁰ Khalilzad, "The war", 293-294; Behrens, *Die Afghanistan*, 58, 68-73; Trofimenko, "The Third", 1032, 1035-1036; he (a Soviet expert on Soviet-American relations) argues that the Soviet Union had enough oil of its own, and that the price of cutting the West's oil supply would likely be nuclear war, a price the USSR would certainly not be prepared to pay; von Borcke, "Die sowjetische", 174-175; she points out that the Soviet Union was anxious to avoid a wider conflict in the area which would automatically ensue, following a Soviet threat to western oil supplies; Berner, "Der Kampf", 365-366; Grasselli, *British*, 134-135; Grasselli points out that even the US Secretary of State Vance was "reluctant to interpret the invasion as a strategic initiative against specific American interests in the Gulf"; Roy, *The Lessons*, 13; Dupree, *Afghanistan*, 778.

¹⁶⁰¹ Von Borcke, "Die sowjetische", 139.

¹⁶⁰² Loyn, *Butcher*, 190; Behrens, *Die Afghanistan*, 71-72; Berner, "Der Kampf", 366.

¹⁶⁰³ Behrens, *Die Afghanistan*, 71-72.

4. International reaction to the invasion

International condemnation was swift. Carter immediately contacted Brezhnev by phone, and demanded a withdrawal of Soviet troops from the country.¹⁶⁰⁴

Subsequently, a resolution was introduced in the Security Council, demanding a Soviet withdrawal. There the Resolution received overwhelming support, but nevertheless failed due to the Soviet veto.¹⁶⁰⁵ Just as during the Suez Crisis, the Security Council then decided to proceed on the basis of the “Uniting for Peace Resolution”, and transferred the matter to the General Assembly for further consideration.¹⁶⁰⁶ In the GA a Resolution demanding Soviet withdrawal was passed by an overwhelming majority.¹⁶⁰⁷ To the dismay of the Soviets many members of the non-aligned movement voted in favour of the resolution.¹⁶⁰⁸ Similar resolutions were subsequently passed by the General Assembly on a yearly basis until 1987, always by a very large majority.¹⁶⁰⁹

The Conference of Islamic States, from which Afghanistan under its new government was suspended, also swiftly condemned the Soviet invasion.¹⁶¹⁰ The USA and other, mostly western, states imposed sanctions on the Soviet Union, which were lifted

¹⁶⁰⁴ Von Borcke, “Die sowjetische”, 157.

¹⁶⁰⁵ The draft Security Council Resolution condemning the Soviet invasion was opposed by only the Soviet Union (veto) and East Germany, but was supported by the other thirteen Council members.

¹⁶⁰⁶ UN Security Council Resolution 462 (1980); Maley, *The Afghanistan*, 64.

¹⁶⁰⁷ GA Resolution ES- 6/2 (January 1980), passed by 104:18:18 votes (call for withdrawal: op. para. 4).

¹⁶⁰⁸ Doswald-Beck, “The Legal”, 206-207; Schachter, “The Right”, 1622; Thomas M. Franck, “Of Gnats and Camels: Is there a Double Standard at the United Nations?”, *AJIL*, Vol. 78, 1984, 811- 833, 813-815; von Borcke, “Die sowjetische”, 179; Hubel, *Die sowjetische*, 49; Heinz Timmermann, “Die USA, Westeuropa und die Dritte Welt: Aspekte des Antwortverhaltens auf die sowjetische Intervention in Afghanistan“, in *Die sowjetische Intervention in Afghanistan. Entstehung und Hintergründe einer weltpolitischen Krise*, Heinrich Bauer (ed.), Baden-Baden: Nomos Verlagsgesellschaft, 1980, 299- 318, 310-311; he points out that of the 94 member states of the Non-Aligned Movement only nine states voted against the General Assembly Resolution calling for a withdrawal of the Soviet troops from Afghanistan; Steele, *Ghosts*, 42.

¹⁶⁰⁹ GA Resolutions 35/37 (November 1980); 36/34 (1981); 37/37 (1982); 38/29 (1983); 39/13 (1984); 40/12 (1985); 41/33 (1986); 42/15 (1987); even in 1987 the Resolution still received overwhelming support, passing by 123:19:11 votes.

¹⁶¹⁰ Campbell, “The Middle East”, 597; Lenczowski, “The Soviet Union”, 318; von Borcke, “Die sowjetische”, 179; Timmermann, “Die USA”, 311-315.

during the next couple of years.¹⁶¹¹ Furthermore, many western states boycotted the Olympic Summer Games, which took place in Moscow in 1980.¹⁶¹²

Many states, including the USA, also refused to recognize the new Afghan government under President Karmal. Nevertheless, the new government continued to represent Afghanistan at most international organizations, including the UN.¹⁶¹³ There was no move to reject the new government's credentials, as had been the case in regard of the new Cambodian government, following the Vietnamese invasion of the country in 1979,¹⁶¹⁴ nor was Afghanistan unrepresented at the UN as Hungary had been between 1957 and 1963, following the Soviet invasion.¹⁶¹⁵ Even the United States, while downgrading its diplomatic relations with Afghanistan, did not sever diplomatic ties.

Some states, notably the USA, took their opposition to the Soviet invasion further: they began to massively support the Afghan rebels in their fight not only against the Afghan government, but against Soviet soldiers. This policy will be examined in more detail in the next section.

¹⁶¹¹ Blum, *Killing*, 343-344; Rasanayagam, *Afghanistan*, 91; Maley, *The Afghanistan*, 66; Behrens, *Die Afghanistan*, 100-103; Timmermann, "Die USA", 301, 303-309; he also describes how controversial US measures against the Soviets were in Europe; Grasselli, *British*, 149-158; Vance, *Hard*, 389-390.

¹⁶¹² Maley, *The Afghanistan*, 66; Timmermann, "Die USA", 302; Grasselli, *British*, 161-163.

¹⁶¹³ In fact, the new Afghan government was already present in the General Assembly when the Soviet invasion was condemned for the first time in January 1980; Amer, "The United Nations", 431; Khalilzad, "The war", 289; Maley, *The Afghanistan*, 65.

¹⁶¹⁴ As far as Cambodia was concerned, the government in place before Vietnam invaded continued to represent that state at the UN; between 1979 and 1982 the credentials of the new Cambodian government were rejected four times by the General Assembly; Amer, "The United Nations", 431.

¹⁶¹⁵ Doswald-Beck, "The Legal", 195.

B. Foreign support for the Afghan *mujahedeen* in their battle against the Soviets

I. Background

The Afghan rebels had always received some support from abroad in their attempt to topple the Afghan government. Notably Iran and Pakistan became involved early on.

Both states have a long history of meddling in Afghanistan's affairs. Persia/Iran had been attempting to increase its influence at Afghanistan's expense for centuries, its efforts mostly being concentrated on Herat, home to a sizeable Shiite population.¹⁶¹⁶ The Shiites from that area have frequently been heavily discriminated against by the other, overwhelmingly Sunni Afghans. They were therefore prone to be rebellious, a situation Persia/Iran repeatedly sought to exploit.¹⁶¹⁷

Already prior to the Soviet invasion there had been evidence of weapons deliveries from Iran to the rebels in Herat.¹⁶¹⁸ Furthermore, Iran offered shelter to hundreds of thousands of Afghan refugees, who had begun coming even before the Soviet invasion.¹⁶¹⁹ As Iran's government, of course, realized there were many rebels among those refugees, who used Iran as a hiding place, and as a place of recruitment. There is also some evidence of military advice being offered to the *mujahedeen*.¹⁶²⁰

Since its creation Pakistan had also repeatedly interfered in Afghanistan's affairs. Due to the mutual hostility between the two states, Pakistan took the view that it was in its interests to destabilize its neighbour. Similar to Iran, Pakistan became involved in the

¹⁶¹⁶ Loyn, *Butcher*, 191; Galster, "Afghanistan", 23; Roy, *The Lessons*, 42-43; Cowper-Coles, *Cables*, 74.

¹⁶¹⁷ Khalilzad, "The war", 286, 290-291; Roy, *The Lessons*, 42-43.

¹⁶¹⁸ Blum, *Killing*, 344; Cynkin, "Aftermath", 289; Gates, *From*, 131-134.

¹⁶¹⁹ Khalilzad, "The war", 290-291; Cowper-Coles, *Cables*, 74.

¹⁶²⁰ Dawisha, "The U.S.S.R.", 448; Mader, *CIA-Operation*, 35; Gates, *From*, 175.

Afghan civil war prior to the Soviet invasion; weapons were provided, advice tendered, and shelter granted.¹⁶²¹

Following the Soviet invasion, Pakistani involvement in Afghanistan became massive.¹⁶²² Pakistan accepted millions of Afghan refugees.¹⁶²³ Once there, the refugees were forced to register with one of the seven -radical- rebel groups recognized by the Pakistani government, if they wanted to receive food and other support for their families.¹⁶²⁴ This was an excellent recruitment opportunity for the *mujahedeen*, who exploited it to the fullest.¹⁶²⁵ Furthermore, Pakistan tolerated fighters moving across the Afghan-Pakistan border.¹⁶²⁶ Increasingly, those fighters included Arabs, such as the Saudi Arabian Osama Bin Laden.¹⁶²⁷

The Pakistani security service (ISI), and the Pakistani military became increasingly involved in the rebel movement by favouring some rebel leaders over others, and by devising the rebels' military strategy.¹⁶²⁸ Pakistan's influence was subsequently massively enhanced by the fact that the USA -and others- decided to funnel their aid to the *mujahedeen* via the Pakistani government, giving the Pakistani military

¹⁶²¹ Blum, *Killing*, 344; Pentz, "The Mujahidin", 383-385; Rasanayagam, *Afghanistan*, 79, 83; Gates, *From*, 131-134, 146-147; Rashid, *Descent*, 8-9.

¹⁶²² Loyn, *Butcher*, 191; Khalilzad, "The war", 290-291; Cynkin, "Aftermath", 289 (although he -somewhat improbably- claims the Pakistanis were "hesitant" in their support); Galster, "Afghanistan", 15; Rasanayagam, *Afghanistan*, 107-108; Maley, *The Afghanistan*, 56-58; Roy, *The Lessons*, 39-42.

¹⁶²³ Khalilzad, "The war", 277-278; Lenczowski, "The Soviet Union", 318; Ross, "Beyond", 103; Pentz, "The Mujahidin", 382; Galster, "Afghanistan", 18; Rasanayagam, *Afghanistan*, 111-112; Maley, *The Afghanistan*, 59-60.

¹⁶²⁴ Loyn, *Butcher*, 195; Rasanayagam, *Afghanistan*, 102-103; Maley, *The Afghanistan*, 62-63; Mader, *CIA-Operation*, 34-35; Hyman, *Afghan Resistance*, 16.

¹⁶²⁵ Loyn, *Butcher*, 195.

¹⁶²⁶ Ross, "Beyond", 103; Rasanayagam, *Afghanistan*, 112.

¹⁶²⁷ Gates, *From*, 349; Koelbl, *Ihlau, Krieg*, 19; they estimate that about 35000 Arab Afghans were supported by the USA and Saudi Arabia.

¹⁶²⁸ Loyn, *Butcher*, 197-198; Alan J. Kuperman, "The Stinger Missile and U.S. Intervention in Afghanistan", *Political Science Quarterly*, Vol. 114, 1999, 219-263, 232, 260-261; Galster, "Afghanistan", 15-16; Rasanayagam, *Afghanistan*, 104-105; Maley, *The Afghanistan*, 61-63; Roy, *The Lessons*, 39-42.

incredible leverage as far as distribution was concerned.¹⁶²⁹ In fact, by some estimates only the lesser part of American aid was actually utilized by the *mujahedeen*, the rest being appropriated by the Pakistani military, or resold to others, sometimes by the rebels themselves.¹⁶³⁰

The main driving force behind the support of the Afghan rebels was, however, the USA, without which Pakistani interference on such a scale would have been impossible.¹⁶³¹ Already prior to the Soviet invasion, the Carter Administration had decided to support the *mujahedeen*.¹⁶³² In July 1979 Carter had signed an Executive Order authorizing covert support which, according to the sources available, consisted mainly of “non-military” aid.¹⁶³³ Following the Soviet invasion, that support escalated

¹⁶²⁹ Campbell, “The Middle East”, 601-604; Kuperman, “The Stinger”, 222-223; Blum, *Killing*, 345-346; Pentz, “The Mujahidin”, 385; Maley, *The Afghanistan*, 61-63; Mader, *CIA-Operation*, 45; Roy, *The Lessons*, 35; Hyman, *Afghan Resistance*, 16-17; Rashid, *Descent*, 10, 38-39; *The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks Upon The United States*, Authorized Edition, New York: W. W. Norton & Company, 2004, 56; Tomsen, *The Wars*, 246-247, 289.

¹⁶³⁰ Kuperman, 253-256; as far as the *Stinger* missiles are concerned, Kuperman provides the following data, collected in the 1990s: 900-1200 missiles were delivered; 340 missiles were fired; 200 missiles were in “Pakistani storage”; 60 were bought back by the USA (which by 1993 had already cost the CIA \$ 65 million); the rest (300-600 missiles) were unaccounted for, presumably hoarded, or sold by the rebels, or given by them to Iran; Blum, *Killing*, 350-351; according to him, estimates of the percentage of US aid actually reaching the *mujahedeen* vary considerably. Some claim 20 % was siphoned off by the Pakistanis and others, some claim that only 20 % of the aid actually reached the Afghan rebels, who themselves allegedly sold weapons on to the Iranians; Rasanayagam, *Afghanistan*, 108; he also describes some incidents where the suppliers were equally guilty of “cheating” the benefactors: weapons paid for by the Americans and others, and delivered by Egypt, for example, on occasion turned out to be “rusted” and “deficient”; Roy, *The Lessons*, 36; he points out that the weapons delivered were often used by the *mujahedeen* to fight each other, donated to other non-Afghanistan-related rebel groups, or sold to “drug-dealers”; Lawrence Wright, *The Looming Tower, Al Qaeda's Road to 9/11*. London: Penguin Books, 2007, 121; Wright points out that many of the warlords who -after the Soviet withdrawal- became instigators of the subsequent destructive civil war had become “rich by skimming off the subsidies that the Americans and the Saudis were providing.”; Tomsen, *The Wars*, 247; the US Special Envoy to the *mujahedeen* (1989-1992) claims that the Pakistanis sold some of the *Stinger* missiles to China.

¹⁶³¹ Cynkin, “Aftermath”, 288; Gates, *From*, 131-134, 146-147; US Defence Secretary until recently, Gates was Deputy Director of the CIA at the time. He claims that it was the Pakistanis, especially President Zia ul-Haq, who were putting pressure on the Americans to support the *mujahedeen*, already prior to the Soviet invasion.

¹⁶³² Blum, *Killing*, 344; Galster, “Afghanistan”, 10-11; he claims the USA started meeting the rebels as of April 1979, following a decision made by Brzezinski to that effect; Rasanayagam, *Afghanistan*, 83; Maley, *The Afghanistan*, 66; Coll, *Ghost*, 42-46; Koelbl, *Ihlaul, Krieg*, 14; Steele, *Ghosts*, 80.

¹⁶³³ Zbigniew Brzezinski, Carter’s National Security Advisor at the time of the Soviet invasion of Afghanistan, “Oui, la CIA est entrée en Afghanistan avant les Russes...”; Interview given to Vincent Jauvert, *Le Nouvel*

Observateur (no. 1732), 15/01/1998, 76; available at: <http://hebdo.nouvelobs.com/hebdo/parution/p19980115/articles/a19460-.html>; accessed 07/02/2010 (no longer available online); an English translation is still available at:

<http://www.globairesearch.ca/articles/BRZ110A.html>; accessed 26/10/2011; Gates, *From*, 143-149; Gates, US Defence Secretary until recently, was Deputy Director of the CIA at the time. He points out that the CIA was

on a yearly basis.¹⁶³⁴ In January 1980 Carter authorized the under-cover supply of weapons.¹⁶³⁵

Carter's policy was continued and reinforced by the Reagan Administration.¹⁶³⁶ As far as Afghanistan was concerned, NSDD 75 (1983) outlined US policy as follows:

*The U.S. objective is to keep maximum pressure on Moscow for withdrawal and to ensure the Soviets' political, military, and other costs remain high while the occupation continues.*¹⁶³⁷

This policy seems to have been stepped up considerably following NSDD 166 (1985), entitled "US Policy, Programs, And Strategy in Afghanistan", which has still not been de-classified. According to most accounts, NSDD 166 authorized support for the Afghan rebels "by all means available".¹⁶³⁸

In any case, the, in some cases reluctant,¹⁶³⁹ Reagan Administration provided the CIA with ever more resources to finance the *mujahedeen*,¹⁶⁴⁰ often egged on by Congress.

looking at options for granting such support as of early 1979 and confirms that US President Carter authorized covert funding of the *mujahedeen* in July 1979; apparently only support for "insurgent propaganda" and other "non-military" support was authorized. He does, however, acknowledge that there was pressure within the US Administration to provide more support; Blum, *Killing*, 344; Galster, "Afghanistan", 14; Coll, *Ghost*, 46; Koelbl, *Ihlau, Krieg*, 14.

¹⁶³⁴ Loyn, *Butcher*, 191 (he, however, claims that the USA only supported the *mujahedeen* as of 1980); Gates, *From*, 251-252, 319-321.

¹⁶³⁵ Kuperman, "The Stinger", 221; Cynkin, "Aftermath", 288; Rasanayagam, *Afghanistan*, 104; Maley, *The Afghanistan*, 66.

¹⁶³⁶ Blum, *Killing*, 345; Cynkin, "Aftermath", 288.

¹⁶³⁷ National Security Decision Directive No. 75 of January 17, 1983, 1-9, 4; available at:

<http://www.fas.org/irp/offdocs/nsdd/nsdd-075.htm>; last accessed 26/10/2011.

¹⁶³⁸ Kuperman, "The Stinger", 227, 243; Rasanayagam, *Afghanistan*, 116; Maley, *The Afghanistan*, 67; Roy, *The Lessons*, 35; Gates, *From*, 348-349, being the CIA Deputy Director at the time, he describes NSDD 166 as setting "forth a new American objective in Afghanistan: to win. To push the Soviets out."; Tomsen, *The Wars*, 223; the US Special Envoy to the *mujahedeen* (1989-1992) confirms the alleged wording of NSDD 166.

¹⁶³⁹ Kuperman, "The Stinger", 222-225, 228-230, 234-235; he describes how widespread opposition to the delivery of *Stinger* missiles to the *mujahedeen* was within the Reagan Administration. Since 1983 the *mujahedeen* had been requesting *Stinger* missiles. This was at first opposed by the Reagan Administration and Pakistan. Although Pakistan's Zia then changed his mind in late 1984, CIA officials nevertheless continued citing Zia's resistance to the delivery of *Stinger* missiles as main obstacle until early 1986, reflecting widespread unease within the CIA. Once the Administration had finally approved the delivery in February 1986, the CIA and the Pentagon then claimed it would no longer be an effective weapon. It was late summer 1986 before the first *Stinger* missiles were actually delivered; Galster, "Afghanistan", 16; he points out how Congress criticized the Reagan Administration for "not pursuing vigorously enough a mujahidin military victory", and how the CIA consistently voiced its opposition to calls for an increase in aid to the rebels; Roy, *The Lessons*, 34-36; Gates, Deputy Director of the CIA at the time, confirms that the CIA had opposed delivering *Stinger* missiles until

Congressman Charlie Wilson¹⁶⁴¹ was one of the most important, and best-known supporters of this policy.¹⁶⁴² Although everybody knew the USA was supporting the rebels, all aid was actually provided by the CIA in the context of a “covert operation.”¹⁶⁴³

By 1987 US aid had increased to at least \$ 600 million/year,¹⁶⁴⁴ an escalation topped by the fact that in 1986 the Reagan Administration -again under pressure from Congress- had agreed to provide the *mujahedeen* with *Stinger* missiles, in order to shoot down Russian helicopters.¹⁶⁴⁵ This was remarkable, because until then the USA had always insisted on preserving official “deniability”, which meant that none of the weapons delivered should be traceable to the USA.¹⁶⁴⁶ The *Stinger* missiles, easily

“late 1985” (*From*, 349); Tomsen, *The Wars*, 265, 268-271, 275; the US Special Envoy to the *mujahedeen* (1989-1992) repeatedly stresses that the Reagan Administration was reluctant to increase aid to the *mujahedeen*, but was “egged on” by Congress.

¹⁶⁴⁰ Loyn, *Butcher*, 195-196; Roy, *The Lessons*, 34-36.

¹⁶⁴¹ An interesting account of Charlie Wilson’s exploits for the *mujahedeen* is provided in George Criley’s book *Charlie Wilson’s War*. London: Atlantic Books, 2002; Charlie Wilson’s pivotal role is also confirmed by the Deputy Director of the CIA at the time, Gates, in: *From*, 320-321.

¹⁶⁴² Loyn, *Butcher*, 196-198; Kuperman, “The Stinger”, 226-227; Blum, *Killing*, 345; Galster, “Afghanistan”, 1-2, 16; Rasanayagam, *Afghanistan*, 105; Roy, *The Lessons*, 34-36; Gates, *From*, 320-321.

¹⁶⁴³ Blum, *Killing*, 345; Galster, “Afghanistan”, 1-2.

¹⁶⁴⁴ Gates, *From*, 251-252, 319-321, 349; the Deputy Director of the CIA at the time provides the following data: 1981-1983 \$ 60 million/year; \$ 100 mio in 1984; \$ 250-300 million in 1985, and \$ 375-425 million in 1986; Loyn, *Butcher*, 204, 219 (1984 \$ 100 million; 1985 \$ 300 million; 1991 \$ 400 million; altogether \$ 3 billion; finally, aid to the Afghan rebels made up 75 % of the CIA Budget); Kuperman, “The Stinger”, 227-228, (1984 \$ 122 million; 1985 \$ 250 million; 1986 \$ 470 million; 1987 \$ 630 million); Blum, *Killing*, 345, (altogether \$ 3 bn); Galster, “Afghanistan”, 18 (\$3 billion altogether, 1987 \$ 700 million); Rasanayagam, *Afghanistan*, 105 (increase from \$ 30 million/year in 1981 to \$ 280 million/year in 1985); Maley, *The Afghanistan*, 66 (his “conservative” estimate is aid of altogether \$ 2 bn); surprisingly, the GDR estimate of American support for the Afghan rebels was more or less identical: Mader, writing in 1988 for the GDR military publishers, claims that total US support (1979-1987) of the rebels officially amounted to \$ 1.7 bn, but was probably in truth closer to \$ 3 bn (*CIA-Operation*, 41-43); Roy, *The Lessons*, 34-36; *9/11 Commission Report*, 56; Tomsen, *The Wars*, 223; according to the US Special Envoy to the *mujahedeen* (1989-1992), by 1987, 60,000 tons of weapons and other supplies/year were being delivered to the *mujahedeen*.

¹⁶⁴⁵ Kuperman, “The Stinger”, 219, 232, 234-235; Khalilzad, “The war”, 290; Galster, “Afghanistan”, 18; Loyn, *Butcher*, 204 (although he dates the delivery of Stinger missiles to 1985); Rasanayagam, *Afghanistan*, 116; Maley, *The Afghanistan*, 67; Koelbl, *Ihlauf, Krieg*, 15; Tomsen, *The Wars*, 223.

¹⁶⁴⁶ Kuperman, “The Stinger”, 222-223; Galster, “Afghanistan”, 18; the issue of “deniability” led to some amusing occurrences. On one occasion in 1984 the Indians -opposed to the *mujahedeen*, because of India’s close ties to the USSR, and India’s disagreements with Pakistan- surprisingly provided weapons to be delivered to the Afghan rebels. The Pakistanis were distrustful of the Indians, opened the boxes, and discovered that all the weapons had been marked “Pakistan Ordnance Factory” (Rasanayagam, *Afghanistan*, 108); Generally speaking, western countries tried to provide the *mujahedeen* with Soviet and East European weapons- often from Egyptian or Chinese stock; Roy, *The Lessons*, 35.

identifiable, therefore marked a new departure in US policy.¹⁶⁴⁷ This massive US support for the Afghan rebels was made even more significant by the fact that Saudi Arabia and the Gulf states had pledged to match the US contribution dollar for dollar.¹⁶⁴⁸

Although the following section will concentrate on US support for the *mujahedeen*, it obviously follows from the above that many other states also became involved on the side of the rebels. Saudi Arabia and the Gulf states not only provided massive financial support, but also knowingly tolerated the fact that some of their own citizens went to Afghanistan to fight the “infidel” Soviets.¹⁶⁴⁹ Egypt chipped in by supplying Soviet-made weapons, which they had received during their once close alliance with the USSR.¹⁶⁵⁰ Western allies of the USA, mainly the UK,¹⁶⁵¹ also contributed some resources to the fighting fund of the Afghan “freedom fighters”.¹⁶⁵² The Chinese, working together with Pakistan against Soviet, and by implication Indian, interests also provided weapons to the *mujahedeen*.¹⁶⁵³

What had started out as a civil war, was now an international conflict. As one Pakistani newspaper put it, it seemed the USA was more than willing to fight the

¹⁶⁴⁷ Kuperman, “The Stinger”, 234; Roy, *The Lessons*, 35-36.

¹⁶⁴⁸ Loyn, *Butcher*, 204; Khalilzad, “The war”, 291-292; Kuperman, “The Stinger”, 228; Cynkin, “Aftermath”, 279, 282, 288-289; Galster, “Afghanistan”, 22-23; Rasanayagam, *Afghanistan*, 106; Maley, *The Afghanistan*, 68; Mader, *CIA-Operation*, 43; Gates, *From*, 320-321; Wright, *The Looming*, 99-100; Tomsen, *The Wars*, 223.

¹⁶⁴⁹ Roy, *The Lessons*, 43-44; Gates, *From*, 349; Rashid, *Descent*, 38-39; by Rashid’s estimates, 35000 “Islamic militants” from 43 “Muslim countries” were trained in “Pakistani madrassas to fight the Soviets in Afghanistan”.

¹⁶⁵⁰ Cynkin, “Aftermath”, 288; Maley, *The Afghanistan*, 68.

¹⁶⁵¹ Loyn, *Butcher*, 198-199; Maley, *The Afghanistan*, 67-68; Mader, *CIA-Operation*, 29.

¹⁶⁵² Ross, “Beyond”, 103.

¹⁶⁵³ Loyn, *Butcher*, 191, 205; Khalilzad, “The war”, 291-292; Ross, “Beyond”, 103; Blum, *Killing*, 344; Cynkin, “Aftermath”, 289; Rasanayagam, *Afghanistan*, 105; Maley, *The Afghanistan*, 67-68; Gates, *From*, 174, 175.

Soviets “to the last Afghan”;¹⁶⁵⁴ the Cold War was being fought by proxies on officially “non-aligned” territory.

2. The legality of US support for the *mujahedeen*

Having examined the Soviet invasion of Afghanistan, and concluded that it was illegal under international law, the legality of the USA’s massive support of the *mujahedeen* will now be examined.

The examination of the legality of the US involvement in Afghanistan is somewhat complicated by the fact that its nature as a “covert operation” means that no official legal justification exists. Any such justification would obviously have countermanded any attempt of preserving the “deniability” of US actions. Nevertheless, as the following discussion will demonstrate, there are only a limited number of justifications the USA could have resorted to that need to be examined. Without any such justification, the massive US involvement in Afghan affairs would clearly constitute an illegal intervention in that state’s internal affairs, a violation of the rule of non-interference in another state’s civil war, and thereby a violation of Afghanistan’s sovereignty.¹⁶⁵⁵

¹⁶⁵⁴ Blum, *Killing*, 346; he quotes from the Pakistani daily newspaper *Muslim*. This US sentiment is confirmed in Cynkin’s article, “Aftermath”, 298; he, writing in 1982, urges increased US (and other) support of the Afghan rebels, despite concluding that, once the Soviets left, it was unlikely that Afghanistan could ever be governed “effectively” again; Gates, *From*, 349; the Deputy Director of the CIA at the time simply states “Our mission was to push the Soviets out of Afghanistan. We expected post-Soviet Afghanistan to be ugly, ...”; Maley, *The Afghanistan*, 66; he comments that the “likely effects on ordinary Afghans of turning their country into Moscow’s Vietnam seems to have weighed all too lightly on policy circles in Washington”.

¹⁶⁵⁵ ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Judgement (Merits), 27/06/1986, I.C.J. Rep. 1986, 14, paras. 195, 241; in para. 241 the ICJ stated: “The Court considers that in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other, whether or not the political objective of the State giving such support and assistance is

a) US support for the *mujahedeen* July 1979- December 1979

As far as any material assistance was given to the *mujahedeen* prior to the Soviet invasion -following Carter's Executive Order of July 1979- it was illegal under international law. It should be noted that this assistance programme went beyond maintaining pre-existing relations: it was a new policy of support for a faction in a civil war that was trying to depose that state's government.

Ross, in an article,¹⁶⁵⁶ seems to be making an attempt to argue that the Soviets had been violating the Afghans' right of self-determination prior to the Soviet invasion, thereby, by implication, also providing a justification for any US support of the Afghan rebels prior to that date.¹⁶⁵⁷ This line of thought is based on the assumption that the communist Afghan governments prior to the invasion were mere "puppet" governments, guided by the Soviets, so that Afghan resistance prior to the Soviet invasion (including, presumably, any external support) could consequently be justified on the basis of the right of self-determination.¹⁶⁵⁸

Such an argument fails to convince and must be rejected. The basis of Ross' argument is flawed. While discussing the "puppet" nature of the communist Afghan governments, without providing any relevant evidence for his far-reaching claims,¹⁶⁵⁹ Ross himself asserts that the Amin government, the last communist government before the Soviets invaded, had "incurred the wrath of the Soviets",¹⁶⁶⁰ a turn of events hardly reconcilable with the notion of a "puppet government". Ross himself

equally far-reaching [sic]"; Sohn, "Gradations", 227 (general principle); Pentz, "The Mujahidin", 385-390 (he deals with the legality of the Pakistani support of the Afghan rebels).

¹⁶⁵⁶ Ross, "Beyond", 92-116.

¹⁶⁵⁷ Ross, "Beyond"; he does not reach a definite conclusion, as to whether he agrees with this line of argument or not; external support of the Afghan rebels is only mentioned in one paragraph (at 103).

¹⁶⁵⁸ Ross, "Beyond", 106-109.

¹⁶⁵⁹ Ross, "Beyond", 107-108.

¹⁶⁶⁰ Ross, "Beyond", 101.

admits that assuming that the Soviets had violated “Afghan self-determination” prior to the invasion “runs the risk of expanding the self-determination doctrine to a point where it loses meaning”.¹⁶⁶¹ There is nothing to add to this prescient observation.

Afghanistan at that stage was in the throes of civil war. Based on the majority view, which assumes that customary international law prohibits any intervention in a civil war, aiding the rebels against the Afghan government -which at that time was recognized by the USA - was a violation of that principle. Supporting the rebels against an indigenous government could not even be reconciled with traditional, pre-WW II customary international law, which also prohibited supporting rebels. Any justification based on a right of “pro-democratic” intervention could also not be put forward, as the theory had not been seriously developed by 1979 (notwithstanding the fact that the *mujahedeen*’s democratic credentials were non-existent).

Supporting the rebels prior to the Soviet invasion was therefore clearly an illegal intervention in the Afghan civil war.

b) US support for the *mujahedeen* subsequent to the Soviet invasion

aa) Right of collective self-defence

Having established that the Soviet invasion of Afghanistan was illegal, and a clear violation of Article 2 (4) UN Charter, there can be no doubt that Afghanistan had suffered an “armed attack” by the Soviet Union. Could the USA therefore claim to be

¹⁶⁶¹ Ross, “Beyond”, 109.

acting in collective self-defence when aiding the Afghan *mujahedeen* who were fighting the Soviet invaders?

Although at first glance seemingly an attractive proposition, a reliance on Article 51 by the USA lacked one decisive criterion: there was no valid request by an appropriate Afghan body for US aid against the Soviets.

As has already been discussed, it is overwhelmingly assumed that a state claiming to be acting in collective self-defence, without having itself been attacked, must have received a request by the attacked state for the use of force to be justified, a view confirmed by the ICJ.¹⁶⁶²

The USA could, however, not claim to have received such a request. Neither the previous Afghan government under President Amin, nor the new Afghan government under President Karmal had made such a request. There was, furthermore, no Afghan government-in-exile, which was recognized by the USA, and could have asked for support. As far as the *mujahedeen* were concerned, there was no uniform organization which spoke on behalf of all of them.¹⁶⁶³ Even Pakistan had recognized seven different rebel groups -referred to by the CIA as the “Seven Dwarves”-¹⁶⁶⁴ and there

¹⁶⁶² ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. USA, Judgement, 27/06/1986, I.C.J. Reports 1986, 105, para. 199; *Case Concerning Oil Platforms*, Iran v. USA, Judgement, 06/11/2003, I.C.J. Reports 2003, 161, para. 51.

¹⁶⁶³ Doswald-Beck, “The Legal”, 243; Khalilzad, “The war”, 285-289; Cynkin, “Aftermath”, 278-282; Galster, “Afghanistan”, 20; Maley, *The Afghanistan*, 48-49, 52-54; he points out that, even in 1992, after the communist government had collapsed, “there was no unified group or party capable of exercising legitimate rule throughout Afghanistan’s territory”; Roy, *The Lessons*, 35-36; he states that -despite financial incentives from the USA to “establish a unified political entity that could challenge the legitimacy of the Kabul regime” - “the Mujahedin gave little indication of organizing themselves”; Hyman, *Afghan Resistance*, 22-24; Gates, *From*, 348; Wright, *The Looming*, 100; Wright describes the different *mujahedeen* groups as “little more than disorganized mobs”.

¹⁶⁶⁴ Wright, *The Looming*, 100.

were many more,¹⁶⁶⁵ and relations between some of these groups were “characterized by conflict including actual warfare.”¹⁶⁶⁶

Furthermore, although the USA had refused to recognize the new Karmal government, diplomatic relations had been maintained, and the new government continued to represent Afghanistan internationally.¹⁶⁶⁷ Immediately after the invasion, on January 11, 1980, the Credentials Committee at the UN in fact explicitly approved the credentials of the new Afghan government’s representative in a resolution supported, notably, by the USA.¹⁶⁶⁸

As late as 1989 the US government was still contemplating whether it would really be advisable to shift official recognition to the *mujahedeen*. This obviously indicates that even at this late stage in the Afghan conflict, the USA did not recognize the *mujahedeen*’s authority to speak for the state of Afghanistan.¹⁶⁶⁹ The *mujahedeen*, in

¹⁶⁶⁵ Doswald-Beck, “The Legal”, 206; she claims there were 37 different rebel groups fighting the Afghan government; Wright, *The Looming*, 100.

¹⁶⁶⁶ Khalilzad, “The war”, 288 (quote); Gates, *From*, 348; Gates, US Defence Secretary until recently and Deputy Director of the CIA at the time, states, referring to the Afghan *mujahedeen*: “No one should have had any illusions about these people coming together politically- before or after a Soviet defeat. Certainly no one at the CIA had such fantasies”; Ross, “Beyond”, 102; Ross, writing in 1990, -correctly- predicted that after the fall of the communist government in Afghanistan, the “cleavages” between the various rebel groups would “draw the battle lines in a bloody struggle for power”; Cynkin, “Aftermath”, 282, 298; he describes how competition between various rebel groups was resolved “in a military manner”, and, writing in 1982, predicted that once the Soviets left Afghanistan it was doubtful whether “any central government” would ever “govern Afghanistan effectively” again; Galster, “Afghanistan”, 20; Rasanayagam, *Afghanistan*, 110, 120; Koelbl, *Ihlauf, Krieg*, 184; Tomsen, *The Wars*, 319.

¹⁶⁶⁷ Amer, “The United Nations”, 431; Maley, *The Afghanistan*, 125-126; Khalilzad, “The war”, 289; he also describes a failed attempt by the *mujahedeen*, in 1985, to take Afghanistan’s seat at the UN (at 286). The confusion within the Reagan Administration, as far as the treatment of the Afghan government and the rebels are concerned is evidenced by various contradictory news reports: “Reagan Bars Ties to Afghan Rebels”, Bernard Gwertzman, *The New York Times*, 17/06/1986, 7; “US May Establish Afghan Rebel Ties”, Richard Halloran, *The New York Times*, 18/06/1986, 8; “Afghan Rebels Get Support from U.S. For A Government”, Robert Pear, *The New York Times*, 06/05/1988; available at: <http://www.nytimes.com/1988/05/06/world/afghan-rebels-get-support-from-us-for-a-government.html?scp=1&sq=afghan+rebels&st=nyt>; last accessed 26/10/2011; “Afghan Vacuum: The U.S. is Wary of Rushing In”, David K. Shieler, *The New York Times*, 15/05/1988; available at: <http://www.nvtimes.com/1988/05/15/world/afghan-vacuum-the-us-is-wary-of-rushing-in.html?scp=1&sq=afghan+vacuum&st=nyt>; last accessed 26/10/2011.

¹⁶⁶⁸ *Yearbook of the United Nations for the Year 1980*, 320; the *Report of the Credentials Committee* states that “China, Ecuador, Pakistan, Panama and the United States... stressed that their acceptance of the credentials of the representatives of Afghanistan should not be taken as acquiescing in the armed intervention in that country.”

¹⁶⁶⁹ “U.S. Considering Diplomatic Shift on Afghanistan”, Elaine Sciolino, *The New York Times*, 19/03/1989; she points out that the “Bush Administration” was “considering a formal break in relations with the Soviet-backed

1989, attempted to set up a government, the so-called “Interim Islamic Government” of Afghanistan. The US Special Envoy to the *mujahedeen*, Peter Tomsen, has referred to this government as the “Potemkin Government”, and it was only recognized by four states, the USA not among them.¹⁶⁷⁰

International reaction to the new Afghan government was therefore markedly different from what it had been towards the Vietnamese-installed Cambodian government in 1979,¹⁶⁷¹ or the Soviet-installed government in Hungary in 1956.¹⁶⁷² It must therefore be concluded that President Karmal’s government was disapproved of, but not rejected outright as the rightful international representative of Afghanistan.¹⁶⁷³ This is also confirmed by the fact that the *Geneva Accords* of 1988 were agreed between the governments of Afghanistan and Pakistan, but without the rebels’ participation.¹⁶⁷⁴

Thus the USA could not plausibly claim to have received a valid request by an authoritative organ that represented the state of Afghanistan for support against the

Afghan Government”, but was “not ready to recognize the rebel government in exile”; available at: <http://www.nytimes.com/1989/03/19/world/us-considering-diplomatic-shift-on-afghanistan.html?scp=2&sq=elaine+sciolino&st=nyt>; last accessed 26/10/2011; in a further article (“Bush Names Envoy to Afghan Rebels”, *The New York Times*, 06/04/1989) a few weeks later, Elaine Sciolino explains that, despite sending “a special envoy to the American-backed Afghan rebels”, the State Department had decided to “stop short of formal recognition of the Afghan government-in-exile”; available at: <http://www.nytimes.com/1989/04/06/world/bush-names-envoy-to-afghan-rebels.html?scp=1&sq=afghan+rebels&st=nyt>; last accessed 26/10/2011; Roy, *The Lessons*, 35; he points out that only in 1989, after much US pressure, did the *mujahedeen* manage to establish a “bureaucratic, corrupt and inefficient monster” which was called AIG; Hyman, *Afghan Resistance*, 24; he, writing in 1984, warns that the “struggle” may go “by default to the Kabul government” if the *mujahedeen* remain incapable of “forming a strong provisional government-in-exile”; Maley, *The Afghanistan*, 125-126; the USA only closed its Embassy in Kabul on January 30, 1989; Steele, *Ghosts*, 84; he believes the *mujahedeen* lacked “full legitimacy”.

¹⁶⁷⁰ Tomsen, *The Wars*, 257, 261, 289, 293 (quote), 320; Maley, *The Afghanistan*, 125-126; Maley points out that even Pakistan abstained when the “Interim Government” -ultimately successfully- initially attempted to gain Afghanistan’s seat at the OIC. No such success was forthcoming at the UN.

¹⁶⁷¹ Amer, “The United Nations”, 431.

¹⁶⁷² Doswald-Beck, “The Legal”, 195 (Hungary was not represented at the UN between 1957-1963; the new Cambodian government’s credentials were rejected by the UN in 1979).

¹⁶⁷³ Maley, *The Afghanistan*, 65; he (disapprovingly) quotes UN Secretary General Pérez de Cuéllar as refusing to negotiate with the Afghan rebels, as it was against the UN’s “philosophy to be in touch with the enemies of governments.”; Khalilzad, “The war”, 289; although he deplores this situation, Khalilzad acknowledges that the Afghan government had achieved a “degree of international acceptance”, and was often treated as the “legitimate authority” in the western media; Blum, *Killing*, 347; he accuses the USA of acting “as if the Afghanistan army and government”....”with a large following of people”...”didn’t exist.”

¹⁶⁷⁴ The *Geneva Accords* were negotiated between Afghanistan and Pakistan, with the USA and the USSR acting as guarantors.

Soviets. The massive US support of the *mujahedeen* could therefore not be justified by invoking Article 51.¹⁶⁷⁵

bb) Right of counter-intervention

Based on the Soviet invasion of Afghanistan in support of the communist government against the rebels, the USA could possibly have claimed to be exercising its customary international law right of counter-intervention by massively supporting the rebels.

It has, however, already been explained that a right of counter-intervention does not exist in customary international law, and that this should remain so.¹⁶⁷⁶ Furthermore, many among those who claim such a right exists, nevertheless, rule out foreign intervention in aid of rebels.¹⁶⁷⁷ As no state has so far explicitly relied on a “right of counter-intervention”, distinct from Article 51, it, however, seems improbable the USA would have done so.

cc) Wars of National Liberation

Reisman has argued that US support of the *mujahedeen* was justified on the basis of the concept of “wars of national liberation”.¹⁶⁷⁸ Afghanistan was subject to Soviet

¹⁶⁷⁵ Moore, “Panel One”, 236; he disagrees with this assertion: according to him, support of the “Afghan people” was justified under Article 51. Unfortunately, he offers no arguments in support of this categorical statement.

¹⁶⁷⁶ See: Chapter IV, A (c), at 399-405; Pentz, “The Mujahidin”, 394-395, 400-401, disagrees; he argues that Pakistani assistance to the Afghan rebels was justified on the basis of the right of counter-intervention, following Soviet support of the Afghan government. Although claiming that the existence of such a rule was “generally agreed”, he provides no evidence of its actual existence.

¹⁶⁷⁷ Joyner/Grimaldi, “The United States”, 647-649; they actually spell out this consequence. They argue a right of counter-intervention, based on prior foreign involvement in a civil war, exists, but then go on to point out that “counter-interventionary aid to insurgents” can never be legal, whatever the circumstances; Gray, *International Law*, 92; she makes a similar point.

¹⁶⁷⁸ Reisman, “The Resistance”, 906-909; Ross, “Beyond”, 105-107; he might also be supportive of this argument; he cites Reisman’s article, without commenting on it, but does go on to examine whether the Afghan resistance was based on a right of self-determination prior to the Soviet invasion (the argument being that the communist government was a puppet government). His conclusions remain ambiguous.

“alien domination”,¹⁶⁷⁹ he argues, so that the US was legally entitled to support the people of Afghanistan in their struggle against foreign suppression by delivering weapons and other aid.¹⁶⁸⁰ The *mujahedeen*, supported, according to him, by the vast majority of the Afghan people, were a national liberation movement.¹⁶⁸¹ Reisman goes on to accuse the General Assembly of having failed to have “used the proper language”, by not clearly establishing that the *mujahedeen* were engaged in a war of national liberation,¹⁶⁸² thereby “depriving the Afghan resistance as well as those third states supporting it of substantial international authority.”¹⁶⁸³

This raises the question of whether the General Assembly had -as Reisman implies- failed in its duty towards Afghanistan, or whether the norm Reisman seems to be relying on perhaps does not exist in customary international law.

The concept of “wars of national liberation” was developed mainly by newly independent former colonies in cooperation with socialist states, against stiff western opposition.¹⁶⁸⁴ Developing countries and the socialist states repeatedly argued that a people, which was subject to colonisation, had the right to rebel, and rid itself of the colonizer, by force if necessary.¹⁶⁸⁵ Such an armed struggle was justified and compatible with international law, especially with the right of self-determination, and

¹⁶⁷⁹ *Definition of Aggression*, Article 7, GA Resolution 3314 (1974).

¹⁶⁸⁰ Reisman, “The Resistance”, 907-909; Reisman’s arguments seem to be supported by Quigley, “The Reagan”, 209-210, and 210, fn. 90.

¹⁶⁸¹ As far as the applicability of the right of self-determination in a non-colonial context is concerned, see, for example: UN GA Resolution ES-7/2 (1980) on Palestine; GA Resolution 42/43 (1987) on South Africa; GA Resolution 46/79 (1991) on Cambodia; Principle VIII of the *Helsinki Final Act* (1975), OSCE; available at: <http://www.osce.org/mc/39501?download=true>; accessed 31/07/2012; in all of these cases the right of self-determination is referred to in a non-colonial context; see also: Koskenniemi, “National”, 241-242, 247-248, 263-264.

¹⁶⁸² Reisman, “The Resistance”, 909.

¹⁶⁸³ Reisman, “The Resistance”, 907; he goes on to state that a General Assembly Resolution was necessary to “underline the lawfulness of third-party support” of the *mujahedeen* (at 909; emphasis by author).

¹⁶⁸⁴ Leon Romaniacki, “Sources of the Brezhnev Doctrine of Limited Sovereignty and Intervention”, *Isr. L. Rev.*, Vol. 5, 1970, 527-541, 537; Rostow, “Law”, 215, Trofimenko, “The Third”, 1022, 1028, 1034-1035; Friedman, “Intervention”, 72; Oglesby, “A Search”, 39-40; Dahm, “Afghanistan”, 186, 189-191; Berner, “Der Kampf”, 328.

¹⁶⁸⁵ Rostow, “Law”, 229; Trofimenko, “The Third”, 1028; Gray, *International Law*, 59-60.

could therefore be actively supported by other states, even militarily.¹⁶⁸⁶ The right of self-determination, as embodied in Articles 1, 55, 56, 73, 76 UN Charter, and the *Declaration on the Granting of Independence to Colonial Countries and Peoples*,¹⁶⁸⁷ was viewed as granting non-self-governing peoples the right to immediate and full independence.¹⁶⁸⁸

Resolution 1514 had, however, only mentioned a dependent people's entitlement to "exercise peacefully and freely their right to complete independence,"¹⁶⁸⁹ a sentiment repeated in the preamble of Resolution 1654.¹⁶⁹⁰

Developing and socialist states, nevertheless, maintained that the use of force by national liberation movements was justified.¹⁶⁹¹ It was argued that colonialism was to be viewed as perpetual use of force, or as an enduring act of aggression by the colonizer from the moment the territory was seized. Therefore the use of force by the colonized against the colonizers was justified as self-defence under Article 51.¹⁶⁹²

States supporting foreign national liberation movements were consequently exercising collective self-defence.¹⁶⁹³ Such support was therefore not an illegal intervention in the internal affairs of another state, but was, to the contrary, entirely compatible with the UN Charter.¹⁶⁹⁴ This argument was again based on the right of self-determination,

¹⁶⁸⁶ Oglesby, "A Search", 39-40; Gray, *International Law*, 60.

¹⁶⁸⁷ GA Resolution 1514 (1960).

¹⁶⁸⁸ Schmeltzer, "Soviet", 99-100; Rosenstock, "The Declaration", 730.

¹⁶⁸⁹ GA Resolution 1514 (1960), Article 4.

¹⁶⁹⁰ GA Resolution 1654 (1961).

¹⁶⁹¹ Arend, "International", 10-12; Falk, "Intervention", 119, 123; Turner, "Soviet", 56-71; Dahm, "Afghanistan", 186; Berner, "Der Kampf", 328; Gray, *International Law*, 60.

¹⁶⁹² Klein, "Nationale", 633, 644-649; Rosenstock, "The Declaration", 730; Robert E. Gorelick, "Wars of National Liberation: Jus Ad Bellum", Case W. Res. J. Int'l L., Vol. 11, 1979, 71-93, 74, 76-77, 77-80; Krauss, "Internal", 227; Turner, 64-65; Stephen M. Schwebel, "Wars of Liberation- as Fought in U.N. Organs" in *Law and Civil War in the Modern World*, John Norton Moore (ed.), Baltimore: The John Hopkins University Press, 1974, Ch. 17, 446-457, 447; as he points out, this argument was part of India's justification of its 1961 invasion of Goa, which at that time was still a Portuguese colony. During the subsequent debates, the USA's UN Ambassador explicitly rejected India's legal arguments.

¹⁶⁹³ Rosenstock, "The Declaration", 730; Gorelick, "Wars", 76.

¹⁶⁹⁴ Schmeltzer, "Soviet", 99-100; Rosenstock, "The Declaration", 730; Gorelick, "Wars", 74.

and arguably strengthened by the fact that the General Assembly had recognized various national liberation movements as the authoritative representatives of their respective state.¹⁶⁹⁵ Another line of argument was to argue that the ban on the use of force in Article 2 (4) did not apply to wars of national liberation, as national liberation movements using force to realize their right to self-determination were acting strictly in accordance with the UN's basic principles.¹⁶⁹⁶

These arguments met with strong resistance on the part of the western states.¹⁶⁹⁷ They insisted that the right of self-determination could not in any way circumvent or limit the ban on the use of force in Article 2 (4).¹⁶⁹⁸ Therefore they opposed attempts to explicitly legalize the use of force by national liberation movements, or, even more so, attempts to legitimize external support for a military campaign.¹⁶⁹⁹ Many western states viewed the term "war of national liberation" as merely an attempt by the socialist states to disguise their true intention of installing communist regimes in the Third World.¹⁷⁰⁰ Discussing Vietnam, US Vice-President Humphrey declared in 1965:

South Viet Nam is the testing ground for the so-called 'war of national liberation' - a contest in which totalitarians believe they can baffle and defeat not only the

¹⁶⁹⁵ GA Resolution 2918 (1972), referring to the national liberation movements of Angola, Guinea-Bissau, Cape Verde, and Mozambique; GA Resolution 3111 (1973), referring to Namibia; GA Resolution 3113 (1973), referring once more to the Portuguese colonies; GA Resolution 3115 (1973), referring to Rhodesia; GA Resolution 3151 G (1973), referring to South Africa. It should, however, be noted that western states were much more hesitant in recognizing national liberation movements as legitimate representatives of their countries. The UK, for example, explicitly refused to recognize SWAPO as the legitimate representative of Namibia (see: Talmon, "Recognition", 253-254).

¹⁶⁹⁶ Gorelick, "Wars", 80-83; Krauss, "Internal", 227; Turner, "Soviet", 65-66; Gray, *International Law*, 61; Schwebel, "Wars", 450-451.

¹⁶⁹⁷ Rosenstock, "The Declaration", 719-720; Rosenstock describes western resistance even against the inclusion, in the 1970 Declaration on Friendly Relations (GA Resolution 2625), of the "prohibition of the use of force against dependent people" (emphasis by author); Falk, "Intervention", 123-124, 128-129; Gorelick, "Wars", 74-75, 76-77, 80, 82; Krauss, "Internal", 227; Gray, *International Law*, 60; Schwebel, "Wars", 447.

¹⁶⁹⁸ Klein, "Nationale", 633; Rohlik, "Some", 400, 407-409; Moore, "Legal Standards", 196; Gorelick, "Wars", 75-76, 80, 82; Schwebel, "Wars", 447; he points out that, during the debates at the UN, the USA's UN Ambassador Adlai Stevenson rejected India's justification of its invasion of the Portuguese colony of Goa in 1961, which had been based on those grounds.

¹⁶⁹⁹ Oglesby, "A Search", 39-40; Moore, "Legal Standards", 196; Moore, "The 'Brezhnev'", 18; Gorelick, "Wars", 75-76, 80, 82.

¹⁷⁰⁰ Falk, "Intervention", 123; Moore, "The 'Brezhnev'", 3.

*forces of the Republic of South Viet Nam but also the forces of the most advanced of all nations. In South Viet Nam our adversaries seek to demonstrate decisively that arrogant militancy -and not peaceful coexistence- is the path to eventual Communist triumph.*¹⁷⁰¹

In the face of western opposition, the socialist and developing states nevertheless managed to secure some success in the General Assembly. While Resolution 1514 had already demanded that “all armed action or repressive measures of all kinds directed against dependent peoples shall cease”,¹⁷⁰² Resolution 2105 recognized the “legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence”, and any provision of “material and moral assistance” to such “national liberation movements” was explicitly welcomed.¹⁷⁰³ This had been a compromise phrase, which tried to paper over the difference in attitude between western states on the one hand, and socialist and developing states on the other towards the legitimacy of the use of force by liberation movements. The question of whether the “struggle” could be conducted by force was deliberately left unanswered.¹⁷⁰⁴

Finally, by the 1970s, the socialist and developing states managed to achieve majorities for resolutions that explicitly permitted the use of force on the part of liberation movements. After Resolution 2621 (1970) had referred to the “inherent right of colonial peoples to struggle by all necessary means at their disposal”,

¹⁷⁰¹ Hubert Humphrey, US Vice President, at the 1965 Annual *National Governors' Association Meeting*; available at: <http://www.nga.org/cms/home/about/nga-annual--winter-meetings/page-nga-annual-meetings/col2-content/main-content-list/1965-nga-annual-meeting.html>; “Memorable Quotes”; accessed 26/10/2011.

¹⁷⁰² GA Resolution 1514 (1960), Article 4.

¹⁷⁰³ GA Resolution 2105 (1965), Article 10.

¹⁷⁰⁴ Klein, “Nationale”, 625; Gray, *International Law*, 60; Schwebel, “Wars”, 453-454.

Resolutions 3070 (1973), and 3246 (1974) declared “armed struggle” to be a legitimate way for liberation movements to proceed.¹⁷⁰⁵

This seemingly startling success in establishing far-reaching rights for national liberation movements had, however, one serious defect: they were not supported by western states that either abstained or voted against the resolutions legitimizing the use of force.¹⁷⁰⁶ As General Assembly Resolutions have no legally binding character as such, they are dependent on near-unanimous votes in favour of passage in order for states to be able to claim them to be reflective of states’ *opinio juris*. The determined and consistent resistance by western states to the concept of wars of national liberation meant that the GA Resolutions passed were therefore not suitable to evidence favourable *opinio juris*. Western opposition actually proved the opposite, namely that the principles put forward by developing and socialist states were not viewed as reflective of customary international law by the developed states.¹⁷⁰⁷

As had already been the case during the debates on the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter*,¹⁷⁰⁸ this became evident once more during the discussions leading up to the passage, in December 1974, of the *Definition of Aggression* by the General Assembly.¹⁷⁰⁹ Socialist and developing states realized that western opposition to the concept of wars of national liberation had to be placated, if

¹⁷⁰⁵ GA Resolution 2621 (1970), Article 2; GA Resolution 3070 (1973), Article 2; GA Resolution 3246 (1974), Article 3.

¹⁷⁰⁶ Klein, “Nationale“, 632; Rohlik, “Some“, 407-409; Gorelick, “Wars“, 83; Gray, *International Law*, 62; Schwebel, “Wars“, 448-457.

¹⁷⁰⁷ Rohlik, “Some“, 407-409; Gorelick, “Wars“, 83; Schwebel, “Wars“, 454-456.

¹⁷⁰⁸ GA Resolution 2625 (1970).

¹⁷⁰⁹ GA Resolution 3314 (1974); Rosenstock, “The Declaration“, 731-732; he refers to near identical discussions surrounding the passage of Resolution 2625 (1970), as does Krauss in “Internal“, 227-228; Schwebel, “Wars“, 448-454, 456; Schwebel outlines the relevant discussions on Resolution 2625 (1970) in detail, but also refers to the -near identical- discussions surrounding the passage of Resolution 3314 (1974); Rohlik, “Some“, 411-412; Gorelick, “Wars“, 76, 83-84; Gray, *International Law*, 60-62.

the *Definition of Aggression* was to achieve a status that justified the claim it was reflective of customary international law.

Arduous and complicated negotiations at the UN followed. While western states were not able to achieve their goal of completely deleting any reference to liberation movements, socialist and developing states had to accept that any reference to the use of force by liberation movements also had to be dropped.¹⁷¹⁰ As a result Resolution 3314 in the end returned to the compromise phrase of 1965: the right of people to “struggle” for independence and to receive support in that endeavour was recognized.¹⁷¹¹ As subsequent discussions showed, this was interpreted in widely differing ways by states: while western states vehemently argued that it remained impermissible to aid liberation movements militarily, developing and socialist states took the opposite view.¹⁷¹²

The discussions subsequent to the Resolution, however, also serve to demonstrate that one section of the community of states, the western states, consistently argued that military aid to liberation movements was illegal.¹⁷¹³ Thus it could not be claimed that the international community had come to the near unanimous conclusion that military support of liberation movements was legal. Unyielding western opposition, led by the

¹⁷¹⁰ Klein, “Nationale”, 632-633.

¹⁷¹¹ GA Resolution 3314 (1974), *Definition of Aggression*, Article 7.

¹⁷¹² Klein, “Nationale”, 633; Rohlik, “Some”, 411-412; Gray, *International Law*, 60-62; Rosenstock, “The Declaration”, 731-732; he refers to near identical discussions surrounding the passage of Resolution 2625 (1970). The compromise achieved was that a people subject to “forcible action” in its fight for self-determination was “entitled to seek and to receive support in accordance with the purposes and principles of the Charter”. The enduring disagreement, as to the interpretation of this phrase, was whether such support could go beyond political and moral support (western states) to include military aid (socialist and many developing states); Gorelick, “Wars”, 85-87; Schwebel, “Wars”, 453-454, 456.

¹⁷¹³ Klein, “Nationale”, 651-652; Schwebel, “Wars”, 450-451, 453, 454-455.

USA, thus meant that no norm in customary international law allowing military support of national liberation movements was created.¹⁷¹⁴

As the US Representative Gimer had already stated before the Legal Committee of the General Assembly in 1970 during a debate on the *Declaration on Friendly Relations*:

*We agree, as the U.K. said, that states are not entitled 'under the Charter, to intervene by giving military support or armed assistance in non-self-governing territories or elsewhere. The support...states were entitled to give to peoples deprived of self-determination was...limited to such support as was in accordance with the purposes and principles of the Charter and was therefore controlled by the overriding duty to maintain international peace and security.' In short, the declaration does not constitute a licence for gun-running...*¹⁷¹⁵

Consequently, neither had the General Assembly failed in its duty towards the Afghan *mujahedeen*, nor could the USA claim to be justified in massively supporting the *mujahedeen* with weapons and money on the basis of a right to militarily support national liberation movements, as Reisman had argued.

Reisman himself also undermines his own argument, when he states that a declaration by the General Assembly that the *mujahedeen*'s struggle was a "war of national liberation" might cause western states to look at the concept more favourably.¹⁷¹⁶ This is an indirect confirmation of the fact that the norm Reisman wants to rely on in order to justify US support of the *mujahedeen* did at that time not exist.

¹⁷¹⁴ The British Foreign Office, in 1984, issued the following legal advice in respect of the right to "assist a national liberation movement seeking to assert the right of self-determination": "Most Western writers reject such a right on the grounds that such assistance (...) infringes the sovereignty of the state,..."; in "Is intervention ever justified?", British Foreign Office, Foreign Policy Document No. 148 of July 1984; extracts reprinted in BYIL, Vol. 57, 1986, 614-624, 619. Western states were anyway very reluctant to recognize national liberation movements as the legitimate representatives of their countries. The UK, for example, explicitly rejecting the GA's contrary decision in that respect, refused to recognize SWAPO as the legitimate representative of Namibia (see: Talmon, "Recognition", 253-254); Rosenstock, "The Declaration", 733; Rohlik, "Some", 407-409, 411-412; Gorelick, "Wars", 83, 87 (referring in particular to US opposition), 92-93; Krauss, "Internal", 230; Schwebel, "Wars", 448-457.

¹⁷¹⁵ Statement by Mr. Gimer, US Alternate Representative to the UN General Assembly, before Committee VI (Legal), Declaration on Principles of Friendly Relations, 24/09/1970; Dept. of State Bulletin, Vol. 63, 1970, 623-627, 626.

¹⁷¹⁶ Reisman, "The Resistance", 909.

Therefore it must be concluded that the right of self-determination in combination with the concept of wars of national liberation did not confer any right on states to militarily support national liberation movements. The USA could consequently not successfully invoke such a right.

e) Conclusion

There is little doubt that the US support of the *mujahedeen* prior to the Soviet invasion violated the rule, in customary international law, of non-intervention in a civil war. The intervention amounted to an unjustified interference in another state's internal affairs.¹⁷¹⁷

The massive and decisive US support of the *mujahedeen* following the Soviet invasion was, however, also illegal under international law. The USA could not claim to be acting in collective self-defence, as it had received no valid Afghan request to that effect. Relying on a right of counter-intervention, or on a right to militarily support national liberation movements in wars of national liberation was also impossible, as such rights did not exist in customary international law.

The USA and its allies had themselves chosen to ignore General Assembly Resolution ES-6/2. Besides condemning the Soviet Union's invasion, and demanding the withdrawal of Soviet troops, the General Assembly had also "appealed"

¹⁷¹⁷ Gray, *International Law*, 106; she describes the USA's massive support for opposition groups in Angola, Cambodia, Nicaragua, and Afghanistan as coming "close to blatant disregard, if not rejection, of the legal principle of non-intervention".

*to all States to respect the sovereignty, territorial integrity, political independence and non-aligned character of Afghanistan and to refrain from any interference in the internal affairs of that country.*¹⁷¹⁸

3. US motives

It remains to be examined why the USA became so massively involved in a conflict which was taking place in a distant country with few resources, and which had for decades -more or less- been accepted as in the Soviet sphere of interest. The US support of the *mujahedeen* seems even more paradoxical, when it is considered that many of the more radical groups fighting the Soviets openly and simultaneously declared their hate of America.¹⁷¹⁹

Cold War perceptions and strategic considerations seem to have pushed the Americans to their massive intervention in Afghanistan. Brzezinski's claims that he, as Carter's National Security Advisor, had advocated the support of the *mujahedeen* as early as 1979 because he wanted to provoke a Soviet invasion, leading, in the end, to communism's downfall, seem exaggerated.¹⁷²⁰ But there is little doubt many influential Americans were hoping that supporting the *mujahedeen* would lead to the

¹⁷¹⁸ GA Resolution ES-6/2 (1980), op. para. 3.

¹⁷¹⁹ Loyn, *Butcher*, 217; he recalls an incident in 1985, when one of the most influential and ruthless rebel leaders, Hekmatyar, even refused to shake President Reagan's hand while in Washington; Kuperman, "The Stinger", 256; he points out that Hekmatyar, the rebel leader favoured by the Pakistani security service ISI (at 232), supported Saddam Hussein in the Gulf conflict 1990/1991; Cynkin, "Aftermath", 281-282; writing in 1982, he describes how during a meeting of Hekmatyar followers anti-Soviet slogans "were followed by cries of 'Death to America.'"

¹⁷²⁰ This is especially so, given the fact that the funding of the Afghan *mujahedeen* between July 1979 and December 1979 was much too limited to provoke a Soviet invasion. As far as Brzezinski's claim is concerned, see: Zbigniew Brzezinski, "Oui, la CIA est entrée en Afghanistan avant les Russes..."; Interview given to Vincent Jauvert, *Le Nouvel Observateur* (No. 1732), 15/01/1998, 76; was available at: <http://hebdo.nouvelobs.com/hebdo/parution/p19980115/articles/a19460-.html>; accessed 07/02/2010 (no longer available online); an English translation is still available at:

<http://www.globalresearch.ca/articles/BRZ110A.html>; accessed 26/10/2011; Loyn, *Butcher*, 208.

USSR suffering “a Vietnam”.¹⁷²¹ Supporting the *mujahedeen* against the Soviets was mainly an opportunity to fight the Soviets without getting directly involved.¹⁷²²

Once the new Reagan Administration came to power some of its more right-wing members were openly advocating a war of attrition to wear the Soviets down. Until the late 1980s nobody considered the possibility the *mujahedeen* might actually win. The aim was, according to Carter’s Foreign Secretary, Cyrus Vance, to make the Afghanistan venture as costly as possible for the USSR.¹⁷²³ By the mid-1980s some were also arguing that it was a waste of time and resources to fight communism in Nicaragua, when the “real” Cold War was being fought in Afghanistan.¹⁷²⁴

Then, as already mentioned, there were those who believed the Soviet Union was gaining a decisive strategic advantage by occupying Afghanistan. Western oil supplies were threatened by Soviet military bases along the North African and Arab coasts, it was argued, and that threat was being increased by the new Soviet possibilities regarding the Strait of Hormuz.¹⁷²⁵ Getting the Soviets out of Afghanistan therefore became a strategic necessity.

¹⁷²¹ Zbigniew Brzezinski, Carter’s National Security Advisor at the time of the Soviet invasion of Afghanistan, “Oui, la CIA est entrée en Afghanistan avant les Russes...”; Interview given to Vincent Jauvert, *Le Nouvel Observateur* (No. 1732), 15/01/1998, 76; was available at: <http://hebdo.nouvelobs.com/hebdo/parution/p19980115/articles/a19460-.html>; accessed 07/02/2010 (no longer available online); an English translation is available at: <http://www.globalresearch.ca/articles/BRZ110A.html>; accessed 26/10/2011; Blum, *Killing*, 344-345; Galster, “Afghanistan”, 1-2; Gates, *From*, 319-321, 348-350; Steele, *Ghosts*, 80.

¹⁷²² Loyn, *Butcher*, 209; Kuperman, “The Stinger”, 221; Roy, *The Lessons*, 15, 34-35.

¹⁷²³ Vance, *Hard*, 389; Galster, “Afghanistan”, 14.

¹⁷²⁴ Galster, “Afghanistan”, 1-2; Loyn, *Butcher*, 195-196 (he believes the CIA’s original reluctance to support the *mujahedeen* was due precisely to the feeling that the “key battleground” in the struggle against communism was “central America”; he quotes CIA Director Casey as follows: “If America challenges the Soviets at every turn and ultimately defeats them in one place, that will shatter the mythology. Nicaragua is that place.”).

¹⁷²⁵ In his *State of the Union Address* after the Soviet invasion of Afghanistan, Carter declared: “The region which is now threatened by Soviet troops in Afghanistan is of great strategic importance: It contains more than two-thirds of the world’s exportable oil. The Soviet effort to dominate Afghanistan has brought Soviet military forces to within 300 miles of the Indian Ocean and close to the Straits of Hormuz, a waterway through which most of the world’s oil must flow. The Soviet Union is now attempting to consolidate a strategic position, therefore, that poses a grave threat to the free movement of Middle East oil.”; *State of the Union Address 1980*

Many also felt that it was time for the USA to take a strong anti-Soviet stand, so as to avoid a further loss of prestige in the Middle East. Having only just suffered the humiliation in Iran, the USA could not afford to accept the Soviet invasion of Afghanistan.¹⁷²⁶ Not only was US policy in the region in disarray following the loss of its most important strategic ally there, but Arab leaders might begin to question US commitment to them, if there was no strong American response to the Soviet aggression.¹⁷²⁷ Cyrus Vance later stated:

*Afghanistan and the continuing disorder in Iran were threatening the Persian Gulf security system. There was a danger of a vacuum into which Soviet power would spread toward the Indian Ocean and the Persian Gulf.*¹⁷²⁸

Lastly, supporting the *mujahedeen* was a popular cause, especially in the USA. Many Americans were enthusiastic about helping these poor, ragged, and ill-equipped Afghan “freedom fighters” against the vicious, faceless, well-equipped, communist Soviets.¹⁷²⁹ Wealthy right-wing industrialists began financing adverts lionizing the *mujahedeen*.¹⁷³⁰ This led to the extraordinary situation that a right-wing Administration, such as Reagan’s, was repeatedly forced by Congress to approve ever more funds for the anti-communist *mujahedeen*, sometimes against its own better

by President Jimmy Carter, 23/01/1980; available at:

<http://www.iimmvcarterlibrary.gov/documents/speeches/su80jec.phtml>; accessed 26/10/2011; Schwenninger, “The 1980s”, 424; Campbell, “The Middle East”, 598-599; Miron Rezun, “The Great Game Revisited”, *Int’l J.*, Vol. 41, 1985-1986, 324-341, 336-337; Lenczowski, “The Soviet Union”, 310-313, 315-317, 319; Galster, “Afghanistan”, 3, 10-11, 13; he quotes from a *Defense Intelligence Agency* Intelligence Commentary of January 7, 1980, which stated: “The key motivation that propelled Moscow’s move was to bring its long-standing strategic goals closer within reach. Control of Afghanistan would be major step toward overland access to the Indian Ocean and to domination of the Asian sub-continent.” (at 13); Maley, *The Afghanistan*, 66; Hauner, “The Soviet”, 162, 165, 175-179; Ulfkotte, *Kontinuität*, 329-331; Grasselli, *British*, 121-130; Roy, *The Lessons*, 15; Coll, *Ghost*, 50; Steele, *Ghosts*, 63-64; Vance, *Hard*, 391-392; Carter’s Secretary of State confirms that this aspect was a major consideration, when developing a US policy response.

¹⁷²⁶ Schwenninger, “The 1980s”, 425; Lenczowski, “The Soviet Union”, 323-324; Trofimenko, “The Third”, 1030; Galster, “Afghanistan”, 4; Behrens, *Die Afghanistan*, 86-89; von Borcke, “Die sowjetische”, 172; Timmermann, “Die USA“, 300-301; Grasselli, *British*, 145; Tomsen, *The Wars*, 124-125.

¹⁷²⁷ Campbell, “The Middle East”, 594-596; Behrens, *Die Afghanistan*, 86-89; Grasselli, *British*, 163-166; Tomsen, *The Wars*, 123-124.

¹⁷²⁸ Vance, *Hard*, 386.

¹⁷²⁹ Khalilzad, “The war”, 271; Kuperman, “The Stinger”, 227; Grasselli, *British*, 130, 144.

¹⁷³⁰ Influential groups within the USA included the “Federation for American-Afghan Action”; “Free the Eagle”; “Committee for a Free Afghanistan”, and the “Freedom Research Foundation”; Kuperman, “The Stinger”, 224; Galster, “Afghanistan”, 16.

judgement. Congress itself was often swayed by the Democrat Congressman Charlie Wilson.¹⁷³¹ That American strategic goals could be marketed to the American public as support for “freedom fighters” against a tyrannical dictatorship, was an added bonus. Anti-American statements made by the “freedom fighters” were, of course, conveniently overlooked.¹⁷³²

Nobody who had studied the various *mujahedeen* groups could, however, have been under any illusions as far as the likelihood of them introducing anything resembling democracy was concerned.¹⁷³³ In truth, that was no concern of the American decision-makers, as nobody, until very late in the day, actually believed the Afghan rebels had any realistic chance of winning.¹⁷³⁴

C. Operation Enduring Freedom

By February 1989 the Soviet troops had been withdrawn, and Afghanistan subsequently descended into an increasingly vicious civil war.¹⁷³⁵ A terrorist

¹⁷³¹ An interesting account of Charlie Wilson's exploits for the *mujahedeen* is provided in George Criley's book *Charlie Wilson's War*, Loyn, *Butcher*, 196-198; Khalilzad, “The war”, 289-290; Blum, *Killing*, 345; Galster, “Afghanistan”, 16; Roy, *The Lessons*, 34-36; Gates, *From*, 320-321; Tomsen, *The Wars*, 265, 268-271, 275.

¹⁷³² Loyn, *Butcher*, 208-209, 217; Blum, *Killing*, 345; Cynkin, “Aftermath”, 281-282; Roy, *The Lessons*, 36.

¹⁷³³ Loyn, *Butcher*, 219; Doswald-Beck, “The Legal”, 206; Khalilzad, “The war”, 285-289, he variously describes the “partisans” as “fundamentalist”, “traditionalist”, “influenced by the revolution in Iran”. Not once does he claim that any of the groups had any democratic aims whatsoever; Blum, *Killing*, 344-345; Cynkin, “Aftermath”, 278-282; Tomsen, *The Wars*, 181, 216-217, 252-253, 296.

¹⁷³⁴ Loyn, *Butcher*, 192; Kuperman, “The Stinger”, 221; Galster, “Afghanistan”, 14.

¹⁷³⁵ The communist government managed to stay in power until 1992. It was succeeded by two weak *mujahedeen* governments (Mojadeddi and Rabbani). The civil war, however, nevertheless escalated even more (Loyn, *Butcher*, 212-213, 222, 225; Blum, *Killing*, 350; Rasanayagam, *Afghanistan*, 124-125, 141-142; Maley, *The Afghanistan*, 145-147, 159-160; Rashid, *Descent*, 11-12, 39; Coll, *Ghost*, 194, 262-263; Burke, *Al-Qaeda*, 98-99; Wright, *The Looming*, 129; Steele, *Ghosts*, 151-165). Many more Afghans died in the “civil war” between the various rebel groups between 1992 and 1996 than during the whole Soviet occupation (Maley, *The Afghanistan*, 171; he is relying on *Amnesty International* figures; Loyn, *Butcher*, 227, 231; Koelbl, Ihlau, *Krieg*, 20-21).

organistan, Al Qaeda,¹⁷³⁶ partly recruited from Arab veterans of the struggle against the Soviets and led by Osama Bin Laden, exploited that volatility, and began to establish itself in the country.¹⁷³⁷ The Afghan Taliban government that had come to power in 1996¹⁷³⁸ tolerated Al Qaeda's presence on Afghan territory. As of the late 1990s an increasing number of terrorist attacks, including the infamous bombings of US embassies in Africa in 1998, were attributed to Al Qaeda.¹⁷³⁹

¹⁷³⁶ For more details on Al Qaeda, see: Burke, *Al-Qaeda*, 8, 171-172, 216, 231-233, 237-238; Burke distinguishes three groups of Al Qaeda supporters; Rasanayagam, *Afghanistan*, 239; he makes similar, though not identical, distinctions based on "three generations" of Al Qaeda supporters; also similar Coll, *Ghost*, 474; he distinguishes between "the core bin Laden leadership group in Afghanistan", "protective rings of militant regional allies", and "softer circles of...support" all over the world; Coll claims to be relying on a 1999 CIA analysis; Wright, *The Looming*, 318; Wright offers another explanation of what he refers to as Al Qaeda's "management philosophy"; Olivier Roy, *Der Falsche Krieg, Islamisten, Terroristen und die Irrtümer des Westens*, Berlin: Pantheon Verlag, 2010, 162-175; *9/11 Commission Report*, 67.

¹⁷³⁷ There is no consensus on how the relationship between Al Qaeda and the Taliban started out in the mid-1990s: Rasanayagam, *Afghanistan*, 152, 233; he, for example, claims there were reports that Bin Laden donated \$ 3 million to the Taliban as early as mid-1996, and that the Afghan Taliban had "offered" Bin Laden "sanctuary" when he left Sudan in 1996; claims also made by Maley, *The Afghanistan*, 177, 180, 207, 213-214; Rashid, *Descent*, 15-17; Rashid claims Mullah Omar "invited" bin Laden to "live with him in Kandahar"; Loyn, *Butcher*, 263-264; he, on the other hand, claims the Taliban were far from enthusiastic about Bin Laden, because they viewed his agenda as a "distraction" and -in 1998- apparently ordered him to move south and stop mentioning attacks abroad; Burke, *Al-Qaeda*, 119; Burke makes similar claims. He points out the Taliban did not "invite bin Laden or his aides to their country", and that "links" between the two groups developed "late" in the Taliban's history; Wright, *The Looming*, 226, 229-230; the *9/11 Commission* also expressed doubts as to any initial Bin Laden-Taliban ties at the time of his moving back to Afghanistan (*9/11 Commission Report*, 65).

¹⁷³⁸ It is estimated that by 1999 the Taliban were in control of up to 90 % of Afghan territory. Nevertheless, only four states recognized the Taliban government, and its attempt to take Afghanistan's seat at the UN in 1999 was rebuffed by the Credentials Committee (Rasanayagam, *Afghanistan*, 163, 203-204; Maley, *The Afghanistan*, 204; Murphy, "Afghanistan", 82; Burke, *Al-Qaeda*, 118). For more information on the Taliban and their international supporters, see: Rasanayagam, *Afghanistan*, 143, 147, 149, 185-188; John F. Murphy, "Afghanistan: Hard Choices and the Future of International Law" in *The War in Afghanistan, A Legal Analysis*, Michael N. Schmitt (ed.), International Law Studies, Volume 85, Newport, Rhode Island: Naval War College, 2009, Part II, Chapter IV, 79- 107, 82; Rashid, *Descent*, XLIII, 14, 24-25; Burke, *Al-Qaeda*, 124-128, Maley, *The Afghanistan*, 180, 183-186, 204; US Embassy (Islamabad), Cable, "Bad News on Pak Afghan Policy: GOP Support for the Taliban Appears to be Getting Stronger", Confidential, July 1, 1998; available at: The National Security Archive, *Volume VII: The Taliban File Part III*, Document 8; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB97/index4.htm>; last accessed 26/10/2011; Defense Intelligence Agency, Cable, "HR (Excised)/Veteran Afghanistan Traveler's Analysis of Al Qaeda and Taliban, Exploitable Weaknesses", Secret, October 2, 2010; available at: The National Security Archive, *Volume VII: The Taliban File*, Document 29; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB97/index.htm>; last accessed 26/10/2011; *Afghanistan, Crisis of Impunity, The Role of Pakistan, Russia, and Iran in fueling the Civil War*, Human Rights Watch, July 2001; available at: <http://www.hrw.org/legacy/reports/2001/afghan2/>; last accessed 26/10/2011.

¹⁷³⁹ The suicide bombing of the *USS Cole* off the Yemenite coast in 2000 (see: Congressional Research Service, Report for Congress, Kenneth Katzman, "Terrorism: Near Eastern Groups and State Sponsors, 2001", September 10, 2001, 11; available at: The National Security Archive, *Volume I: Terrorism and U.S. Policy*, Chapter II, Document 2; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/index1.html>; last accessed 26/10/2011; Rasanayagam, *Afghanistan*, 204 (although he -mistakenly- claims that the incident took place in 1999); Rashid, *Descent*, 17-18; Burke, *Al-Qaeda*, 213-215; *The Looming*, 318-321, 331-332; Bush,

1) September 11, 2001, and Operation Enduring Freedom

After months of planning and preparation, Al Qaeda then managed to pull off one of the largest terrorist attacks ever. On September 11, 2001, four planes were hijacked by altogether 19 Al Qaeda terrorists, 15 of whom were Saudi Arabian citizens.¹⁷⁴⁰ They aimed to attack the World Trade Centre, the Pentagon, and an unknown further target in Washington D.C. Their successful attacks on the World Trade Centre and the Pentagon killed about 3000 civilians and injured many thousand more.¹⁷⁴¹ The passengers of the fourth plane managed to overpower the terrorists before they had reached their target, resulting in “only” the loss of all lives on board.¹⁷⁴²

The world was waiting to see how the USA, confronted by such an enormous attack, would react. On September 12, 2001, the UN Security Council unanimously condemned the attacks.¹⁷⁴³ This was followed by many states’ declarations of shock, condemnation, and solidarity with the US.¹⁷⁴⁴

Once again Afghanistan’s Taliban government was asked to hand over Bin Laden to the USA so that he could be put on trial.¹⁷⁴⁵ It is not absolutely clear how the Taliban

Decision, 191; *9/11 Commission Report*, 190-191, 196), and a similar attack on a French military vessel carried out in 2002 have been attributed to Al Qaeda. The simultaneous bomb attacks on the US embassies in Dar es Salaam and Nairobi in August 1998, which killed 235 people and injured about 5500, have also been attributed to Al Qaeda. These attacks had been preceded, in February 1998, by the creation of the “World Islamic Front for the Jihad against the Jews and the Crusaders”, announced by Bin Laden, and by a “fatwa”, issued by him in May 1998, in which he called for the killing of Americans, including civilians (see: Rasanayagam, *Afghanistan*, 204, 225; Loyn, *Butcher*, 263-264; Rashid, *Descent*, 16; Burke, *Al-Qaeda*, 25, 158-160-161, 175-176, 178; Coll, *Ghost*, 10, 403-404; *9/11 Commission Report*, 47, 68-70, 115-116).

¹⁷⁴⁰ Rasanayagam, *Afghanistan*, 214; Coll, *Ghost*, 570-571.

¹⁷⁴¹ Rasanayagam, *Afghanistan*, 246; Jason Burke, *Al-Qaeda. The True Story of Radical Islam*, London: Penguin Books Ltd., 2004, 2007, 234.

¹⁷⁴² Burke, *Al-Qaeda*, 234.

¹⁷⁴³ UN Security Council Resolution 1368 (2001); see also: General Assembly Resolution 56/1 (2001).

¹⁷⁴⁴ Rasanayagam, *Afghanistan*, 250-251; Lindsay Moir, *Reappraising the Resort to Force, International Law, Jus ad Bellum and the War on Terror*, Oxford and Portland: Hart Publishing, 2010, 42.

¹⁷⁴⁵ US President Bush declared: “And tonight the United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of Al Qaida who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats, and aid workers in your country. Close immediately and permanently every terrorist training camp in

responded to the request in detail. It is sometimes claimed that the Taliban offered to put Bin Laden on trial before an “Islamic court” in Afghanistan, if sufficient evidence of Bin Laden’s responsibility for the attacks were provided by the international community.¹⁷⁴⁶ There can, however, be no doubt that the Taliban at all times refused to comply with the UN Security Council Resolutions demanding the extradition of Bin Laden.

This intransigence on the part of the Taliban was to lead to Operation *Enduring Freedom*, the massive military attack on Afghanistan, carried out -initially- by the USA and the United Kingdom, and launched on October 7, 2001. This was to be the first military episode in the so-called “War on Terror”, and targeted not only Al Qaeda, but more controversially, the Taliban government.¹⁷⁴⁷

Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.”; George W. Bush, *Address before a Joint Session of Congress of the United States Response to the Terrorist Attacks of September 11*; available at:

<http://www.presidency.ucsb.edu/ws/index.php?pid=64731&st=&st1=>; last accessed 26/10/2011; in a more general fashion, the UN Security Council declared in Resolution 1373 (2001) that “all states shall...2 (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;...”.

¹⁷⁴⁶ Cowper-Coles, *Cables*, 58-59; the UK Ambassador in Kabul (2008-2009, and again in 2010) even implies that, given time, the Taliban may have complied with the UN Resolutions: “He [an informant Cowper-Coles describes as an “Afghan patriot” who had worked in the Taliban Defence Ministry] was convinced that the tide in those discussions was moving in favour of expelling bin Laden,...But turning that tide into a majority would have taken more time than Western governments thirsting for violent revenge were prepared to give. After the humiliation of 9/11, America needed to kick some butt.”; Steven R. Ratner, “*Jus Ad Bellum And Jus in Bello* After September 11”, *AJIL*, Vol. 96, 2002, 905-921, 906-907; John Quigley, “The Afghanistan War and Self-Defense”, *Valparaiso University Law Review*, Vol. 37, 2002-2003, 541-562, 546-548; Alex Strick van Linschoten, Felix Kuehn, “Separating the Taliban from al-Qaeda: The Core of Success in Afghanistan”, 1-12, 5; available at: http://www.cic.nyu.edu/afghanistan/docs/gregg_sep_tal_alqaeda.pdf; last accessed 26/10/2011; Steele, *Ghosts*, 216-218.

¹⁷⁴⁷ UK Foreign Secretary Straw, *Defeating international terrorism: campaign objectives*, Dep. 01/1460; October 16, 2001; reprinted in *Operation Enduring Freedom and the Conflict in Afghanistan: An Update*, House of Commons Library Research Paper 01/81 (October 31, 2001), 12-13; available at: <http://www.parliament.uk/documents/commons/lib/research/rp2001/rp01-081.pdf>; last accessed 26/10/2011; Murphy, “Afghanistan”, 83.

As this military campaign is still enduring more than ten years after its initiation, it is highly relevant to examine the legality, in international law, of the use of force against Afghanistan.

2. The legality of the use of force against Afghanistan in 2001

Whether the US-led attack on Afghanistan in 2001 conformed to international law was and remains controversial. Various attempts at reconciling American and allied actions as of October 2001 with public international law have been made and these will now be examined in turn.

a) Authorization by the UN Security Council

Based on Security Council Resolutions 1368 and 1373, it has been argued that the Anglo-American attack on Afghanistan had been explicitly or implicitly authorized by the United Nations. In the preamble of Resolution 1368 of September 12, 2001, passed by the Council in response to the terrorist attacks of September 11, the Security Council had declared it was

*Recognizing the inherent right of individual or collective self-defence in accordance with the Charter.*¹⁷⁴⁸

This was followed by Resolution 1373, which was passed on September 28, 2001. In it the Security Council, explicitly acting under Chapter VII of the Charter, again

¹⁷⁴⁸ UN Security Council Resolution 1368 (2001).

utilized the resolution's preamble to make some basic observations. By passing the Resolution the Security Council was, it declared,

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

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

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

*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,...*¹⁷⁴⁹

The fact that the UN Security Council had reaffirmed Resolution 1368, had proceeded to declare "such acts" to be a threat to international peace and security, had "reaffirmed" the right of self-defence, and had emphasized "the need to combat by all means" such threats, was, in fact, the argument goes, tantamount to an authorization of the use of force by the USA against Afghanistan and Al Qaeda. This is allegedly confirmed by the fact that by the time Resolution 1373 was passed, the members of the UN Security Council were well aware of the USA's plans to attack Afghanistan in response to its government's intransigence.¹⁷⁵⁰

¹⁷⁴⁹ UN Security Council Resolution 1373 (2001).

¹⁷⁵⁰ Rashid, *Descent*, XLIII, 66 (referring in particular to Resolution 1373); Michael Byers, "Terrorism, the Use of Force and International Law After September 11", *ICLQ*, Vol. 51, 2002, 401-414, 401-403; Byers argues that Resolution 1373 "could" be read to authorize the use of force (although he himself does not agree with such an interpretation); Jordan J. Paust, "Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond", *Cornell Int'l L. J.*, Vol. 35, 2001-2002, 533-557, 544-545; he, however, argues that the UN Security Council authorization was limited to attacking Al Qaeda, and did not extend to attacking Afghanistan and the Taliban. He believes that this -limited- UN authorization is to be found in the phrases "combat by all means" (quoted above) and Article 3 (c) of the resolution which "calls upon all states to"... "(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts; ..." By emphasizing the "take action" aspect of Article 3 (c), Paust, however, overlooks the context in which that statement was made. It is obvious that Article 3 is meant to address investigative, crime prevention, and criminal law issues, and not authorize the use of force in self-defence.

aa) No authorization in operative part of the resolutions

This argument is, however, deeply flawed. The first major weakness of assuming UN authorization of the subsequent use of force is the fact that all the relevant statements, which supposedly amounted to an authorization, are to be found exclusively in the preambles, not in the operative paragraphs of the relevant resolutions. It would be unheard of, and has indeed never occurred so far, for the UN Security Council to authorize the use of force, arguably one of its most intrusive and extensive powers, within general declarations contained in non-operative sections of its resolutions. Furthermore, Afghanistan is not even mentioned in either Resolution.¹⁷⁵¹

bb) Comparison with other resolutions permitting the use of force

This becomes even more evident when the language used in Resolutions 1368 and 1373 is compared to that of another UN Security Council Resolution, which did authorize the use of force in a self-defence case.

Following the Iraqi invasion of Kuwait in August 1990, the Security Council -after negotiations had proved fruitless- authorized the use of force in order to liberate Kuwait, clearly a case of collective self-defence under Article 51. In Resolution 678 of November 29, 1990, the Security Council declared that it hereby

*2. Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before January 15, 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area...*¹⁷⁵²

¹⁷⁵¹ Quigley, "The Afghanistan", 549; Karl M. Meesen, "Unilateral Recourse to Military Force against Terrorist Attacks", Yale J. Int'l L., Vol. 28, 2003, 341-354, 347-348; Steele, *Ghosts*, 225.

¹⁷⁵² UN Security Council Resolution 678 (1990); in Resolution 660 (1990) the UN Security Council had already determined that the situation in Iraq/Kuwait was a "breach of international peace and security", and that it was acting under Articles 39, 40 UN Charter, thus making it clear that it was acting under Chapter VII.

In other cases, too, when, in the past, the Security Council has approved of the use of force it has done so explicitly. In Resolution 83, relating to Korea, the Council declared that it

*recommends that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.*¹⁷⁵³

Even more explicit Security Council authorizations of the use of force can be found in Resolutions 161A and 169 (both 1961),¹⁷⁵⁴ and in Resolution 221 (1966).¹⁷⁵⁵

The comparison between the Resolutions, which have undoubtedly authorized or approved the use of force, with Resolutions 1368 and 1373 leaves little doubt that any claim the Anglo-American attack on Afghanistan had been authorized by the Security Council is far-fetched.¹⁷⁵⁶

¹⁷⁵³ UN Security Council Resolution 83 (1950); in Resolution 82 (1950) the UN Security Council had "determined" that North Korea's attack on the Republic of Korea was a "breach of the peace" (Article 39 UN Charter), and Resolution 83 (1950), in its preamble, referred to that decision. It must therefore be concluded that the Security Council was acting under Chapter VII.

¹⁷⁵⁴ UN Security Council Resolutions 161A and 169 (both 1961) dealt with the civil war in Congo, and authorized the use of force by the UN peacekeeping operation there (ONUC); in Resolution 161A the Security Council declared that it (emphases by author) "1. Urges that the United Nations take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes, and the use of force, if necessary, in the last resort..."; in Resolution 169 the Council emphasized that it hereby (emphasis by author) "4. Authorizes the Secretary-General to take vigorous action, including the use of the requisite measure of force, if necessary, for the immediate apprehension, detention pending legal action and/or deportation of all foreign military and paramilitary personnel and political advisers not under the United Nations Command, and mercenaries, as laid down in paragraph 2 of Security Council resolution 161 A (1961) of 21 February 1961;"

¹⁷⁵⁵ UN Security Council Resolution 221 (1966) dealt with the sanctions imposed on Southern Rhodesia. In it the Council explicitly (emphasis by author) "5. Calls upon the Government of the United Kingdom of Great Britain and Northern Ireland to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia,..."

¹⁷⁵⁶ Moir, *Reappraising*, 52-53; W. Michael Reisman, "International Legal Dynamics and the Design of Feasible Missions: The Case of Afghanistan" in *The War in Afghanistan: A Legal Analysis*, Michael N. Schmitt (ed.), International Law Studies, Volume 85, Newport, Rhode Island: Naval War College, 2009, Part I, Chapter III, 59-75, 65; Christopher Greenwood, "International Law and the 'war against terrorism'", *International Affairs*, Vol. 78, 2002, 301-317, 309; Quigley, "The Afghanistan", 549; Eric P.J. Myjer, Nigel D. White, "The Twin Towers Attack: An Unlimited Right to Self-Defence?", *J. Conflict & Sec. L.*, Vol. 7, 2002, 5-17, 7; Jörg Kammerhofer, "The *Armed Activities* Case and Non-state Actors in Self-Defence Law", *Leiden Journal of International Law*, Vol. 20, 2007, 89-113, 99-100; J. Wouters, F. Naert, "Shockwaves through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism" in *Legal Instruments in the Fight against International Terrorism, A Transatlantic Dialogue*, C. Fijnaut, J. Wouters, F.

cc) US/UK justifications

Furthermore, proponents of the opposite view cannot overcome one final, but decisive hurdle: neither the UK, nor the USA claimed that their actions had been authorized by the Security Council, when they launched their attack on Afghanistan on October 7, 2001.¹⁷⁵⁷ In letters to the Security Council dated that same day, both states claimed to be acting in self-defence/collective self-defence under Article 51, which, of course, does not require UN authorization. No mention was made of any authorization.¹⁷⁵⁸

It must therefore be concluded that not only is there hardly any scope to interpret the language used in Resolutions 1368 and 1373 in such a way, so as to read the authorization of the use of force into them, but the states that ultimately used force did not view them as granting them any such authorization either.¹⁷⁵⁹

b) Self-defence under Article 51

In a letter, dated October 7, 2001, to the President of the Security Council, the Permanent Representative of the USA at the UN justified the military action as follows:

Naert (eds.), Leiden: Martinus Nijhoff Publishers, 2004, 411-545, 463; Gazzini, *The changing*, 77-78; Bowring, *The Degradation*, 56.

¹⁷⁵⁷ Tom Ruys, Sten Verhoeven, "Attacks by private actors and the right of self-defence", *Journal of Conflict & Security Law*, Vol. 10, 2005, 289-320, 297; Greenwood, "International Law", 309; Gazzini, *The changing*, 77.

¹⁷⁵⁸ Moir, *Reappraising*, 44; Byers, "Terrorism", 402-403; Myjer, White, "The Twin Towers", 7.

¹⁷⁵⁹ Myjer, White, "The Twin Towers", 10-11; they speculate that China and Russia would possibly have vetoed an explicit Resolution; Jonathan I. Charney, "The Use of Force Against Terrorism and International Law", *AJIL*, Vol. 95, 2001, 835-839, 835, 836, 837; Sean D. Murphy, "Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter", *Harv. Int'l L. J.*, Vol. 42, 2002, 41-51, 44; Michael Byers, "Terrorism", 401-403 (although he views Resolution 1373 as interpretable in such a way so as to read an authorization into it, an interpretation he himself, however, disagrees with); and "Terror and the Future of International Law" in *Worlds in Collision, Terror and the Future of Global Order*, Ken Booth, Tim Dunne (eds.), Basingstoke: Palgrave Macmillan, 2002, Chapter 10, 118-127, 123 (here Byers is more categorical in rejecting the notion of UN authorization); Abdullah Ahmed An-Na'im, "Upholding International Legality Against Islamic and American Jihad" in *Worlds in Collision, Terror and the Future of Global Order*, Ken Booth, Tim Dunne (eds.), Basingstoke: Palgrave Macmillan, 2002, Chapter 14, 162-171, 168.

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001...

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.¹⁷⁶⁰

In similar vein, the British Representative at the UN declared, also in a letter to the President of Security Council dated October 7, 2001, 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.

...this military action ... is directed against Usama Bin Laden's Al Qaida terrorist organisation and the Taliban regime that is supporting it.¹⁷⁶¹

It is therefore necessary to examine whether the attack on Afghanistan, initiated on October 7, 2001, was justified as individual and collective self-defence under Article 51, as claimed by these two states. The American and British justifications raise several difficult questions, as far as the right of self-defence is concerned, and, accordingly, there is a wide variety of opinion on the matter.

¹⁷⁶⁰ 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 Doc. S/2001/946; available at: <http://www.hamamoto.law.kyoto-u.ac.jp/kogi/2005kiko/s-2001-946e.pdf>; last accessed 26/10/2011.

¹⁷⁶¹ 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; excerpts in: Operation *Enduring Freedom* and the Conflict in Afghanistan: An Update, House of Commons Library, Research Paper 01/81 (October 31, 2001), 10; available at: <http://www.parliament.uk/documents/commons/lib/research/rp2001/rp01-081.pdf>; last accessed 26/10/2011.

aa) Security Council confirmation of Article 51 situation

Without going into any detail as to whether Operation *Enduring Freedom* actually conformed to the criteria laid down in Article 51, it has been argued that the Security Council had, in Resolutions 1368 and 1373, declared the military action against Afghanistan to be in accordance with Article 51, making any further analysis obsolete.¹⁷⁶²

For a number of reasons that view is, however, incorrect. Since the USA and the UK decided not to proceed on the basis of a UN approved military intervention in Afghanistan, this obviously means that the Security Council did not have the chance to express its views on the actual use of force by the two allies. There is not one Security Council resolution that explicitly declares the attack on Afghanistan to be in accordance with Article 51.¹⁷⁶³

By stating that it “recognized”, or wanted to “reaffirm” the right of self-defence in the aftermath of 09/11, in Resolutions adopted prior to the initiation of any hostilities on

¹⁷⁶² Yoram Dinstein, “Terrorism and Afghanistan” in *The War in Afghanistan, A Legal Analysis*, Michael N. Schmitt (ed.), International Law Studies, Volume 85, Naval War College, Newport, Rhode Island: 2009, Part I, Chapter II, 43-57, 46; Moir, *Reappraising*, 53-54; despite acknowledging that international law prior to 09/11 demanded an attack to be imputable to a state in order to qualify under Article 51, and accepting the fact there was no UN authorization, Moir then concludes that the UN Security Council had -apparently- authoritatively decided that, on 09/11, an “armed attack” on the United States under Article 51 had occurred, and that the US could therefore respond by using force in self-defence. He therefore obviously deems the UN Security Council Resolutions on the matter sufficient to assume Article 51 was basically adhered to. Moir then proceeds to examine only the questions of necessity and proportionality.; Nicholas Rostow, “Before And After: The Changed UN Response to Terrorism since September 11th”, *Cornell J. Int’l L.*, Vol. 35, 2001-2002, 475-490, 481; Jane E. Stromseth, “New Paradigms for the Jus Ad Bellum?”, *Geo. Wash. Int’l L. Rev.*, Vol. 38, 2006, 561-575, 566; Meesen, “Unilateral”, 347-348; it is not quite clear whether he supports this argument or not. However, he does examine whether the Council’s response to 09/11 had now made the “recourse to unilateral military force dependent on prior authorization” by the Council, which seems somewhat far-fetched, but implies Meesen believes the Council had authoritatively confirmed an Article 51 situation.

¹⁷⁶³ Noelle Quénivet, “The World after September 11: Has It Really Changed?”, *EJIL*, Vol. 16, 2005, 561-577, 576; she argues the Security Council “preferred to abstain from judging the legality of the British and American intervention”; Myjer, White, “The Twin Towers”, 9-13; they describe the Security Council’s reaction as one of “deliberate ambiguity”, and accuse it of “doing its best to ignore the crucial issue of the legal basis of the US response.”; Quigley, “The Afghanistan”, 553-554; in his view the Security Council reaction was one of “inaction” and “silence” in response to Operation *Enduring Freedom*; Antonio Cassese, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law”, *EJIL*, Vol. 12, 2001, 993-1001, 996; Gray, *International Law*, 206-207.

October 7, 2001, the Security Council obviously did not declare that any action subsequently undertaken by the USA would necessarily conform to the prerequisites of the right of self-defence as laid down in Article 51.¹⁷⁶⁴ Furthermore, Afghanistan was not even explicitly mentioned in those resolutions as a possible target of the use of force.¹⁷⁶⁵ The phrases the Security Council employed in reaction to 09/11 are thus markedly different from the language used in Resolution 661 (1990): then the Security Council declared it was

*Affirming the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter...*¹⁷⁶⁶

As Ruys and Verhoeven have correctly pointed out, the fact that the Security Council, in Resolutions 1368 and 1373, avoided any explicit reference to an “armed attack” having occurred, and instead only described them as a “threat to international peace and security”, implies the Council -far from confirming an Article 51 situation- was in truth “hesitant in accepting the right of self-defence in response to attacks by private actors.”¹⁷⁶⁷ Reisman has gone even further, and claims that the language used by the Security Council, especially in Resolution 1368, actually “kept” terrorist acts “from falling under Article 51’s right of self-defence.”¹⁷⁶⁸

¹⁷⁶⁴ Wouters, Naert, “Shockwaves”, 446.

¹⁷⁶⁵ Moir, *Reappraising*, 53; Quigley, “The Afghanistan”, 549; Kammerhofer, “The *Armed Activities*”, 99-100.

¹⁷⁶⁶ UN Security Council Resolution 661 (1990).

¹⁷⁶⁷ Ruys, Verhoeven, “Attacks”, 312; Myjer, White, “The Twin Towers”, 9-11; they make the same point; Murphy, “Terrorism”, 46; he makes a similar point in respect of the General Assembly’s Resolution in reaction to the events of September 11, 2001 (Resolution 56/1 (2001); a point also made by Wouters, Naert, “Shockwaves”, 446; Mikael Nabati, “International Law at a Crossroads: Self-Defense, Global Terrorism and Preemption (A Call to Rethink the Self-Defense Normative Framework)”, *Transnat’l L. & Contemp. Probs.*, Vol. 13, 2003, 771-802, 780; he points out that GA Resolution 56/1 “explicitly declines to characterize the acts as an armed attack under Article 51 of the Charter.”

¹⁷⁶⁸ Reisman, “International Legal Dynamics”, 64-65; he bases this conclusion on the fact that the Council, in Resolution 1368, chose to refer to “threats to the peace”, instead of “breaches of the peace” or “acts of aggression”, when categorizing the attacks of 09/11. He also refers to Resolution 1378 (2001) of November 14, 2001, in which the Council had declared its support for “international efforts to root out terrorism”, but that these efforts were to “be in keeping with the Charter of the United Nations”. In Reisman’s view this is “code for the Charter’s prohibition on the unilateral use of force in any circumstance other than exigent self-defence”.

It should also be pointed out that, while there can be no doubt that the Security Council has wide discretion, when determining whether a specific situation constitutes a “threat to the peace” under Article 39, and can, under Chapter VII, if necessary, possibly override international law,¹⁷⁶⁹ it does not have the competence to fulfil judicial functions by interpreting (or even changing) treaty norms.¹⁷⁷⁰

Under Article 51 a state can claim a right to use force in self-defence, when the article’s criteria are met, without -at this stage- any Security Council involvement beyond the state’s reporting duty towards it. The fact that a sufficient majority of states represented on the Security Council declare an action to be in accordance with the UN Charter does thus not automatically make it so (and vice versa). Any -in this case non-existent- decision by the Security Council declaring Operation *Enduring Freedom* to be in accordance with Article 51 would consequently not obviate the need to examine whether that was really the case.¹⁷⁷¹

The conclusion must therefore be that neither did the Security Council declare Operation *Enduring Freedom* to be in accordance with Article 51, nor would it have had any judicial competency to do so.

bb) Were the attacks of 09/11 “armed attacks” according to Article 51?

In order to justify the use of force in (individual or collective) self-defence under Article 51 it is necessary for an “armed attack” to be occurring against a member of

¹⁷⁶⁹ This can at least be inferred when Article 1 (1) is considered. The way Article 1 (1) is phrased would imply that the UN must only act in “conformity with international law”, as far as the “adjustment or settlement of international disputes” is concerned; see also: ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Incident at Lockerbie*, Libya v. USA, Provisional Measures, Order of April 14, 1992, I.C.J. Rep. 1992, 114, paras. 36-44. However, the Security Council is at all times obliged to “act in accordance with the Purposes and Principles of the United Nations” (Article 24 (2) UN Charter).

¹⁷⁷⁰ Kammerhofer, “The Armed Activities”, 100; Reisman, “The International Legal Dynamics”, 67.

¹⁷⁷¹ Quigley, “The Afghanistan”, 554; Kammerhofer, “The Armed Activities”, 100; Reisman, “The International Legal Dynamics”, 67.

the UN. It must therefore be established, whether the terrorist attacks on New York and Washington D.C. on September 11, 2001, amounted to “armed attacks” against the USA according to Article 51.

One very controversial aspect of the definition of the term “armed attack”, the “gravity” criterion, introduced by the ICJ,¹⁷⁷² is not relevant here. There can be no doubt that the attacks on the WTC and the Pentagon, and the loss of another civilian airliner, resulting, altogether, in about 3000 deaths, many more injured, and the destruction of iconic buildings, would meet any reasonable application of the controversial “scale and effect” criteria outlined by the ICJ. The gravity of the terrorist attacks was such, that they undoubtedly could be classified as “armed attacks”, if that were the only criterion to be met.¹⁷⁷³

Whether an attack has to meet additional criteria in order for it to be classified as an “armed attack” under Article 51 is very controversial.

(i) State involvement in attack is *not* necessary under Article 51

The question that has aroused most controversy is whether an “armed attack”, as required by Article 51, can only be carried out by a state, or whether it can originate from any other source as well. This is particularly relevant when deciding whether a state can resort to the use of force in self-defence under Article 51 in response to a terrorist attack. It is, after all, the very nature of terrorist attacks that they are usually

¹⁷⁷² ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgement, 27/06/1986; I.C.J. Rep. 1986, 14, para. 191; *Case Concerning Oil Platforms*, Judgement, 06/11/2003, I.C.J. Rep. 2003, 161, para. 64.

¹⁷⁷³ Murphy, “Terrorism”, 47; Carsten Stahn, “Terrorist Acts as ‘Armed Attack’: The Right to Self-Defense, Article 51 (1/2) of the Charter, and International Terrorism”, Fletcher F. World Aff., Vol. 27, 2003, 35-54, 45-46; Myjer, White, “The Twin Towers”, 7; Wouters, Naert, “Shockwaves”, 456; Gray, *International Law*, 202; Gilles Dorransoro, “The Security Council and the Afghan Conflict” in *The United Nations Security Council and War, The Evolution of Thought and Practice since 1945*, Vaughan Lowe, Adam Roberts, Jennifer Welsh, Dominik Zaum (eds.), Oxford: Oxford University Press, 2008, Chapter 20, 452-465, 463.

not carried out by states, or at the behest of states. Demanding state participation in any attack for it to be judged an “armed attack” would thus preclude an attacked state’s recourse to Article 51 in response to most terrorist attacks.

There are, broadly speaking, two lines of argument in support of the argument that state participation in an “armed attack” is not a requirement of Article 51. Both rely on a literal interpretation of the wording of Article 51, especially in contrast to the wording of Article 2 (4): while Article 2 (4) requires “all Members” to “refrain ...from the threat or use of force against...any State”, Article 51 only refers to armed attacks occurring “against a Member of the United Nations”, without specifying from whom the attack must originate. Based on the wording of Article 51, the argument goes, any “armed attack”, no matter who carries it out, is sufficient to trigger the right of self-defence.¹⁷⁷⁴

This interpretation is, some argue, confirmed by the legal discussions surrounding the *Caroline* incident of 1837, usually analysed in the context of anticipatory self-defence. In 1837 the American ship *Caroline*, which was in the hand of Canadian rebels, was set on fire by British troops while moored in American territorial waters, and two people were killed. The Americans subsequently demanded compensation from the British, who in return claimed to have acted in self-defence. Although the question of whether the British had acted in self-defence was contentious between the two states, the fact the Canadian rebels were non-state actors was, judging by the notes, obviously not deemed relevant by the two states. Some therefore conclude that

¹⁷⁷⁴ (Emphases by author); Moir, *Reappraising*, 47; Ruys, Verhoeven, “Attacks”, 311; Franck, “Terrorism”, 840; Murphy, “Terrorism”, 46, 51; Stahn, “Terrorist Acts”, 35-36; Paust, “Use of Armed Force”, 534-535; Stromseth, “New Paradigms”, 566; Ruth Wedgwood, “Responding to Terrorism: The Strikes Against bin Laden”, *Yale J. Int’l L.*, Vol. 24, 1999, 559-576, 564; Wilmshurst, “The Chatham”, 969-970; Dinstein, “Terrorism”, 45-46; and *War*, 245-247.

the Anglo-American exchange of notes confirms that the right of self-defence has always also been available in response to attacks carried out by non-state actors.¹⁷⁷⁵

The slight difference between the two strands of thought in support of the view that, under Article 51, attacks carried out by non-state actors, are sufficient, is perhaps one more of emphasis than of substance: while some simply rely on a literal reading of Article 51, others acknowledge that the authors of the Charter, in the immediate aftermath of WW II, did not envisage massive terrorist attacks, so automatically assumed that armed attacks could only be carried out by states.¹⁷⁷⁶

The latter, however, insist that times had changed, because terrorist organizations had since then gained the ability to carry out armed attacks on states. The wording of Article 51 made it possible to now interpret it in such a way as to include attacks not launched by states in the definition of "armed attack".¹⁷⁷⁷

It cannot be disputed that the arguments just set out do have some merits. The literal interpretation of Article 51 is certainly in accordance with Article 31 (1) *Vienna*

¹⁷⁷⁵ Paust, "Use of Armed Force", 535; Reisman, "International Legal Responses to Terrorism", *Houston J. Int'l L.*, Vol. 22, 1999-2000, 3-61, 42-46; Guy B. Roberts, "Self-Help in Combatting State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals", *Case W. Res. J. Int'l L.*, Vol. 19, 1987, 243-293, 268-269; Wilmshurst, "The Chatham", 970, Yoram Dinstein, *War, Aggression and Self-Defence*, 4th ed., Cambridge: Cambridge University Press, 2005, 248-249; for extracts of the notes exchanged between Britain and the USA in 1841/1842, see: http://avalon.law.yale.edu/19th_century/br-1842d.asp; last accessed 26/10/2011.

¹⁷⁷⁶ Moir, *Reappraising*, 47; Murphy, "Terrorism", 46, 51; Stuart G. Baker, "Comparing the 1993 Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51", *Ga. J. Int'l & Comp. L.*, Vol. 24, 1994-1995, 99-116, 107-108; Gregory M. Travalio, "Terrorism, International Law, and the Use of Military Force", *Wis. Int'l L. J.*, Vol. 18, 2000, 145-191, 156; Rein Müllerson, "Jus ad Bellum: plus ça change (Le Monde) or plus la même chose (Le Droit)?", *Journal of Conflict & Security Law*, Vol. 7, 2002, 149-189, 172; Niaz A. Shah, "Self-defence, anticipatory self-defence and pre-emption: International law's response to terrorism", *Journal of Conflict & Security Law*, Vol. 12, 2007, 95-126, 104, 108-111; his stance seems contradictory: he argues that Article 51 includes "the activities of non-state actors in the case of an armed attack", but then goes on to claim that the use of force against "non-state actors" is only justified when the acts are "attributable to a state".

¹⁷⁷⁷ Moir, *Reappraising*, 47; Murphy, "Terrorism", 46, 51; Stahn, "Terrorist Acts", 41-43; Baker, "Comparing", 108; Erin L. Guruli, "The Terrorism Era: Should the International Community Redefine Its Legal Standards on Use of Force in Self-Defense?", *Willamette J. Int'l L. & Disp. Res.*, Vol. 12, 2004, 100-123, 108-109; Shah, "Self-defence", 104-108; Franklin Berman, "The UN Charter and the Use of Force", *SYBIL*, Vol. 10, 2006, 9-17, 10-11; Müllerson, "Jus ad Bellum", 171-179; Gazzini, *The changing*, 183; Greenwood, "International Law", 307; he accuses adherents of the opposite view of "strange formalism".

Convention on the Law of Treaties, the provisions of which are, despite having only been codified in 1969, generally seen as reflective of longstanding customary international law.¹⁷⁷⁸ Furthermore, the arguments are seemingly reinforced by NATO's decision, on September 12, 2001, to invoke Article 5 of the *North Atlantic Treaty*, which also requires an "armed attack" in order to justify mutual assistance.¹⁷⁷⁹

(ii) State involvement in attack is necessary under Article 51

Nevertheless, more convincing arguments can be made in favour of the opposite point of view, requiring state participation in any armed attack to trigger the right of self-defence under Article 51.

As acknowledged by some of those who do not require a state to be the initiator of an armed attack, the drafters of the Charter would simply not have deemed it necessary to specify, in Article 51, possible perpetrators of an "armed attack", as it would have been self-evident to them that such an attack could only be carried out by a state. The difference to Article 2 (4) is that the use of force outlawed in that article could conceivably also be resorted to by non-state actors, such as secessionist insurgents.¹⁷⁸⁰

A purely textual interpretation of Article 51 does, however, not only most likely contradict the Charter drafters' intentions, but it also difficult to reconcile with the

¹⁷⁷⁸ Ruys, Verhoeven, "Attacks", 290; Wouters, Naert, "Shockwaves", 430.

¹⁷⁷⁹ Statement by the North Atlantic Council, Press Release (2001) 124, September 12, 2001; available at: <http://www.nato.int/docu/pr/2001/p01-124e.htm>; last accessed 26/10/2011; Thomas M. Franck, "Terrorism and the Right of Self-Defense", *AJIL*, Vol. 95, 2001, 839-843, 840; Franck adds another argument: as the Security Council felt competent to act under Article 39 in respect of a non-state actor (Al Qaeda) in the aftermath of 09/11, it follows the "attacked state" can act as well. This argument fails to convince. There can be no doubt that the Security Council, when acting under Chapter VII, has much broader discretion and more rights than an individual state. It would be a catastrophe for world peace, if it were assumed that every time the UN Security Council decided there was a Chapter VII situation, any individual state could automatically act independently. Frankly, such an approach would ultimately make the Security Council obsolete.

¹⁷⁸⁰ Richard H. Heindel, Thorsten V. Kalijarvi, Francis O. Wilcox, "The North Atlantic Treaty in the United States Senate", *AJIL*, Vol. 43, 1949, 633-665, 645; Mohamed R. Hassanien, "International Law Fights Terrorism in the Muslim World: A Middle Eastern Perspective", *Denv. J. Int'l L. & Pol'y*, Vol. 36, 2007-2008, 221-253, 249; Brownlie, *International Law*, 278-279; he states that it is "doubtful" whether the phrase "armed attack" applied to the activities of armed bands or other irregulars.

Charter's aims. Allowing the use of force in self-defence against a state not involved in an "armed attack", simply based on the fact that the perpetrators happen to be within that state's territory -which would be the consequence of a purely textual interpretation of Article 51- would necessarily not only undermine the Charter's aim of preserving peace, but would also threaten the concepts of sovereign equality and of sovereignty as such.¹⁷⁸¹

Since an armed attack by a non-state actor would, under such a literal interpretation of Article 51, automatically trigger the right of self-defence, the victim state would be justified in ignoring another state's independence and sovereignty by attacking presumed "terrorist bases" on that other state's territory (with all the resulting risks of civilian casualties, etc.). This could occur even when the attacked state could not be accused of any wrong-doing whatsoever. Such a state of affairs would necessarily run the risk of turning a major terrorist attack into a war, thus possibly even furthering the terrorists' cause.¹⁷⁸² Application of a purely textual understanding of Article 51 to the India-Pakistan conflict, as far as the troubles in Kashmir are concerned, should give any adherent of the opposite view pause for thought.¹⁷⁸³

The argument that, based on the *Caroline* incident of 1837, a strict interpretation of Article 51 is unjustified is also not convincing. As the Anglo-American exchange of

¹⁷⁸¹ Antonio Cassese, "Terrorism", 997; and "The International Community's 'Legal' Response to Terrorism", ICLQ, Vol. 38, 1989, 598-608, 606; Travalio, "Terrorism", 179-180.

¹⁷⁸² Cassese, "Terrorism", 997; and "The International", 606; Ian Johnstone, "The Plea of 'Necessity' in International Legal Discourse: Humanitarian Intervention and Counterterrorism", Colum. J. Transnat'l L., Vol. 43, 2004-2005, 337-388, 369; Jules Lobel, "The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan", Yale J. Int'l L., Vol. 24, 1999, 537-557, 542-543, 556; Travalio, "Terrorism", 156-157, 159, 179-180; Shah, "Self-defence", 105; Richard A. Falk, "The Beirut Raid and the International Law of Retaliation", AJIL, Vol. 63, 1969, 415-443, 438; Reisman, "International Legal Dynamics", 70-71; in a general discussion of the legality of the use of force in the aftermath of terrorist attacks, he points out that danger. He cites the example of Afghanistan's President Karzai, in June 2008, threatening neighbouring Pakistan with "cross-border attacks" to deal with the "militants" there, thereby relying on Afghanistan's right of self-defence as justification. Pakistan reacted by reminding Karzai of its "sovereignty", despite acknowledging the presence of militants in the Afghan-Pakistani border area.

¹⁷⁸³ Ratner, "Jus Ad Bellum", 917-918.

notes demonstrates, the phrase “armed attack” was neither discussed, nor even mentioned in the exchange between the two states, a consequence of the fact that an “armed attack” was not a prerequisite of the right to use force in self-defence in 1837, in contrast to the situation under the Charter. The views on self-defence expressed by the British and American representatives in 1841/1842 can therefore have no bearing on the interpretation of the phrase “armed attack”. As the author has already argued previously,¹⁷⁸⁴ the much more generous view of self-defence in existence prior to the Charter was not confirmed by the Charter, but rather severely restricted by it.¹⁷⁸⁵ As Kammerhofer has argued, the emphasis put on the *Caroline* incident in the context of the use of force in self-defence against private actors is in truth an attempt to make us “believe that a statement on the law on the use of force made in 1842 is still correct despite the developments over the last 165 years”- a view he correctly views as “not corroborated in any way.”¹⁷⁸⁶

That Article 51 should be understood as requiring an “armed attack” to be attributable to a state is also confirmed by state practice and *opinio juris*.¹⁷⁸⁷ Prior to the terrorist attacks of September 11, 2001, most states assumed and argued that any armed attack triggering the right of self-defence must be attributable to a state.¹⁷⁸⁸ As even Judge

¹⁷⁸⁴ The author has previously discussed the scope of Articles 2 (4), 51 UN Charter -in the context of forcible rescue missions- in *US-Iran Relations in International Law since 1979*, 24-33.

¹⁷⁸⁵ Moir, *Reappraising*, 47; Ruys, Verhoeven, “Attacks”, 311; Franck, “Terrorism”, 840; Murphy, “Terrorism”, 46, 51; Stahn, “Terrorist Acts”, 35-36; Paust, “Use of Armed Force”, 534-535; Stromseth, “New Paradigms”, 566.

¹⁷⁸⁶ Kammerhofer, “The *Armed Activities*”, 99. It is therefore not surprising that, for example, Antonio Cassese, in his more than 500 page-textbook on international law (*International Law*, 2nd ed., Oxford: Oxford University Press, 2005) only mentions the *Caroline* case once (at 298) -and then only as an example of the traditional, pre-WW I law on “forcible intervention”.

¹⁷⁸⁷ These are relevant criteria as confirmed by Article 31 (3) (b) *Vienna Convention on the Law of Treaties*.

¹⁷⁸⁸ Ruys, Verhoeven, “Attacks”, 290-291, 312; Myjer, White, “The Twin Towers”, 7; Kammerhofer, “The *Armed Activities*”, 100; Murphy, “Terrorism”, 46, 51; Cassese, “Terrorism”, 997; and “The International”, 597; Yutaka Arai-Takahashi, “Shifting Boundaries of the Right of Self-Defence- Appraising the Impact of the September 11 Attacks on Jus Ad Bellum”, *International Lawyer*, Vol. 36, 2002, 1081-1102, 1087; Baker, “Comparing”, 110; Travaglio, “Terrorism”, 152; Wouters, Naert, “Shockwaves”, 432; Falk, “The Beirut”, 427; Gray, *International Law*, 199; Steele, *Ghosts*, 226; Moir, *Reappraising*, 47-48, 52; although he personally disagrees with this interpretation of Article 51, he acknowledges that the ICJ’s judgement in the *Nicaragua Case*

Kooijmans of the ICJ -despite arguing that changes in the law may have taken place in the aftermath of 09/11- acknowledged in his *Separate Opinion* in the *Wall Case*, the view that an “armed attack”, as understood in Article 51, had to be carried out by another state had been “the generally accepted interpretation for more than fifty years.”¹⁷⁸⁹ This was notably also the position taken by the USA, the International Law Commission,¹⁷⁹⁰ and NATO.¹⁷⁹¹

The Foreign Relations Committee of the US Senate, when reporting on the *North Atlantic Treaty* to the full Senate prior to ratification, defined the term “armed attack” in Article 5 of the *North Atlantic Treaty* as follows:

*The committee notes that article 5 would come into operation only when a nation had committed an international crime by launching an armed attack against a party to the treaty.*¹⁷⁹²

-analysed in detail later- in that respect “was probably justified in light of the practice of states, and of the Security Council.”; Nabati, “International Law”, 780-781; he, however, uses this argument to demonstrate that the law on the use of force must be adapted, so that states can in future respond effectively to the new phenomenon of terrorist attacks. One way of doing so, he argues, is to accept that in future the phrase “armed attack” must be interpreted “broadly to include non-military actions by private actors.” (at 791-792).

¹⁷⁸⁹ ICJ, *Legal Consequences of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 09/07/2004, I.C.J. Rep. 2004, 136; Separate Opinion Judge Kooijmans; para. 35; Murphy, “Afghanistan”, 98-99; writing in 2008/2009, states that there was “considerable scholarly comment in support of the notion that there is no right of self-defense under Article 51 against an armed attack by a non-state actor”; Gazzini, *The changing*, 139.

¹⁷⁹⁰ *Yearbook of the International Law Commission 1980*, Report of the Commission to the General Assembly on the Work of Its Thirty-Second Session, Volume II, Part 2, 52-53 (Article 34, para. 3); available at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1980_v2_p2_e.pdf; last accessed 26/10/2011; the International Law Commission was, however, more hesitant in its 2001 Report; see *Yearbook of the International Law Commission 2001*, Report of the Commission to the General Assembly on the Work of Its Fifty-Third Session, Volume II, Part 2, 75 (Article 21, paras. 5, 6); available at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_2001_v2_p2_e.pdf; last accessed 26/10/2011.

¹⁷⁹¹ NATO, “The Alliance’s Strategic Concept”, April 24, 1999, especially paras. 24 and 10 (“Security”, “Deterrence and Defence”); available at: http://www.nato.int/cps/en/natolive/official_texts_27433.htm?selectedLocale=en; last accessed 26/10/2011; the way the Concept’s para. 24 is formulated it is clear that terrorist attacks were not seen as “armed attacks” covered by Articles 5 and 6 of the *Washington Treaty* (emphases by author): “Any armed attack on the territory of the Allies, from whatever direction, would be covered by Articles 5 and 6 of the Washington Treaty. However, Alliance security must also take account of the global context. Alliance security interests can be affected by other risks of a wider nature, including acts of terrorism, sabotage and organised crime, and by the disruption of the flow of vital resources.”; Arai-Takahashi, “Shifting”, 1087.

¹⁷⁹² Excerpts from the *Executive Report of the Committee on Foreign Relations*, US Senate, Report No. 8, 81st Congress, 1st session, June 6, 1949; reprinted in *Department of State Bulletin*, Vol. 20, 1949, 787-794, 789 (emphasis by author).

Three staff members on the *US Senate Committee on Foreign Relations* at the time concurred with this assessment in a subsequent article, published in the *AJIL*, elaborating further:

*But what is an armed attack? Does any violence perpetrated upon any member or upon any of its nationals constitute an armed attack under the Treaty? Since the principal objective of the Treaty is to safeguard the security of the North Atlantic area, only such armed attacks as threaten that security are contemplated. This rules out violence of irresponsible groups and refers, as Article 51 of the Charter clearly contemplates, to an armed attack of one state against another. Purely internal disturbances and revolutions are not included, although aid given to revolutions by outside Powers can conceivably be considered an armed attack.*¹⁷⁹³

Similarly, the *Definition of Aggression*, passed unanimously by the General Assembly, defined an act of aggression as follows:

*Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.*¹⁷⁹⁴

This obviously reflects widespread consensus, as far as the necessity of state attribution is concerned. The fact that Resolution 3314 did not define the term “armed attack” is not relevant in this context, as there can be no serious doubt that an “armed attack”, as understood in Article 51, is probably the most serious manifestation of an act of aggression.¹⁷⁹⁵

Resolution 3314, passed in 1974, refutes the argument that states, certainly at that time, interpreted Article 51 in such a way so as to include attacks carried out by non-state actors. It is far-fetched to assume that states would have wanted to exclude some of the manifestations of an “armed attack” under Article 51 from the definition of aggression.¹⁷⁹⁶ This is further confirmed by Article 3 (g) of the Definition, which

¹⁷⁹³ Heindel, Kalijarvi, Wilcox, “The North Atlantic Treaty”, 633-665, 645 (emphasis by author).

¹⁷⁹⁴ Article 1, *Definition of Aggression*, Annex to Resolution 3314 (XXIX) (1974; emphases by author).

¹⁷⁹⁵ Arai-Takahashi, “Shifting”, 1084; Wouters, Naert, “Shockwaves”, 431; Gray, *International Law*, 199-200.

¹⁷⁹⁶ Roberts, “Self-Help”, 263.

explicitly deals with non-state actors, and declares their actions to be acts of aggression only in those cases when they have been “sent by or on behalf of a State”, or when another state is otherwise “substantially involved”.

Denying the necessity of state participation in an “armed attack” would thus lead to the unsatisfactory conclusion that terrorist attacks would qualify as “armed attacks” under Article 51, but would not be deemed to be “acts of aggression” under the unanimously passed *Definition of Aggression*.

It may be countered that the 1974 Resolution is out-dated and has been overtaken by events.¹⁷⁹⁷ Still, when this Resolution was adopted in 1974, terrorists were already steadily strengthening their capabilities. It is also the case that the Resolution, generally viewed as reflective of customary international law, has so far not been repudiated or disowned by any state. Although not directly relevant to the issue discussed here, it should be noted that the state parties to the *Rome Statute* of the ICC, have, in their Resolution of June 11, 2010, in fact again relied on Article 3 (g) of the *Definition of Aggression* in their attempt to define the equivalent crime.¹⁷⁹⁸

(iii) The International Court of Justice's view

The International Court of Justice, too, has indicated that it believes that an armed attack under Article 51 must be imputable to a state.¹⁷⁹⁹ In the 1986 *Nicaragua Case* the ICJ had the opportunity to deal with the use of force by non-state actors, when it had to decide whether US-support for the Nicaraguan rebels, the *Contras*, in their

¹⁷⁹⁷ Reisman, “International Legal Responses”, 39.

¹⁷⁹⁸ *Review Conference of the Rome Statute*, RC/Res. 6, The Crime of Aggression, Annex I, Article 2; available at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf, last accessed 26/10/2011.

¹⁷⁹⁹ Johnstone, “The Plea”, 367-368; Moir, *Reappraising*, 24-25 (he, however, seems to disagree with the ICJ's interpretation).

armed struggle against the Nicaraguan government, amounted to an “armed attack” against that state. *Inter alia*, the Court declared:

In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack...

There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3 paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law...

*But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States...*¹⁸⁰⁰

By relying on Article 3 (g) of the *Definition of Aggression*, when interpreting the term “armed attack”, the Court emphasized that state involvement was necessary for sufficiently grave acts, committed by “armed bands”, to be classified as “armed attacks”. This conclusion is further confirmed by the fact that the Court proceeded to exclude even a state’s “mere” provision of weapons or logistical support for such an attack by “armed bands” from the concept of “armed attack”.¹⁸⁰¹

As far as the *Nicaragua* Judgement, handed down in 1986, is concerned it is -again- sometimes argued that the court’s view had been overtaken by events.¹⁸⁰² However, in

¹⁸⁰⁰ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. USA, Judgement (Merits), 27/06/1986, I.C.J. Rep. 1986, 14, para. 195 (emphases by author).

¹⁸⁰¹ Murphy, “Terrorism”, 44; Byers, “Terrorism”, 407-408; Nabati, “International Law”, 781; Kammerhofer, “The Armed Activities”, 105, 107, 109; Arai-Takahashi, “Shifting”, 1084; Lobel, “The Use”, 541; Gray, *International Law*, 200.

¹⁸⁰² Reisman, “International Legal Responses”, 39; Johnstone, “The Plea”, 370; Travalio, “Terrorism”, 173-174; Guruli, “The Terrorism”, 115; Müllerson, “Jus ad Bellum”, 183-185 (he, however, uses this argument in respect of the threshold of state responsibility developed by the ICJ in the *Nicaragua Case*).

much more recent rulings, the ICJ seems to be inclined to confirm its earlier view on the matter.

In its 2004 Advisory Opinion as to the legality of the Israeli-constructed wall on occupied Palestinian territory, the ICJ declared:

*Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.*¹⁸⁰³

Although this statement leaves little room for doubt as to the ICJ's view on the matter -and was certainly understood that way by judges not agreeing with this interpretation of Article 51-¹⁸⁰⁴ it has been argued that the ICJ's statement should not be taken literally, as the Court was dealing specifically with alleged incidents originating from territory occupied by Israel itself.¹⁸⁰⁵ Based on the clarity of the Court's statement, however, that argument has no basis in fact, as also confirmed by the disagreeing judges' interpretation of it.¹⁸⁰⁶

That the ICJ continues to be unwilling to re-interpret Article 51 in such a way, so as to allow any "armed attack" -no matter whether a state was involved or not- to suffice is also strongly implied by its 2005 judgements in the *Armed Activities Cases*.¹⁸⁰⁷

Uganda's claim of self-defence -based on attacks carried out by an Ugandan rebel

¹⁸⁰³ ICJ, *Legal Consequences of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 09/07/2004, I.C.J. Rep. 2004, 136, para. 139 (emphasis by author).

¹⁸⁰⁴ ICJ, *Legal Consequences of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 09/07/2004, I.C.J. Rep. 2004, 136; Separate Opinion Judge Higgins, at para. 33: "I do not agree with all that the Court has to say on the question of the law of self-defence. In paragraph 139 the Court quotes Article 51 of the Charter and then continues 'Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.' There is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State."; Separate Opinion Judge Kooijmans, at para. 35; Declaration of Judge Buergenthal, at para. 6.

¹⁸⁰⁵ Ruys, Verhoeven, "Attacks", 305; Johnstone, "The Plea", 374-375; Berman, "The UN", 10; he simply describes the ICJ's view as "strange"; Dinstein, "Terrorism", 46 (he, nevertheless, disagrees with the ICJ's decision); Gazzini, *The changing*, 184.

¹⁸⁰⁶ Ruys, Verhoeven, "Attacks", 305; Murphy, "Afghanistan", 99.

¹⁸⁰⁷ Kammerhofer, "The *Armed Activities*", 89, 96, 105.

group (the ADF), very likely partly based in the DRC- made in the face of the Democratic Republic of Congo's allegation of the illegal use of force on the part of Uganda was rejected by the Court.¹⁸⁰⁸ It declared:

It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.¹⁸⁰⁹

In by now familiar vein, it has been argued that the ICJ had, as far as Article 51 is concerned, not taken a clear position, because Uganda's statements regarding the justification of its actions had, as the Court emphasized, been contradictory, and Uganda had not been able to prove many of its allegations against the DRC. The view that the Court did not specifically deal with "armed attacks" carried out by non-state actors is allegedly further confirmed by a statement the Court made elsewhere in the judgement:¹⁸¹⁰

Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.¹⁸¹¹

¹⁸⁰⁸ Kammerhofer, "The Armed Activities", 91.

¹⁸⁰⁹ ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgement, 19/12/2005, I.C.J. Rep. 2005, 168, para. 146 (emphases by author).

¹⁸¹⁰ Dinstein, "Terrorism", 49; Dinstein claims the majority of judges at the ICJ had "glossed over" the issue; Murphy, "Afghanistan", 99; Murphy claims the Court had "arguably backed off" from the earlier statements on self-defence it had made in its 2004 Advisory Opinion; Berman, "The UN", 10; in this context Berman, without elaborating, claims that the ICJ had "more by its silences than by clear words" "corrected" the "unfortunate aspects of its earlier decision in the *Nicaragua* case"; Gray, *International Law*, 202.

¹⁸¹¹ ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgement, 19/12/2005, I.C.J. Rep. 2005, 168, para. 147.

The Court, however, made this statement after having just rejected Uganda's claim of self-defence, due to a lack of imputability to the DRC in the previous paragraph.

Having acknowledged that many of the attacks relied on by Uganda in its defence had actually taken place,¹⁸¹² and having further acknowledged that the ADF was perhaps indeed partly operating from Congolese territory,¹⁸¹³ the Court, nevertheless, denied that any "armed attack" imputable to the DRC had taken place, and therefore rejected Uganda's claim of self-defence. Furthermore, its reliance, once again, on Article 3 (g) of the *Definition of Aggression* strongly suggests that the Court still regards imputability to a state of an attack as a necessary requirement of any claim of self-defence under Article 51. This interpretation of the judgement is once again also confirmed by the statements made by those judges who disagreed with the court's reasoning on the matter.¹⁸¹⁴

It must therefore be concluded that the *International Court of Justice* as late as 2005, and thus after the terrorist attacks of 09/11, still adhered to the view that an attack must be attributable to a state for it to be judged an "armed attack" according to Article 51.¹⁸¹⁵

(iv) Summary

Interpreting Article 51 in such a way so as to require the imputability of any attack to a state, before the victim state can resort to the use of force in self-defence, is much more in line with the UN Charter's aims and principles than the contrary view. Letting

¹⁸¹² ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgement, 19/12/2005, I.C.J. Rep. 2005, 168, paras. 132-133.

¹⁸¹³ ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgement, 19/12/2005, I.C.J. Rep. 2005, 168, para. 135.

¹⁸¹⁴ ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgement, 19/12/2005, I.C.J. rep. 2005, 168; *Separate Opinion* of Judge Kooijmans, at paras. 20-32; to some extent, see also: *Separate Opinion* of Judge Simma, at paras. 8-14.

¹⁸¹⁵ Kammerhofer, "The *Armed Activities*," 112-113.

an armed attack by non-state actors suffice would greatly endanger world peace, and would raise serious issues as far as sovereignty and sovereign equality are concerned.¹⁸¹⁶ Overwhelming state practice prior to 09/11 confirms that most states adhered to this view of Article 51, also shared by the ICJ, even in recent years.

Finally, this conclusion seems to be confirmed by the official US and UK justifications for Operation *Enduring Freedom*. Both relied heavily on the alleged support the Taliban provided to Al Qaeda when justifying their attack on Afghanistan.¹⁸¹⁷ The question that arises when the Anglo-American justifications are considered is therefore not so much whether state involvement in a terrorist attack is necessary at all to justify the use of force in self-defence, but rather what level of support suffices.

In order for Operation *Enduring Freedom* to be in accordance with Article 51, it is therefore necessary to establish whether the attacks on New York and Washington were imputable to Afghanistan.

¹⁸¹⁶ Kammerhofer, "The *Armed Activities*", 105, 110; Kammerhofer adds another argument in favour of assuming that an "armed attack" under Article 51 must be imputable to a state: targeting individuals who committed terrorist attacks is not a use of force banned under Article 2 (4). He therefore concludes that an "armed attack" under Article 51 must be imputable to a state, in order for the use of force against the "host state" to be justified under Article 51. Although the argument has some merit, it is not wholly convincing. It could just as well be argued that Article 51 justifies the use of force against the "host state", based on the fact that the attack by the non-state actor was severe enough to qualify as an "armed attack".

¹⁸¹⁷ The American UN Ambassador declared (emphases by author): "Since 11 September, 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... The attacks on 11 September 2001... 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..."; 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 Doc. S/2001/946; available at: <http://www.hamamoto.law.kyoto-u.ac.jp/kogi/2005kiko/s-2001-946e.pdf>; last accessed 26/10/2011; the UK Representative stated (emphasis by author): "...this military action ... is directed against Usama Bin Laden's Al Qaida terrorist organisation and the Taliban regime that is supporting it ..."; 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; excerpts in: Operation *Enduring Freedom* and the Conflict in Afghanistan: An Update, House of Commons Library, Research Paper 01/81 (October 31, 2001), 10; available at: <http://www.parliament.uk/documents/commons/lib/research/rp2001/rp01-081.pdf>; last accessed 16/10/2011; Wouters, Naert, "Shockwaves", 432; similarly, former US President Bush Jr., in his memoirs, makes the point that "by 9/11 Afghanistan was not only a state sponsor of terror, but a state sponsored by terror" (*Decision*, at 187).

cc) Were the attacks of 09/11 imputable to Afghanistan?

It is beyond dispute that the attacks of September 11, 2001, were carried out by Al Qaeda. Al Qaeda, however, was never equivalent to, or formed part of, the regular Taliban forces of Afghanistan.¹⁸¹⁸ It is therefore necessary to establish whether the attacks of 09/11 could nevertheless be attributed to the State of Afghanistan as a result of sufficient direct or indirect influence exerted by the Taliban government on the organization.¹⁸¹⁹

As far as the responsibility of a state for the actions of irregular forces is concerned, it is necessary to rely on customary international law.¹⁸²⁰ Apart from the *International Law Commission*, the ICJ and the ICTY have been attempting to establish relevant criteria.

(i) Effective control

In the *Nicaragua Case* the ICJ had cause to examine whether the attacks carried out by the Nicaraguan rebels, the *Contras*, were directly attributable to the USA as a result of their long-standing support of that group. This was rejected by the Court, due to the fact that the USA did not have “effective control” of the *Contras*’ “military or paramilitary operations.”¹⁸²¹

¹⁸¹⁸ Moir, *Reappraising*, 61; Dorransoro, “The Security Council”, 453, 464.

¹⁸¹⁹ Moir, *Reappraising*, 61.

¹⁸²⁰ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Hercegovina v. Serbia and Montenegro, Judgement, 26/02/2007, I.C.J. Rep. 2007, 43, paras. 398, 407.

¹⁸²¹ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. USA, Judgement (Merits), 27/06/1986, I.C.J. Rep. 1986, 14, para. 115; Moir, *Reappraising*, 50; Ruys, Verhoeven, “Attacks”, 300; Nabati, “International Law”, 781; Meesen, “Unilateral”, 345; Kammerhofer, “The Armed Activities”, 111; Johnstone, “The Plea”, 367; Travalio, “Terrorism”, 152-153; Shah, “Self-defence”, 109; Müllerson, “Jus ad Bellum”, 183-184; Wouters, Naert, “Shockwaves”, 432; Dinstein, “Terrorism”, 47; Gazzini, *The changing*, 140.

United States actions,

even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation,

were deemed “insufficient” by the Court, in order to attribute *Contra* attacks directly to the USA.¹⁸²² For such actions to be imputable to the USA, the ICJ thought it necessary to establish that they had been “directed” or “enforced” by it.¹⁸²³

In 2007, the ICJ, in the *Genocide Convention Case*, explicitly confirmed its “effective control” threshold when establishing a state’s international responsibility for acts committed by non-state actors. Having explicitly restated its jurisprudence in the *Nicaragua Case*, the ICJ continued:

The passages quoted show that, according to the Court’s jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups, or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument...¹⁸²⁴

Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent’s instructions, or under its direction or control. An affirmative answer to this question would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would merely mean that the FRY’s international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations... What must be determined is whether FRY organs -incontestably having that status under the FRY’s internal law- originated the genocide by issuing instructions to the perpetrators or exercising direction or control...¹⁸²⁵

¹⁸²² ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. USA, Judgement (Merits), 27/06/1986, I.C.J. Rep. 1986, 14, para. 115.

¹⁸²³ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. USA, Judgement (Merits), 27/06/1986, I.C.J. Rep. 1986, 14, para. 115.

¹⁸²⁴ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina v. Serbia and Montenegro, Judgement, 26/02/2007, I.C.J. Rep. 2007, 43, para. 392.

¹⁸²⁵ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina v. Serbia and Montenegro, Judgement, 26/02/2007, I.C.J. Rep. 2007, 43, para. 397.

This concept of “effective control”, as developed by the ICJ, is also reflected in Article 8 of the *Draft Articles on State Responsibility*, proposed by the ILC, and seen as reflective of customary international law.¹⁸²⁶

As far as the situation in Afghanistan is concerned, there is no evidence, nor has it been claimed by anybody, that Al Qaeda was “effectively” controlled by the Taliban.¹⁸²⁷ Although it is not impossible that Al Qaeda’s leadership told the Taliban in advance about the terrorist attacks of 09/11, there is no evidence to suggest that these attacks were “directed” or “enforced” by them.¹⁸²⁸

Applying the ICJ’s very high threshold of “effective control” to the relationship between the Taliban and Al Qaeda must therefore lead to the conclusion that the attacks of September 11, 2001, cannot be attributed to the Taliban government of Afghanistan.

¹⁸²⁶ Article 8, *Responsibility of States for Internationally Wrongful Acts*, available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf, last accessed 26/10/2011; Article 8 reads: “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 acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina v. Serbia and Montenegro, Judgement, 26/02/2007, I.C.J. Rep. 2007, 43, paras. 398, 407; Arai-Takahashi, “Shifting”, 1096.

¹⁸²⁷ Meesen, “Unilateral”, 345; Moir, *Reappraising*, 50, 63-64; Arai-Takahashi, “Shifting”, 1097; Ruys, Verhoeven, “Attacks”, 313; Ratner, “Jus Ad Bellum”, 907, 908; Paust, “Use of Armed Force”, 542-542; Wouters, Naert, “Shockwaves”, 456-457; Dorronsoro, “The Security Council”, 464; Stahn, “Terrorist Acts”, 37; Stahn, however, therefore concludes that international approval of Operation *Enduring Freedom* meant that the “effective control” test had been “overturned”. He provides no evidence for this argument. This is even more striking, given the fact that even the ICJ has allowed alternative ways of establishing state responsibility, as demonstrated in the *Tehran Hostages Case*.

¹⁸²⁸ Cowper-Coles, *Cables*, 58; the former UK Ambassador to Kabul states that “many contemporary accounts record the surprise and horror with which the Taliban and many Afghans greeted the news of the attacks on New York and Washington on 11 September 2001.”; van Linschoten, Kuehn, “Separating”, 5; in their study of February 2011, which the former British Ambassador to Kabul (2008-2009, 2010) has described as “close to conclusive” (Cowper-Coles, *Cables*, 58), the authors claim that “the Taliban leadership do not seem to have had foreknowledge of the September 11 attacks”; that view is controversial, although no evidence of Taliban foreknowledge has ever been provided; Moir, *Reappraising*, 64; Paust, “Use of Armed Force”, 543; Arai-Takahashi, “Shifting”, 1096.

(ii) Overall control

Needless to say, the strict standard applied by the ICJ to the question of imputability to states of acts committed by non-state actors has come in for some criticism.¹⁸²⁹ The *International Criminal Tribunal for the Former Yugoslavia*, faced with the question of whether the conflict in Bosnia could be judged to be an international armed conflict, developed a new threshold for establishing state responsibility, which resulted in the concept of “overall control”.¹⁸³⁰

As far as “organized” non-state actors were concerned, state responsibility for their acts should be assumed, the ICTY argued, when the “group as a whole” was “under the overall control of the State.”¹⁸³¹ Once such “overall control” had been established, the group’s actions could be attributed to the state “whether or not each of them was specifically imposed, requested or directed by the State.”¹⁸³² This concept of “overall

¹⁸²⁹ Moir, *Reappraising* 49; Ruys, Verhoeven, “Attacks”, 303-304; Anne-Marie Slaughter, William Burke-White, “An International Constitutional Moment”, *Harv. J. Int’l L.*, Vol. 43, 2002, 1-21, 20; they describe the effective control “test” as “insufficient”, as far as “global criminals and the states that harbour them” are concerned.

¹⁸³⁰ Moir, *Reappraising*, 50; Ruys, Verhoeven, “Attacks”, 301; Nabati, “International Law”, 78; Kammerhofer, “The Armed Activities”, 111; Shah, “Self-defence”, 109-110; Müllerson, “Jus ad Bellum”, 184; Wouters, Naert, “Shockwaves”, 433; Dinstein, “Terrorism”, 48; Gazzini, *The changing*, 142-143.

¹⁸³¹ ICTY, Appeals Chamber, *Prosecutor v. Tadic*, Judgement, 15/07/1999, para. 120 (available at: <http://www.ictv.org/sid/10095>; last accessed 22/11/2011): “One should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.”

¹⁸³² ICTY, Appeals Chamber, *Prosecutor v. Tadic*, Judgement, 15/07/1999, para. 122; the *European Court of Human Rights* has adopted a similar stance in regard of Turkey’s responsibility for actions carried out by Northern Cyprus; see for example: *Case of Cyprus v. Turkey*, Application no. 25781/94, Judgement, 10/05/2001, paras. 76-78; available at: <http://www.echr.coe.int>; last accessed 26/10/2011. It should, however, also be noted that the ECtHR explained the adoption of the overall control test by emphasizing that it was obliged to avoid any vacuum in the protection of human rights. Not assuming Turkey’s responsibility for the unrecognized state of Northern Cyprus’ actions, would, according to the ECtHR, result in just such a vacuum.

control” was rejected by the ICJ in 2007 as a means of establishing state responsibility for wrongful acts.¹⁸³³

Even the application of this more generous standard to the situation in Afghanistan does, however, not lead to any other result. Although Al Qaeda (certainly at the time) basically fulfilled the criteria of being an organized and hierarchical group, there is no evidence to support the notion that the Taliban government exerted any kind of control over the organization.¹⁸³⁴ Not even the USA or the UK alleged anything of the kind.¹⁸³⁵ In an analysis, dated October 2, 2010, provided by the US Defense Intelligence Agency, it is concluded that

*Eventually the Taliban and Al Qaeda will war with each other. ...Al Qaeda have not integrated with the Afghanis or the Taliban, leaving them susceptible to exploitation.*¹⁸³⁶

In a Report, dated September 13, 2001, the (US) Congressional Research Service provided the following assessment:

*Although the Taliban movement of Afghanistan, which controls about 90 % of that country, gives bin Ladin and his subordinates safehaven, bin Ladin does not appear to be acting on behalf of the Taliban or vice versa.*¹⁸³⁷

¹⁸³³ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina v. Serbia and Montenegro, Judgement, 26/02/2007, I.C.J. Rep. 2007, 43, para. 406. As far as establishing state responsibility was concerned, the ICJ stated: “In this regard the ‘overall control’ test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility.”

¹⁸³⁴ Ratner, “Jus Ad Bellum”, 908; Wouters, Naert, “Shockwaves”, 457; Moir, *Reappraising*, 50, 64 (he states that asserting the Taliban’s “overall control” over Al Qaeda “seems to go too far”); Dinstein, “Terrorism”, 50; he acknowledges the Taliban regime “was not directly involved” in the attacks of 09/11, but goes to to claim the regime was “tainted” by “its subsequent behaviour”; Stahn, “Terrorist Acts”, 47, disagrees. He boldly states that the “application of the ‘overall control’ test would ...suffice” to justify the US attack on the Taliban. Given the extremely controversial nature of this statement, he then surprisingly offers no evidence in support of it.

¹⁸³⁵ Moir, *Reappraising*, 63; Paust, “Use of Armed Force”, 542; Ratner, “Jus Ad Bellum”, 907; Quigley, “The Afghanistan”, 545; Reisman, “International Legal Responses”, 49 (referring to the 1998 Embassy bombings and the US response); Müllerson, “Jud ad Bellum”, 177; Wouters, Naert, “Shockwaves”, 457; Dorransoro, “The Security Council”, 464; Steele, *Ghosts*, 226.

¹⁸³⁶ Defense Intelligence Agency, Cable, “HR (Excised)/Veteran Afghanistan Traveler’s Analysis of Al Qaeda and Taliban, Exploitable Weaknesses”, Secret, October 2, 2010; available at: The National Security Archive, *Volume VII: The Taliban File*, Documents 28 (quote) and 29; available at:

<http://www.ewu.edu/~nsarchiv/NSAEBB/NSAEBB97/index.htm>; last accessed 26/10/2011; Burke, *Al-Qaeda*, 183-184.

In February 2011 a study by van Linschoten and Kuehn on the relationship between Al Qaeda and the Taliban was published. It concluded:

*The Taliban and al-Qaeda remain distinct groups with different goals, ideologies, and sources of recruits; there was considerable friction between them before September 11, 2001, and today that friction persists...The claim that the link between the Taliban and al-Qaeda is stronger than ever, or unbreakable, is potentially a major intelligence failure that hinders the United States...Afghans have not been involved in international terrorism, nor have Afghan Taliban adopted the internationalist jihadi rhetoric of affiliates of al-Qaeda...None of the September 11 hijackers were Afghan...*¹⁸³⁸

The former British Ambassador to Kabul, Sherard Cowper-Coles, views this study's conclusions as "close to convincing", and goes on to describe the following conversation:

*...as the US Special Representative for Afghanistan and Pakistan Richard Holbrooke once remarked to David Miliband and me, it suggests that, in the Western campaign against the Taliban, we may be fighting the wrong enemy in the wrong country...*¹⁸³⁹

Based on the concept of "overall control", Al Qaeda's actions can therefore not be attributed to the State of Afghanistan.

¹⁸³⁷ Congressional Research Service, Report for Congress, Kenneth Katzman, "Terrorism: Near Eastern Groups and State Sponsors, 2001", September 10, 2001, 10; available at: The National Security Archive, *Volume I: Terrorism and U.S. Policy*, Chapter II, Document 2; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/index1.html>; last accessed 26/10/2011.

¹⁸³⁸ Van Linschoten, Kuehn, "Separating", 2, 4, 8; Steele, *Ghosts*, 38-39.

¹⁸³⁹ Cowper-Coles, *Cables*, 58; Tomsen, *The Wars*, XVI; the US Special Envoy to the *mujahedeen* (1989-1992) seems to share this view. He claims the "epi-center of world terrorism is in Pakistan, not Afghanistan."; Rice, *No Higher*, 62-63; the former US Secretary of State claims that Russian President Putin warned the Americans about the dangers emanating from Pakistan during a summit in June 2001. She states: "After touching on some other issues, Putin suddenly raised the problem of Pakistan. He excoriated the Pervez Musharraf regime for its support of extremists and for the connections of the Pakistani army and intelligence services to the Taliban and al Qaeda. Those extremists were all being funded by Saudi Arabia, he said, and it was only a matter of time until it resulted in a major catastrophe...I...chalked it up to Russian bitterness toward Pakistan for supporting the Afghan mujahideen...Putin, though, was right...Pakistan's relationship with the extremists would become one of our gravest problems. Putin never let us forget it...".

(iii) Did the Taliban “make” Al Qaeda’s actions their own?

In the *Tehran Hostages Case* the ICJ developed another method of establishing state responsibility in respect of actions carried out by non-state actors. Having established that Iran could not be held directly responsible for the Iranian students having taken American diplomats as hostages, the Court went on to assert that Iran had, nevertheless, subsequently incurred direct state responsibility for the students’ actions by making these actions their own.¹⁸⁴⁰

After quoting various official statements made by members of Iran’s government that approved of the students’ actions in the preceding paragraphs of the judgement, the ICJ proceeded to state:

*The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible.*¹⁸⁴¹

By supporting the students’ actions and by using the resulting situation to its advantage (*inter alia*, by utilizing the hostages as bargaining chips in negotiations with the USA), Iran had become responsible for these actions, without having (at least on the basis of the evidence available) “directed” them.¹⁸⁴²

Article 11 of the *Draft Articles on State Responsibility* reflects the ICJ’s view on incurring state responsibility just outlined:

¹⁸⁴⁰ Ruys, Verhoeven, “Attacks”, 301; Travalio, “Terrorism”, 153; Wouters, Naert, “Shockwaves”, 457-458.

¹⁸⁴¹ ICJ, *Case Concerning United States Diplomatic and Consular Staff in Tehran*, USA v. Iran, Judgement, 24/05/1980, I.C.J. Rep. 1980, 3, para. 74.

¹⁸⁴² Ruys, Verhoeven, “Attacks”, 301.

*Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.*¹⁸⁴³

The question of whether it can possibly be argued that the Taliban incurred direct state responsibility for the 2001 terrorist attacks on the USA by “adopting” them as their own is contentious. Given that the other two alternatives of possible state responsibility for non-state actors, can, in the case of Afghanistan and the Taliban, not plausibly be argued to exist, that is not surprising.

Those who argue that the Afghan Taliban government could be held directly responsible for 09/11, claim that the Taliban had “adopted” Al Qaeda’s conduct as their own by a) ignoring the Security Council resolutions demanding the extradition of Osama Bin Laden, and b) “harbouring” the terrorist Al Qaeda organization on Afghanistan’s territory in defiance of that country’s obligations under international law.¹⁸⁴⁴

Both accusations, as far as Afghanistan’s conduct under international law is concerned, are correct.¹⁸⁴⁵ Rasanayagam, for example, estimates that before the launch of Operation *Enduring Freedom* there were between 6,000-7,000 Arab Afghan

¹⁸⁴³ Article 11, *Responsibility of States for Internationally Wrongful Acts*; available at:

http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf; last accessed 26/10/2011.

¹⁸⁴⁴ Franck, “Terrorism”, 840-841; Dinstein, “Terrorism”, 51 and *War*, 236-237; Stromseth, “New Paradigms”, 568-569; Moir, *Reappraising*, 66-68; Murphy, “Terrorism”, 50-51; Müllerson, “Jus ad Bellum”, 183-185; Gazzini, *The changing*, 189-191; Greenwood, “International Law”, 312-313; it remains somewhat obscure whether Greenwood argues that the Taliban were responsible for Al Qaeda’s actions, based on these violations of international law, or whether he only assumes that these violations justify attacks against them; Stahn, “Terrorist Acts”, 47; he claims there is a “trend” to accept harbouring as sufficient for establishing state responsibility; Byers, “Terrorism”, 408-410; Byers offers an interesting take on US strategy. He argues US attempts to claim Taliban responsibility for the attacks were motivated by an attempt to create a broad coalition of states in support of the USA. Realizing that attacks on terrorists in other sovereign states might not be supported by other states, claiming direct Taliban responsibility made the legal arguments in support of an attack on Afghanistan much more acceptable; Guruli, “The Terrorism”, 109, 117; he makes the bold statement that “undeniably, the attacks of September 11th can be imputed to Afghanistan”. Unfortunately, she does not elaborate this far-reaching statement in any way.

¹⁸⁴⁵ Moir, *Reappraising*, 60-61; Arai-Takahashi, “Shifting”, 1082.

War veterans in Afghanistan (sometimes referred to as Al Qaeda's "Brigade 55"),¹⁸⁴⁶ as well as four Al Qaeda training camps, where between 1996 and 2001 about 11,000 "recruits" were trained.¹⁸⁴⁷

The Taliban government ignored the Security Council resolutions¹⁸⁴⁸ demanding the trial or extradition of Osama Bin Laden, in clear violation of its obligations under Article 25 UN Charter. In Resolution 1267 (1999) the Security Council, explicitly acting under Chapter VII, had stated:

1. Insists that the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan, comply promptly with its previous resolutions and in particular cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice;

*2. Demands that the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice;...*¹⁸⁴⁹

These demands were re-iterated and further expanded in Resolution 1333 (2000), again explicitly passed under the Council's Chapter VII powers.¹⁸⁵⁰

By continuing to tolerate the presence, on its territory, of Osama bin Laden and his Al Qaeda organization, Afghanistan also knowingly violated its long-established obligations under international law to refrain from

¹⁸⁴⁶ Rasanayagam, *Afghanistan*, 252-253.

¹⁸⁴⁷ Rasanayagam, *Afghanistan*, 234, 237; Rashid, *Descent*, 15-17; he claims that "between 1996 and 2001 ...an estimated thirty thousand militants from around the world" had been trained by al Qaeda in Afghanistan; George W. Bush, *Decision Points*, UK: Virgin Books, 2011 (paperback edition), 187 (the former US President claims an "estimated ten thousand terrorists" were trained there).

¹⁸⁴⁸ UN Security Council Resolution 1214 (1998), op. para. 13.

¹⁸⁴⁹ UN Security Council Resolution 1267 (1999); op. paras. 1, 2.

¹⁸⁵⁰ UN Security Council Resolution 1333 (2000).

*...organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.*¹⁸⁵¹

As early as 1934, the Council of the League of Nations had already unanimously passed a Resolution which stated that it:

Recalls, that it is the duty of every state neither to encourage nor tolerate on its territory any terrorist activity with a political purpose;

*That every State must do all in its power to prevent and repress acts of this nature and must for this purpose lend its assistance to Governments which request it:...*¹⁸⁵²

Despite these clear violations of international law on the part of Afghanistan, they are not sufficient to argue that the Taliban “adopted” Al Qaeda’s terrorist attacks as their own.¹⁸⁵³ There is a clear distinction between violations of international law by a state, and conduct which justifies attributing the acts of other, non-state actors to that state.¹⁸⁵⁴

¹⁸⁵¹ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, General Assembly Resolution 2625 (XXV) (1970), Principles; this Resolution is generally viewed as reflective of customary international law (a view confirmed by the ICJ in the *Armed Activities Case*, Judgement, 19/12/2005, I.C.J. Rep. 2005, 168, para. 162). The basic principle was established by the ICJ in the *Corfu Channel Case* (Judgement, 09/04/1949, I.C.J. Rep. 1949, 4, 22). When spelling out Albania’s obligations under international law, the court referred to “every state’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states”; see also: the preambles of UN Security Council Resolutions 1189 (1998), 1267 (1999) in respect of Afghanistan and Resolution 748 (1992) in respect of Libya; Reisman, “International Legal Responses”, 41; Stromseth, “New Paradigms”, 570; Kammerhofer, “*The Armed Activities*”, 102; Travalio, “Terrorism”, 148-150; Wouter, Naert, “Shockwaves”, 417-418, 423; Dinstein, “Terrorism”, 49; and *War*, 244; Gazzini, *The changing*, 186.

¹⁸⁵² Resolution of the League of Nations Council, Sixth Meeting (Public), December 10, 1934; League of Nations O. J., Vol. 15, 1934, 1758-1760, 1758-1759.

¹⁸⁵³ Quigley, “The Afghanistan”, 546; Moir, *Reappraising*, 66; Ratner, “Jus Ad Bellum”, 908; Ruys, Verhoeven, “Attacks”, 13-14; Wouters, Naert, “Shockwaves”, 433-434, 458; Charney, “The Use”, 836; he, however, limits himself to stating that the USA had, prior to attacking Afghanistan, not provided any proof of a sufficient link between the Taliban and al Qaeda; Murphy, “Terrorism”, 46; although he himself argues that Al Qaeda’s actions can be attributed to Afghanistan via Article 11 of the Draft Articles, he acknowledges that the connections between Al Qaeda and the Taliban “remain somewhat obscure”.

¹⁸⁵⁴ In fact, Reisman, writing in 1999 in the aftermath of the 1998 African embassy bombings and the US response, states that “apparently, the United States has assumed that bin Laden is an independent terrorist, finding refuge in a third country, rather than an independent contractor who has been retained by a particular state.” He himself describes Bin Laden as “ostensibly an autonomous private operator” (“International Legal Responses”, 49, 55); Travalio, “Terrorism”, 149, 154-155; Wouters, Naert, “Shockwaves”, 433-434.

Not once did the Taliban government approve of the terrorist attacks carried out by Al Qaeda.¹⁸⁵⁵ Mullah Omar, the Afghan leader, always claimed there was a lack of evidence, as far as Osama Bin Laden's and Al Qaeda's responsibility for the attacks was concerned. He, however, never endorsed the actions in any way, quite in contrast to the way the Iranian officials behaved during the Tehran hostage crisis.¹⁸⁵⁶ Some even claim that the Taliban offered to conduct an "Islamic" trial to deal with Bin Laden, although it is unclear, whether any such offer was to be taken seriously.¹⁸⁵⁷ Moreover, some Taliban representatives explicitly condemned the attacks.¹⁸⁵⁸

The justified accusation against the Afghan Taliban government was that it tolerated Al Qaeda's presence in the country, despite knowing of its terrorist intentions. "Harbouring" terrorists is, however, not sufficient to attribute every action carried out by these terrorists to the state concerned, if the concept of state responsibility is to have any meaning.¹⁸⁵⁹

If it is assumed, as it is here, that an "armed attack" must be imputable to a state for the use of force in self-defence to be justified under Article 51, the "harbouring" of

¹⁸⁵⁵ Moir, *Reappraising*, 66; Ruys, Verhoeven, "Attacks", 313-314.

¹⁸⁵⁶ Moir, *Reappraising*, 66.

¹⁸⁵⁷ Moir, *Reappraising*, 66; Ruys, Verhoeven, "Attacks", 313-314; Ratner, "Jus Ad Bellum", 906; Quigley, "The Afghanistan", 547; he goes even further, and accuses the USA of never having "made a credible demand on Afghanistan for the surrender of Al-Qaeda figures", and proceeds to claim that the "Taliban government of Afghanistan was...adhering to accepted standards of international conduct" when demanding additional information before extraditing Al Qaeda leaders; Steele, *Ghosts*, 216-218.

¹⁸⁵⁸ For example, the Afghan (Taliban) Ambassador to Pakistan did so, according to CNN; "Taliban diplomat condemns attacks", 12/09/2001; available at:

<http://archives.cnn.com/2001/WORLD/asiapcf/central/09/11/afghan.taliban/index.html>; last accessed 26/10/2011; Moir, *Reappraising*, 59; Ruys, Verhoeven, "Attacks", 313-314; Steele, *Ghosts*, 216.

¹⁸⁵⁹ Paust, "Use of Armed Force", 539-540, 542-543; Quigley, "The Afghanistan", 545; Kammerhofer, "The Armed Activities", 103-104; Nabati, "International Law", 781; Travalio, "Terrorism", 154-155, 176, 191; Cassese, "The International", 597; by implication: Slaughter, Burke-White, "An International", 19-20; obviously perceiving the weakness of the argument that the Taliban's actions meant that Afghanistan as a state was responsible for Al Qaeda's deeds, they suggest a new test: state responsibility should hinge on the question of whether "a government and the terrorists on its soil are distinguishable". Where a distinction can be made, the effective control "test" should still apply, while otherwise state responsibility can be assumed. A similar approach has been suggested by Reisman ("International Legal Responses", 41-42). Needless to say, such a new proposal cannot retrospectively legalize Operation *Enduring Freedom*, as there is so far no customary international law, let alone treaty law to that effect. The authors do also not proceed to actually apply their new rules to the conflict in Afghanistan.

terrorists can in itself not be sufficient to establish state responsibility. As international terrorist organizations are bound to be at least partly located and organized in some form within the territory of another state than the victim state, letting the mere “harbouring” of such a group suffice to attribute to that state any attack carried out by it, would, in effect, render the requirement of state imputability meaningless. Once it is accepted that any attack under Article 51 must be imputable to a state, the “harbouring” of terrorists can consequently not be deemed sufficient to declare a state responsible for the terrorist organization’s actions.¹⁸⁶⁰

This view of state responsibility is also implicitly confirmed by the ICJ. Having, in the *Nicaragua Case*, deemed even “the financing, organizing, training, supplying and equipping of the contras” by the USA “insufficient” to establish that state’s responsibility for attacks carried out by the *Contras*,¹⁸⁶¹ it is obvious that the much lesser form of support, the “harbouring” of “irregular bands” would not suffice to meet the ICJ’s standard.¹⁸⁶² In the *Armed Activities Case*, decided in 2005, the Court, after having acknowledged the possibility that the Ugandan rebels that had carried out attacks in Uganda were -at least partly- operating from Congolese territory,¹⁸⁶³ nevertheless stated:

The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this

¹⁸⁶⁰ Nicholas Kerton-Johnson, “Justifying the use of force in a post 09/11 world: striving for hierarchy in international society”, *International Affairs*, Vol. 84, 2008, 991-1007, 996.

¹⁸⁶¹ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. USA, Judgement (Merits), 27/06/1986, I.C.J. Rep. 1986, 14, para. 115.

¹⁸⁶² Travalio, “Terrorism”, 158.

¹⁸⁶³ ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgement, 19/12/2005, I.C.J. Rep. 2005, 168, para. 135.

*series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.*¹⁸⁶⁴

Although the ICJ, in the latter case, indicated that the presence, on Congolese territory, of the Ugandan rebels was perhaps due to the DRC's "inability to control events along its border",¹⁸⁶⁵ the Court's ruling, nevertheless, does imply that it does not deem the mere presence of "irregulars" sufficient to attribute responsibility for the attacks carried out by them to the state concerned. By re-emphasizing the central role of Article 3 (g) of the *Definition of Aggression*, which as a minimum requires a state's "substantial involvement" in the acts of "irregulars" for them to be attributed to it, the Court has implicitly rejected the concept of allowing the "harbouring" of terrorists to suffice in order to justify attribution of actions carried out by these groups to the state.

Lastly, in 2007, the ICJ, in the *Genocide Convention Case*, rejected even the "overall control" test as a means of establishing a state's international responsibility as "unsuitable, for it stretches too far, almost to breaking point, the connection that must exist between a State's organs and its international responsibility."¹⁸⁶⁶ This strongly implies that the mere "harbouring" of terrorists would certainly not satisfy the ICJ's criteria.

Based on the fact that the mere "harbouring" of terrorists is not sufficient to hold the state tolerating their presence on its territory responsible for every act carried out by them, it must be concluded that Afghanistan did not make the attacks of 09/11 "its

¹⁸⁶⁴ ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgement, 19/12/2005, I.C.J. Rep. 2005, 168, para 146.

¹⁸⁶⁵ ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgement, 19/12/2005, I.C.J. Rep. 2005, 168, para. 135.

¹⁸⁶⁶ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina v. Serbia and Montenegro, Judgement, 26/02/2007, I.C.J. Rep. 2007, 43, para. 406.

own” by endorsing them. The terrorist attacks were therefore not imputable to Afghanistan.

(iv) Summary

Since Afghanistan neither had “effective” nor “overall” control over Al Qaeda it cannot be held directly responsible for the attacks carried out by this organization on 09/11. Because the Taliban government never endorsed the attacks, and because its support of Al Qaeda (as far as is known) never went beyond tolerating the organization’s presence on its territory, it also cannot be claimed that Afghanistan “adopted” Al Qaeda’s course of action as its own.

dd) Conclusion

The massive attacks carried out by Al Qaeda terrorists which resulted in about 3000 deaths, cannot be attributed to the State of Afghanistan. Although Afghanistan, as has been shown, violated its obligations under international law, as far as its toleration of Al Qaeda and its leaders on its territory was concerned, it cannot be held responsible for the attacks carried out by the organization.

Since the attacks of 09/11 were not imputable to any state, Operation *Enduring Freedom*, launched on October 7, 2001 by the USA and the UK (and others), could not be justified as self-defence under Article 51.¹⁸⁶⁷

¹⁸⁶⁷ Quigley, “The Afghanistan”, 543-544; Michael J. Glennon, “The Fog of Law: Self-Defense, Inherence And Incoherence in Article 51 of the United Nations Charter”, Harv. J. L. & Pub. Pol’y, Vol. 25, 2001-2002, 539-558, 541-545; Glennon, however, instrumentalizes this conclusion to support his argument that Article 51 does not reflect the state of the law, as state practice has allegedly never conformed to it; Nabati, “International Law”, 780-781; he, in some ways similar to Glennon, then, uses this argument to underline his main thesis, which is

It should also be pointed out that there must be doubts as to whether the measures adopted by the USA and the UK were “necessary”. Even adherents of a more generous interpretation of state responsibility would have some difficulty in reconciling Operation *Enduring Freedom* with a rightful resort to self-defence. As argued elsewhere,¹⁸⁶⁸ the fact that the Al Qaeda attacks were completed, and that the USA and the UK, although mentioning possible “future attacks”, did not claim an attack by Al Qaeda was imminent, raises the question of whether the attacks on Afghanistan should not be classified as a “reprisal”. Reprisals are, however, generally viewed as having been outlawed by the Charter, and as such not “necessary” to end an ongoing attack.¹⁸⁶⁹ Viewing Operation *Enduring Freedom* as an act of retaliation, instead of as one of self-defence, also seems justified when former UK Prime Minister Blair’s recollections are considered:

Partly as a result of this, I thought it essential that the battle we were about to embark upon was not simply a war to punish. It had to liberate. Yes, the cause was the attack on the Twin Towers, but once engagement began, it couldn't just be retaliation, a reprisal, a redress of wrong done to us.¹⁸⁷⁰

that Article 51 had “lost its ‘normative power’”, and that it was therefore necessary to update the legal rules on the use of force, so as to offer states a way of effectively dealing with terrorism.

¹⁸⁶⁸ The author has previously discussed the criterion of “necessity” and the legality of “armed reprisals” in *US-Iran Relations in International Law since 1979*, 48-51.

¹⁸⁶⁹ Quigley, “The Afghanistan”, 556-557; Cassese, “Terrorism”, 998; An-Na’im, “Upholding”, 168; Myjer, White, “The Twin Towers”, 8, 11-12; Steele, *Ghosts*, 226; Wouters, Naert, “Shockwaves”, 434-437, 461; Gray, *International Law*, 203; Glennon, “The Fog”, 546-549; Glennon, however, instrumentalizes this conclusion to support his argument that Article 51 does not reflect the state of the law, as state practice has allegedly never conformed to it; Kelly, “Time Warp”, 2, 12, 19-22, 36; Kelly goes one step further. While acknowledging that reprisals were outlawed by the UN Charter, he argues that the USA was careful to adopt a legal position in response to 09/11 that -in his view- was in accordance with Article 51. He goes on to claim that the US government had, nevertheless, gone to great lengths to justify the war on Afghanistan in terms that were also concordant with the classical definition of a “reprisal”. Kelly implies that the USA is in fact attempting to re-introduce reprisals as a possible legal justification for the use of force; a point also made by Gazzini, *The changing*, 183-184, esp. 203-204. To some extent such a development might be seen to have been foreshadowed by President Reagan’s “promise” to terrorists, as early as 1981, of “swift and effective retribution” (“Swift U.S. Retribution for Terrorists Called Doubtful”, Richard Halloran, *The New York Times*, 03/02/1981, B 13); Roberts, “Self-Help”, 282-286; he argues in favour of the legality of reprisals, because their “prohibition may run the risk of leaving much state conduct unregulated”; W. Michael Reisman, “The Raid on Baghdad: Some Reflections on its Lawfulness and Implications”, *EJIL*, Vol. 5, 1994, 120-133, 125-129; referring to the US raid on Baghdad in 1993, Reisman claims the US justification “fits at least as comfortably, if not more so, under the classic rubric of reprisal” than under the rubric of self-defence. He goes on to claim that “the notion of reprisal is generally reviving”; Gazzini, *The changing*, 183-184, 203-204.

¹⁸⁷⁰ Tony Blair, *A Journey*, London: Hutchinson, 2010, 356 (emphases by author); Cowper-Coles, *Cables*, 59; the former British Ambassador comes to a more unequivocal conclusion. Referring to ongoing discussions

Lastly, there are severe doubts as to whether Operation *Enduring Freedom* was “proportional” to the preceding attacks. Even the USA accused the Taliban government of Afghanistan of only “harbouring” Al Qaeda.¹⁸⁷¹ Attacks on regular Taliban forces, and “regime change” in Afghanistan can hardly be deemed a proportionate response to the kind of involvement that state was accused of in relation to Al Qaeda’s actions.¹⁸⁷²

In the *Armed Activities Case* the ICJ raised the issue in an *obiter dictum* as far as Uganda’s attacks on the DRC are concerned:

*The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda’s border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.*¹⁸⁷³

A massive operation, such as the war in Afghanistan, with the open goal of deposing that state’s government, must surely lead to very similar observations, based, as it

among the Taliban on whether to expel Bin Laden after the attacks of 09/11, he states: “But turning that tide into a majority would have taken more time than Western governments thirsting for violent revenge were prepared to give. After the humiliation of 9/11, America needed to kick some butt.”; former US President Bush seems to contradict Blair’s and Cowper-Coles’ assessments somewhat, by stating: “Removing al Qaeda’s safe haven in Afghanistan was essential to protecting the American people. We had planned the mission carefully. We were acting out of necessity and self-defense, not revenge” (Bush, *Decision*, 184); however, further doubts are raised, when Steele’s account of US preparations for a military conflict with Afghanistan are considered. According to him, the “Bush administration had warned the Taliban” in mid-July 2001 “that it might take military action to topple the regime unless they handed bin Laden over...The administration was ready with its new strategy, by coincidence, on the day before the attacks in New York and Washington.” (in: Steele, *Ghosts*, 219-221).

¹⁸⁷¹ Gray, *International Law*, 200.

¹⁸⁷² Myjer, White, “The Twin Towers”, 8; Gazzini, *The changing*, 198-199; Cassese, “Terrorism”, 999-1000; Wouters, Naert, “Shockwaves”, 461; Reisman, “International Legal Dynamics”, 68-69; he does not express a clear view on the legality of “regime change” in the case of Afghanistan, but makes the point that the goal of regime change certainly made the legality of the use of force much more controversial than would perhaps otherwise have been the case; Murphy, “Afghanistan”, 86; Murphy describes the doubts raised, as far as the legality of this war aim is concerned; Falk, “The Beirut”, 426; he refers to the Israeli attack on Beirut airport in response to a terrorist attack on an Israeli plane in Athens carried out by terrorists “harboured” by Lebanon as a “disproportionate response”, because the self-defence action was undertaken “by the regular military force of the government against a foreign state”, despite the original attack having been carried out not by that foreign state, but by a “liberation movement”.

¹⁸⁷³ ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgement, 19/12/2005, I.C.J. Rep. 2005, 168, para. 147.

was, on that government's mere "harbouring" of a terrorist group.¹⁸⁷⁴ Operation *Enduring Freedom* can thus not be reconciled with Article 51.¹⁸⁷⁵

c) Customary international law, as it stood prior to 09/11

The conclusion that Operation *Enduring Freedom* cannot be reconciled with Article 51 does not necessarily mean that the military action was contrary to international law. It is possible, and has indeed been argued by many, that new rules have developed in customary international law as far as a state's lawful response to terrorist attacks is concerned.¹⁸⁷⁶

According to some, it must be assumed that the international legal rules on the use of force in response to terrorist attacks have changed as a result of the growth of international terrorist organizations, and the development of their capability to launch massive attacks, resulting, as in the case of 09/11, in the death of thousands of people.

Notably, the USA and Israel have claimed to be legally entitled to combat terrorists in other states. In 1986, US Secretary of State Shultz declared:

*It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations, ...; or from using force against states that support, train and harbour terrorists or guerrillas. International law demands no such result.*¹⁸⁷⁷

¹⁸⁷⁴ Glennon, "The Fog", 545-546; Glennon, however, instrumentalizes this conclusion to support his argument that Article 51 does not reflect the state of the law, as state practice has allegedly never conformed to it.

¹⁸⁷⁵ Glennon, "The Fog", 539-558; perhaps surprising to some, Glennon comes to the conclusion that the attack on Afghanistan was "unlawful" under Article 51. He, however, argues that Article 51 does not reflect the law, as state practice has allegedly never conformed to it.

¹⁸⁷⁶ Cassese, "The International", 591.

¹⁸⁷⁷ George Shultz, "Low-Intensity Warfare, The Challenge of Ambiguity", Address before the Low-Intensity Warfare Conference, National Defense University, Washington D.C., January 15, 1986; reprinted in ILM, Vol. 25, 1986, 204-207, 206. Shultz's remarks, as quoted here, are sometimes referred to as "the Shultz Doctrine"; Quigley, "The Afghanistan", 558.

Whether this proposition has gained sufficient international support to justify the conclusion that it reflects customary international law must now be examined in detail. It should, first of all, be pointed out that Articles 2 (4), 51 do not *-per se-* create a bar to the development of new rules in customary international law on the use of force.¹⁸⁷⁸ As the *International Court of Justice* emphasized in the *Nicaragua Case*, customary international law on the use of force exists side by side with the Charter rules.¹⁸⁷⁹ Although the Court, in 1986, argued that customary international law and Articles 2(4), 51, had become near identical since the Charter had come into force, it did allow for some differences in detail, and by doing so certainly allowed for the development of new rules in the future.¹⁸⁸⁰

Such new rules would also not necessarily contravene the generally accepted *jus cogens* status of the ban on the use of force, as it is overwhelmingly agreed that the *jus cogens* status applies to the core of the ban on the use of force, but does not automatically outlaw all changes in the detail of when the use of force is exceptionally permitted.¹⁸⁸¹

Before proceeding to examine whether new rules have developed in customary international law, allowing states to respond to terrorist attacks by using force against the territory of another state (and if so, under what precise conditions), it should be

¹⁸⁷⁸ Moir, *Reappraising*, 11; Myjer, White, "The Twin Towers", 16-17; Wouters, Naert, "Shockwaves", 427.

¹⁸⁷⁹ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. USA, Judgement (Merits), 27/06/1986, I.C.J. Rep. 1986, 14, paras. 172-181.

¹⁸⁸⁰ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. USA, Judgement (Merits), 27/06/1986, I.C.J. Rep. 1986, 14, paras. 172-181; Moir, *Reappraising*, 11; Meesen,

"Unilateral", 346; Myjer, White, "The Twin Towers", 16-17; Wouters, Naert, "Shockwaves", 427.

¹⁸⁸¹ Cassese, "Terrorism", 1000; Müllerson, "Jus ad Bellum", 169.

noted that there is one major problem when assuming such new rules exist: the lack of a consensual definition of the term “terrorist”.¹⁸⁸²

As this is not particularly relevant in respect of Operation *Enduring Freedom* -there is, if not universal, certainly absolutely overwhelming consensus within the international community that Al Qaeda is a terrorist organization-¹⁸⁸³ it suffices to refer to that often quoted statement “one man’s terrorist is another man’s freedom fighter”,¹⁸⁸⁴ in order to pinpoint the complexities surrounding the topic.¹⁸⁸⁵

The conflicts surrounding India/Kashmir and Israel/Palestine are just two examples of when states have come to very different conclusions, as to whether specific groups should be categorized as “terrorist” or not,¹⁸⁸⁶ leading to potentially explosive disputes when trying to apply apparent customary international law rules in response to “terrorist” attacks.¹⁸⁸⁷

Nevertheless, as there can be no doubt that the attacks of 09/11 were terrorist in nature, and carried out by a terrorist organization, this problem can be put aside in the context discussed here.

¹⁸⁸² Ben Saul, *Defining Terrorism in International Law*, Oxford: Oxford University Press, 2006, 5; Hassanien, “International Law”, 246-247; Rostow, “Before”, 475, 480, 488-489; Jackson Nyamuya Maogoto, “America’s War on Terror: Rattling International Law with Raw Power?”, *Newcastle L. Rev.*, Vol. 32, 2004-2005, 32-47, 35; Quénavivet, “The World”, 562-564; Roberts, “Self-Help”, 248-251; Guruli, “The Terrorism”, 114-115; Shah, “Self-defence”, 105; Gazzini, *The changing*, 181.

¹⁸⁸³ Anatol Lieven, “The Secret Policeman’s Ball: the United States, Russia and the international order after 11 September”, *International Affairs*, Vol. 78, 2002, 245-259, 247; Moir, *Reappraising*, 42; Quénavivet, “The World”, 564.

¹⁸⁸⁴ A statement sometimes attributed to former US President Reagan; Slaughter, Burke-White, “An International”, 12; Hassanien, “International Law”, 247; Roberts, “Self-Help”, 249.

¹⁸⁸⁵ Saul, *Defining*, 121-122; Saul also lists a few examples where public perception has rapidly evolved, especially in western states (Nelson Mandela, Yasser Arafat, Gerry Adams); Slaughter, Burke-White, “An International”, 9, 11-12; Hassanien, “International Law”, 246-247.

¹⁸⁸⁶ Saul, *Defining*, 2, 50, 188; Wedgwood, “Responding”, 561 (referring to Öcalan, the PKK leader).

¹⁸⁸⁷ Quénavivet, “The World”, 564; she provides further examples where states disagree on the classification of specific groups as “terrorists”.

There had been, prior to 09/11, three basic constellations, as far as terrorist attacks are concerned, to which states have responded by using force against another state. As the international community's reaction to these events may lead to differing conclusions on the precise content of customary international law, they must be examined separately.

The three relevant constellations are as follows: firstly, a state resorted to the use of force against a state it accused of either having let its officials carry out a terrorist attack, or of having directly instructed a group of people to carry out the attack; secondly, a state has responded to a terrorist attack by not only attacking the alleged terrorist bases, but by also launching military action against the state itself, in which the terrorists were located; and, thirdly, as a result of a terrorist attack, a state has responded by directly targeting alleged terrorist bases in another state.

aa) Use of force against states allegedly involved in "state terrorism"

Contrary to what is often implied in articles and books, the cases, when states have attacked other states they had previously accused of carrying out or organizing a terrorist attack against the victim state or its nationals, are not useful precedents for *Operation Enduring Freedom*.

In all these cases the victim state accused the other state it used force against of having direct responsibility for the previous terrorist attack. In every case the "terrorists" were -according to the victim state- either officials employed by the other state (leaving, if true, no room for doubt as far as state responsibility is concerned), or terrorists who had been instructed to carry out the specific attack by the other state (a

constellation that can easily be subsumed under Article 3 (g) of the *Definition of Aggression*, heavily relied on by the ICJ in its judgements).

The controversies that actually arose in this constellation, apart from problems of evidence, were whether the respective terrorist attack was sufficiently grave to be defined as an “armed attack” under Article 51, as well as whether the victim state’s response was necessary and proportional, both controversial issues that are frequently in dispute under Article 51.¹⁸⁸⁸

As already outlined above, the main controversy surrounding Operation *Enduring Freedom* is whether the “armed attack” must be attributable to a state for it to fall under Article 51, and of what nature this attribution should be, matters which are not relevant in cases of “state terrorism”.

Because cases falling into this category are, nevertheless, often discussed as precedents of Operation *Enduring Freedom*,¹⁸⁸⁹ they will be briefly discussed to determine whether any useful conclusions, as far as customary international law is concerned, can be drawn.

The main cases of forceful responses to “state terrorism” are the Israeli attack on Egypt in 1956 (Suez);¹⁸⁹⁰ the 1986 US attack on Libya in reaction to the bombing of a discotheque in Berlin, frequented mainly by US service men;¹⁸⁹¹ and the US attack on

¹⁸⁸⁸ Stahn, “Terrorist Acts”, 36; Moir, *Reappraising*, 28-29 (he argues that many of the following examples of state practice would better be described as “armed reprisals”); Motshabi, “International”, 675-677, 681; Tom J. Farer, Christopher C. Joyner, “The United States and the Use of Force: Looking Back to See Ahead”, *Transnat’l L. & Contemp. Probs.*, Vol. 1, 1991, 15-41, 33 (all three referring to Libya).

¹⁸⁸⁹ Moir, *Reappraising*, 27-28; Kelly, “Time Warp”, 16-18; Murphy, “Terrorism”, 46-47; Donald R. Rothwell, “Anticipatory Self-Defence in the Age of International Terrorism”, *U. Queensland L. J.*, Vol. 24, 2005, 337-353, 343.

¹⁸⁹⁰ Moir, *Reappraising*, 26; Travalio, “Terrorism”, 164.

¹⁸⁹¹ Moir, *Reappraising*, 27; Reisman, “International Legal Responses”, 31-32; Johnstone, “The Plea”, 372-373; Motshabi, “International”, 672.

Iraq in 1993, as a consequence of a failed assassination attempt on former US President Bush Senior while he was visiting Kuwait.¹⁸⁹²

All three events had in common that the victim state accused the state it subsequently attacked of having direct responsibility for the terrorist attack it had suffered: as has already been described in detail, Israel, in 1956 (and before) accused Egypt of “sending” the *fedaheen* living in the Sinai across the armistice lines in order to carry out “terrorist attacks” in Israel; in 1986, the USA accused Libya of having ordered the bombing of the discotheque in Berlin, and claimed to have proof based on documents the US had obtained, originating from the Libyan Embassy in the GDR;¹⁸⁹³ and in 1993 US President Clinton claimed the failed assassination plot had been organized by Iraq’s security service.¹⁸⁹⁴

Both Israel and the USA justified their subsequent use of force as self-defence under Article 51, a claim doubtful in all these events.¹⁸⁹⁵ There must be severe doubts, as to whether any of the military actions were “necessary” to end an ongoing attack, and in both the Libya, and certainly in the Iraq, cases it is questionable whether it could be claimed that a sufficiently grave “armed attack” under Article 51 had even occurred.¹⁸⁹⁶ Most importantly, as far as establishing customary international law is concerned, international reaction was not sufficiently positive to allow the conclusion that a new rule had been created.

¹⁸⁹² Reisman, “International Legal Responses”, 35; Baker, “Comparing”, 99.

¹⁸⁹³ Moir, *Reappraising*, 27; Murphy, “Terrorism”, 47; Reisman, “International Legal Responses”, 31-32; Kelly, “Time Warp”, 16-18; Baker, “Comparing”, 104-105; Roberts, “Self-Help”, 254-255.

¹⁸⁹⁴ Baker, “Comparing”, 99-103; Reisman, “The Raid”, 120-121.

¹⁸⁹⁵ Wouters, Naert, “Shockwaves”, 427; Reisman, “The Raid”, 121 (referring to the attack on Iraq in 1993);

Motshabi, “International”, 675 (referring to Libya); Gray, *International Law*, 196.

¹⁸⁹⁶ Farer, Joyner, “The United States”, 33; Motshabi, “International”, 677-678 (all three referring to Libya); Baker, “Comparing”, 112; Wouters, Naert, “Shockwaves”, 430 (all three referring to Iraq in 1993)

As far as the 1956 Suez War is concerned, it has already been outlined in Chapter III that the Anglo-French-Israeli attack on Egypt met with widespread international condemnation, including from the USA, which resulted in numerous General Assembly Resolutions to that effect.¹⁸⁹⁷ Condemnation by the Security Council was only blocked by British and French vetoes.

International reaction to the 1986 airstrikes against Libya was hardly more positive.¹⁸⁹⁸ The attack was condemned by a majority of states on the Security Council, although no resolution was adopted due to US, British, and French vetoes.¹⁸⁹⁹ Nevertheless, the General Assembly did pass a resolution, in which it declared that it:

*Condemns the military attack perpetrated against the Socialist People's Libyan Arab Jamahiriya on 15 April 1986, which constitutes a violation of the Charter of the United Nations and of international law;...*¹⁹⁰⁰

Reaction to the 1993 missiles strikes against Iraq was much more muted,¹⁹⁰¹ most likely owing to Iraq's extremely tarnished reputation at the time, shortly after the Gulf War and Iraq's preceding attack on Kuwait. Nevertheless, China declared the attack on Iraq to be illegal under international law,¹⁹⁰² as did many Arab states.¹⁹⁰³

¹⁸⁹⁷ Travalio, "Terrorism", 164; Moir, *Reappraising*, 26 (although he wrongly asserts that the Security Council had condemned the Israeli action, while the General Assembly had not).

¹⁸⁹⁸ Moir, *Reappraising*, 28; Byers, "Terrorism", 407; Quigley, "The Afghanistan", 558; Reisman, "International Legal Responses", 33-34; Kelly, "Time Warp", 16-18; Baker, "Comparing", 105-106; Wouters, Naert, "Shockwaves", 442; Motshabi, "International", 677; Gazzini, *The changing*, 192, fn. 52; Gray, *International Law*, 196.

¹⁸⁹⁹ Murphy, "Terrorism", 47; Reisman, "International Legal Responses", 34; Wouter, Naert, "Shockwaves", 419-420; Gray, *International Law*, 196.

¹⁹⁰⁰ General Assembly Resolution 41/38 (1986); passed by 79:28:33 votes.

¹⁹⁰¹ Stahn, "Terrorist Acts", 36; Baker, "Comparing", 99, 103; Reisman, "The Raid", 122; Gray, *International Law*, 196.

¹⁹⁰² Stahn, "Terrorist Acts", 36; Wouters, Naert, "Shockwaves", 443; Gray, *International Law*, 196-197.

¹⁹⁰³ Baker, "Comparing", 100, fn. 8; Wouters, Naert, "Shockwaves", 443; Reisman, "The Raid", 122.

Furthermore, only very few states publicly supported the legal arguments put forward by the USA.¹⁹⁰⁴

Besides not being useful precedents for the attack on Afghanistan in 2001, it must therefore be concluded that the above examples of the use of force against states allegedly involved in state terrorism did not generate sufficient international support as to their legality to allow any new rules in customary international law to develop.

bb) Attacks on states “harbouring” terrorists

The next category of responses to terrorist attacks consists of those cases, when victim states have responded by not only targeting alleged terrorist bases in other countries, but by actually attacking the “host” states themselves. This constellation is very relevant to Operation *Enduring Freedom* as the use of force was from the outset not only targeted towards Al Qaeda bases in Afghanistan, but included attacks on regular Taliban forces and regime change.

Prior to 09/11, however, the instances when states decided to react to a terrorist attack by using force against the “host state” of the alleged terrorists had actually been quite rare. Former US President Bush Jnr. confirms this, as far as the USA is concerned. In his memoirs he claims that the decision to attack Afghanistan in the aftermath of 09/11 was “a departure from America’s policies over the past two decades.”¹⁹⁰⁵

¹⁹⁰⁴ Byers, “Terrorism”, 407; Wouters, Naert, “Shockwaves”, 442-443; Gray, *International Law*, 196; Baker, “Comparing”, 103; although he argues that the international community reacted positively to the 1993 strikes on Iraq, he does acknowledge that “Russia, Germany, Italy, Japan and South Korea” had “voiced unanimous if somewhat subdued support”, while France had even “expressed certain reservations”.

¹⁹⁰⁵ Bush, *Decision*, 190 (he compares his response to President Reagan’s response to the attacks on American troops in Lebanon in 1983, and President Clinton’s reaction to both the events in Somalia in 1993 and the embassy bombings in 1998).

The notable exception in that respect has been Israel's conduct in the Middle East. Beginning with an air raid on Beirut airport in 1968 in retaliation for a terrorist attack carried out in Athens against an Israeli plane,¹⁹⁰⁶ Israel repeatedly (notably in 1982) attacked Lebanon itself (by destroying the state's infrastructure, and killing many civilians), and even invaded and occupied parts of the country. These actions were justified by Israel on the basis of Lebanon's alleged harbouring, and therefore support of Arab terrorists within its territory.¹⁹⁰⁷ The repeated use of force against Lebanon was consequently declared to be in accordance with Israel's right of self-defence.¹⁹⁰⁸

Israel's repeated attacks on Lebanon, however, received little support in the international community. As far as the 1968 Israeli raid on Beirut airport was concerned, international condemnation was swift.¹⁹⁰⁹ A senior representative of the Israeli Embassy in Washington D.C., summoned to the Department of State, explained the Israeli government's view of its raid on Beirut airport to Assistant Secretary of State Hart as follows:

*Beirut is the center and headquarters for some organizations including PFLOP. Israel's view is that no government harboring such organizations can be immune from responsibility for actions of these organizations. The savage attack on Israeli aircraft on an international flight struck at Israel's vital life-line. No Government can permit this to happen.*¹⁹¹⁰

Assistant Secretary of State Hart responded by making the following statement:

¹⁹⁰⁶ Falk, "The Beirut", 416; Gray, *International Law*, 195.

¹⁹⁰⁷ Ruys, Verhoeven, "Attacks", 292.

¹⁹⁰⁸ Wouters, Naert, "Shockwaves", 427; Falk, "The Beirut", 429 (referring to 1968).

¹⁹⁰⁹ Falk, "The Beirut", 416-417; Gray, *International Law*, 195.

¹⁹¹⁰ *Telegram From the Department of State to the Embassy in Israel*, 29/12/1968, FRUS, 1964-1968, Volume XX, Arab-Israeli Dispute, 1967-1968, Document 369; available at: <http://history.state.gov/historicaldocuments/frus1964-68v20/d369>; last accessed 26/10/11.

*We believe this an inexcusable retaliatory act striking at innocent people and facilities and also greatly impairing US interests.*¹⁹¹¹

This negative assessment was echoed by the UN Security Council, which responded by passing Resolution 262, which stated, *inter alia*, that it

*Condemns Israel for its premeditated military action in violation of its obligations under the Charter and the cease-fire resolutions;...*¹⁹¹²

Israel's decision to invade Lebanon in 1982, as a reaction to the attempted assassination of the Israeli Ambassador in London one week previously,¹⁹¹³ attributed to the PLO (Fatah), also did not win approval within the international community.¹⁹¹⁴

The Security Council "called for":

*strict respect for the territorial integrity, sovereignty and political independence of Lebanon within its internationally recognized boundaries;...*¹⁹¹⁵

and "called upon"

*Israel immediately to cease its military action against Lebanese territorial integrity and withdraw forthwith its forces from all Lebanese territory;...*¹⁹¹⁶

These sentiments were reiterated by the Security Council in several further Resolutions.¹⁹¹⁷ Furthermore, the General Assembly passed its own resolution,

¹⁹¹¹ *Telegram From the Department of State to the Embassy in Israel*, 29/12/1968, FRUS, 1964-1968, Volume XX, Arab-Israeli Dispute, 1967-1968, Document 369; available at: <http://history.state.gov/historicaldocuments/frus1964-68v20/d369>; last accessed 26/10/11.

¹⁹¹² UN Security Council Resolution 262 (1968); Wouter, Naert. "Shockwaves", 419; Gray, *International Law*, 195.

¹⁹¹³ "Begin tells leading U.S. Jews of Invasion's Goals", Paul L. Montgomery, *The New York Times*, 18/06/1982, 6.

¹⁹¹⁴ Moir, *Reappraising*, 26-27; Murphy, "Terrorism", 46; Reisman. "International Legal Responses", 52-53; Gazzini, *The changing*, 192, fn. 52; Dinstein, *War*, 247-248; he, however, without even mentioning international reaction to Israel's 1982 attack on Lebanon, does seem to view that action as a precedent for Operation *Enduring Freedom* ("extraterritorial law enforcement").

¹⁹¹⁵ UN Security Council Resolution 501 (1982).

¹⁹¹⁶ UN Security Council Resolution 501 (1982).

¹⁹¹⁷ UN Security Council Resolutions 508, 509, 516, 520 (all 1982).

condemning Israel for not having complied with the Security Council Resolutions, and “demanded” Israel’s immediate withdrawal from the country.¹⁹¹⁸

In this context it is especially noteworthy that the question of whether the PLO, or at least some of its more radical supporters, could be classified as terrorists was - certainly in the early 1980s- not without controversy.¹⁹¹⁹ Nevertheless, even some of those states, such as the USA, that at the time categorized these Palestinian groups as terrorist organizations did at least not block passage of the negative Resolutions, and often supported them (even though the USA vetoed others that were even more critical of Israel’s conduct).

Lastly, Turkey’s repeated incursions into northern Iraq in the 1990s in an attempt to combat Kurdish terrorists (the PKK) there, also did not garner much international support, certainly not as far as their legality was concerned.¹⁹²⁰ Notably, Turkey did not even attempt to justify its actions in Iraq on the basis of Article 51, nor did it report its incursions to the Security Council.¹⁹²¹ Although reaction in many western states was muted, sometimes even supportive of the Turkish actions,¹⁹²² a majority of states demanded an immediate Turkish withdrawal,¹⁹²³ later to be joined by western states.¹⁹²⁴ Furthermore, the more muted reaction to Turkish actions towards Iraq on the part of western states is easily explained by the fact that, while Turkey was and is

¹⁹¹⁸ General Assembly Resolution ES-7/5 (1982), passed by 127:2:0 votes.

¹⁹¹⁹ Saul, *Defining*, 2, 50.

¹⁹²⁰ “Turkey: Military Crosses Into Iraq to Step Up Kurdish Crackdown”, Nadire Mater, *IPS-Inter Press Service*, 17/10/1992; “Turkey/Iraq, VOA News 05 October 1997”; available at: http://www.fas.org/news/iraq/1997/10/turkey_iraq.html; accessed 26/10/2011; Gray, *International Law*, 139-143.

¹⁹²¹ Gray, *International Law*, 141.

¹⁹²² “Rival Factions Complicate Turkey’s Pursuit of Kurds; Ankara Juggles Broker, Partisan Roles”, Kelly Couturier, *The Washington Post*, 25/10/1997, A13; Couturier quotes a State Department spokesman; Moir, *Reappraising*, 29.

¹⁹²³ The Arab League, the Gulf Cooperation Council, and the Non-Aligned Movement condemned Turkey’s actions; Gray, *International Law*, 142; Moir, *Reappraising*, 29; Ruys, Verhoeven, “Attacks”, 296; “Turkey/Iraq, VOA News 05 October 1997”; available at: http://www.fas.org/news/iraq/1997/10/turkey_iraq.html; accessed 26/10/2011.

¹⁹²⁴ Ruys, Verhoeven, “Attacks”, 296.

a NATO ally, Iraq's standing in the 1990s was, certainly in western eyes, abysmally low.

It must therefore be concluded that, prior to 09/11, state practice and *opinio juris* had not developed sufficiently, if at all, in such a fashion so as to justify the assumption that the use of force against states "harbouring" terrorists was viewed as legal, certainly when that use of force went beyond targeting specific, alleged terrorist bases.¹⁹²⁵

Operation *Enduring Freedom* can therefore not be claimed to be in accordance with customary international law as it stood prior to the attacks on New York and Washington.¹⁹²⁶ This becomes even more obvious, when it is considered that the official goals of the Israeli/Turkish interventions were much less far-reaching than Operation *Enduring Freedom*'s aims, regime change never being on the official agenda in those cases.¹⁹²⁷

cc) Attacks on terrorist bases in other states

One category of the use of force in response to terrorist attacks remains to be examined: did customary international law prior to 09/11 allow attacks on terrorist bases located in other states without those states' consent?

This constellation, too, has not been as common as many assume. Analysing the 1998 US airstrikes on Afghanistan and Sudan, the Congressional Research Service, for example, concluded

¹⁹²⁵ Moir, *Reappraising*, 30-31; Paust, "Use of Armed Force", 539-544; Travalio, "Terrorism", 158-159, 171-172, 176-177, 191.

¹⁹²⁶ Kerton-Johnson, "Justifying", 996.

¹⁹²⁷ This is also implicitly confirmed by Rasanayagam in *Afghanistan*, 252; he claims the USA "downplayed" the objective of taking out the Taliban military installations when launching Operation *Enduring Freedom* because of "concerns expressed by its partners."; Wouters, Naert, "Shockwaves", 424.

*the fact remains that this is the first time the U.S. has...(2) launched such a strike within a territory of a state which presumably is not conclusively, actively and directly to blame for the action triggering retaliation,...*¹⁹²⁸

Nevertheless, there have been a number of such cases in state practice. Again, notably Israel has, beginning in the late 1940s/early 1950s, frequently relied on that justification, when launching attacks on neighbouring states. As has been described in the Chapter III, Israel repeatedly attacked alleged terrorist bases in Egypt, Jordan, Lebanon, and Syria. As has also been explained previously, these attacks were routinely condemned by the UN Security Councils as “reprisals”, and therefore as contrary to international law, and as violations of the Armistice Agreements Israel had signed with its neighbours.

In 1985 three Israelis were killed on their yacht off Cyprus by a group called “Force 17”, associated with the PLO. Israel claimed a right of self-defence, and responded by destroying the PLO-Headquarters in Tunis in an air raid.¹⁹²⁹ This action was condemned by the Security Council in a Resolution passed by an overwhelming vote, with only the USA abstaining.¹⁹³⁰ The Security Council declared that it

*Condemns vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct...*¹⁹³¹

Although perhaps less relevant to the development of customary international law, given the two states’ racist regimes, and the nature of the resistance against them,

¹⁹²⁸ Congressional Research Service, Report for Congress, Raphael F. Perl, “Terrorism: U.S. Response to Bombings in Kenya and Tanzania: A New Policy Direction?”, September 1, 1998, 3; available at: The National Security Archive, *Volume I: Terrorism and U.S. Policy*, Chapter II, Document 6; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/index1.html>; last accessed 26/10/2011.

¹⁹²⁹ Ruys, Verhoeven, “Attacks”, 292; Gray, *International Law*, 195-196.

¹⁹³⁰ Moir, *Reappraising*, 27; Ruys, Verhoeven, “Attacks”, 293; Murphy, “Terrorism”, 46-47; Byers, “Terrorism”, 407; Reisman, “International Legal Responses”, 38; Kelly, “Time Warp”, 15; Wouter, Naert, “Shockwaves”, 419; Gazzini, *The changing*, 192, fn. 53; Gray, *International Law*, 196.

¹⁹³¹ UN Security Council Resolution 573 (1985).

South African attacks on alleged ANC terrorist bases in neighbouring Angola,¹⁹³² and Southern Rhodesia's incursions into Mozambique¹⁹³³ fared little better. In a Resolution passed in 1980, for example, the Security Council declared South Africa's attacks on ANC bases to be "a flagrant violation of the sovereignty and the territorial integrity" of Angola.¹⁹³⁴

It is the US response to the embassy bombings in Africa in 1998 that poses the most difficult questions, as far as the development of customary international law is concerned. In August 1998 the US embassies in Kenya and in Tanzania suffered simultaneous terrorist attacks; 235 people were killed, many more injured, and both embassies were severely damaged.

The USA blamed Al Qaeda for the attack, and decided to launch cruise missile attacks on alleged terrorist bases in Afghanistan and on a chemical factory in Sudan, the latter allegedly a facility that was producing chemical weapons and was partly owned by Osama Bin Laden.¹⁹³⁵ These actions were justified as measures taken in self-defence.¹⁹³⁶ International reaction to these attacks was muted, especially as far as the

¹⁹³² Ruys, Verhoeven, "Attacks", 292-293; Gray, *International Law*, 136-137.

¹⁹³³ UN Security Council Resolution 411 (1976); the UN Security Council "strongly condemned" Southern Rhodesia's "recent acts of aggression against the People's Republic of Mozambique".

¹⁹³⁴ UN Security Council Resolution 475 (1980); many other Resolutions on the incursions of South African troops into Angola were passed, such as Resolution 387 (1976); Resolution 428 (1978); and Resolutions 447 and 454 (both 1979); the UK Representative to the *International Conference for Immediate Independence of Namibia* declared on July 8, 1986: "South Africa has also, in defiance of international law, continued its armed incursion into Namibia's neighbours, particularly Angola, thus imperilling their sovereignty and creating a grave danger to peace and security in the region"; a sentiment repeated in a statement issued by the Foreign Office on August 13, 1986, in response to further South African incursions into Angola; both quoted in BYIL 1986, Vol. 57, 621-622; Ruys, Verhoeven, "Attacks", 293.

¹⁹³⁵ Sean D. Murphy, "Contemporary Practice of the United States Relating to International Law", AJIL, Vol. 93, 1999, 161-194, 161-163; Reisman, "International Legal Responses", 47-49; Lobel, "The Use", 537; Travaglio, "Terrorism", 145; Loyn, *Butcher*, 264-265.

¹⁹³⁶ Murphy, "Contemporary", 162-163; Reisman, "International Legal Responses", 47-49; Gray, *International Law*, 197.

attacks on Afghanistan were concerned.¹⁹³⁷ A request by Sudan and others for the Security Council to deal with the matter was not heeded.¹⁹³⁸

The muted reaction to the 1998 attacks is often argued to evidence the emergence of new rules in customary international law, allowing at least the use of force against terrorist bases located in other states.¹⁹³⁹

This, however, seems doubtful. As Gray has pointed out, states supportive of the US, were “careful not to adopt the US doctrine of self-defence.”¹⁹⁴⁰ Furthermore, especially the attacks on Sudan did come in for some heavy criticism.¹⁹⁴¹ It was expressly condemned by the Arab League, which, however, did not mention the attack on Afghanistan.¹⁹⁴² Pakistan deemed the attack on Afghanistan illegal,¹⁹⁴³ and, as Pakistani airspace had been violated, claimed its sovereignty had not been respected.¹⁹⁴⁴ Iran, Iraq, Libya, Yemen, and, notably, Russia also declared both the attacks on Afghanistan and Sudan to be illegal.¹⁹⁴⁵

¹⁹³⁷ Murphy, “Contemporary”, 164-165; “Terrorism”, 49-50; Wouters, Naert, “Shockwaves”, 442-444; Gray, *International Law*, 197.

¹⁹³⁸ Murphy, “Contemporary”, 165; Ruys, Verhoeven, “Attacks”, 295; Gray, *International Law*, 197.

¹⁹³⁹ Murphy, “Terrorism”, 49-50; Stahn, “Terrorist Acts”, 48; Johnstone, “The Plea”, 372; Travalio, “Terrorism”, 168, 171-173, 178-179; Gazzini, *The changing*, 192-193.

¹⁹⁴⁰ Gray, *International Law*, 197; Wouters, Naert, “Shockwaves”, 443 (quoting Gray); Ruys, Verhoeven, “Attacks”, 295; Murphy, “Contemporary”, 165; he makes a similar point, when stating that “other states” had “expressed support...or at least understanding for the attacks”; Byers, *War*, 63; makes the point that, as far as Germany, France, and the UK were concerned, US President Clinton made sure their support was forthcoming by telephoning the respective leaders in advance of the attacks and ensuring their support, without them being able to consult their legal advisors. Such a chain of events would, of course, undermine the attempt to attribute legal significance to those states’ statements, as far as the 1998 attacks are concerned.

¹⁹⁴¹ Quigley, “The Afghanistan”, 560-561; Lobel, “The Use”, 544-547; Wouters, Naert, “Shockwaves”, 443-444.

¹⁹⁴² Murphy, “Contemporary”, 165; Ruys, Verhoeven, “Attacks”, 295; Reisman, “International Legal Responses”, 49.

¹⁹⁴³ Moir, *Reappraising*, 30.

¹⁹⁴⁴ Byers, *War*, 63.

¹⁹⁴⁵ Murphy, “Contemporary”, 164; Moir, *Reappraising*, 30; Ruys, Verhoeven, “Attacks”, 295; Byers, *War*, 63; Reisman, “International Legal Responses”, 49; Wouters, Naert, “Shockwaves”, 443-444; Gray, *International Law*, 197; Lobel, “The Use”, 538; Lobel adds China, and UN Secretary General Kofi Annan to the critics/opponents of the 1998 airstrikes.

Scepticism as to the legality of the US attacks was also expressed at the subsequent summit of the Non-Aligned Movement.¹⁹⁴⁶ Having condemned the terrorist attacks in Kenya and Tanzania in the preceding paragraph, the assembled leaders went on to declare:

*The Heads of State or Government emphasised that international co-operation to combat terrorism should be conducted in conformity with the principles of the United Nations Charter, international law and relevant international conventions, and expressed their opposition to selective and unilateral actions in violation of principles and purposes of the United Nations Charter. In this context, they called upon the competent United Nations Organs to promote ways and means to strengthen co-operation, including the international legal regime for combating international terrorism.*¹⁹⁴⁷

Lastly, there seem to have been some doubts within the US government, as far as the legality of the 1998 airstrikes under international law is concerned. In two Reports for Congress, from 1998 and 2001, the *Congressional Research Service* (CRS), analysed the “arguments against”/ the “risks” of using force against terrorists in other states. In its Report of September 1, 1998, dealing explicitly with the 1998 airstrikes, the CRS stated that

*Such a policy: (1) undermines the rule of law, violating the sovereignty of nations with whom we are not at war;...*¹⁹⁴⁸

This concern was reiterated in its Report of September 13, 2001, where one of the “risks” of the use of “military force” against terrorists listed was the

*(6) perception that U.S. ignores rules of international law.*¹⁹⁴⁹

¹⁹⁴⁶ Byers, “Terrorism”, 407; Lobel, “The Use”, 538; Gray, *International Law*, 197.

¹⁹⁴⁷ *Durban Final Document*, NAM XII Summit, Durban (South Africa), 2-3 September 1998, para. 159; available at: <http://www.nam.gov.za/xiisummit/>; last accessed 26/10/2011 (emphasis by author).

¹⁹⁴⁸ Congressional Research Service, Report for Congress, Raphael F. Perl, “Terrorism: U.S. Response to Bombings in Kenya and Tanzania: A New Policy Direction?”, September 1, 1998, 4; available at: The National Security Archive, *Volume I: Terrorism and U.S. Policy*, Chapter II, Document 6; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/index1.html>; last accessed 26/10/2011.

Based on these reactions, it is not possible to assert that the 1998 US response to the terrorist attacks created customary international law, allowing the targeting of terrorist bases in other states. Not only was sufficient affirmation of the legality of the action lacking, but those states analysing the legality of the US response tended to raise doubts as to their compatibility with international law.¹⁹⁵⁰ When it is considered that both Afghanistan and Sudan had, by 1998, become something akin to pariah states, this becomes even more remarkable.¹⁹⁵¹

The conclusion must therefore be that prior to 09/11 no rule in customary international law had developed allowing states to respond to terrorist attacks by attacking terrorist bases in other states, thereby violating their sovereignty.¹⁹⁵² This means that the attack on Afghanistan, even if limited to the Al Qaeda bases, could not be justified under pre-09/11 customary international law.

dd) Customary international law prior to 09/11: a summary

Prior to the Al Qaeda terrorist attacks on the USA in September 2001 customary international law had not developed in such a way so as to allow a forceful response to terrorist attacks on other states' territories without their prior consent.¹⁹⁵³

¹⁹⁴⁹ Congressional Research Service, Report for Congress, Raphael F. Perl, "Terrorism, the Future, and U.S. Foreign Policy", September 13, 2001, 8; available at: The National Security Archive, *Volume I: Terrorism and U.S. Policy*, Chapter II, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/index1.html>; last accessed 26/10/2011.

¹⁹⁵⁰ Lobel, "The Use", 538; Gray, *International Law*, 197-198.

¹⁹⁵¹ Lobel, "The Use", 556.

¹⁹⁵² Cassese, "Terrorism", 996; Lobel, "The Use", 557; he argues that the US, in 1998/1999, would actually have opposed the creation of any such rule in customary international law out of fear of other states exploiting it.

¹⁹⁵³ Wouters, Naert, "Shockwaves", 444-445; Gray, *International Law*, 198; she describes the legality of the use of force "against terrorist attacks" prior to 09/11 as "controversial"; Byers, "Terrorism", 408; and "Terror and the Future", 122-123; writing in 2002, after Operation *Enduring Freedom* had been launched, he states that "even today, most states would not support a rule that opened them up to attack whenever terrorists were thought to operate within their territory."

When in the past states have decided to use force in self-defence to attack states “harbouring” terrorists this has always resulted in condemnation, or at least a lack of support. Even the more limited objective of taking out terrorist bases in other states has met with considerable resistance in the international community, and, even where such resistance was weaker, lacked sufficient express support for the creation of new rules in customary international law to be possible.

The legal situation on the eve of Operation *Enduring Freedom* is perhaps best summed up by a statement made by the UK representative to the UN in 1986 in response to Israeli attacks on Lebanon:

*The Government of Israel holds the view that cross-border attacks on its territory launched from Lebanon are unacceptable. No member of the Council, entrusted as we are with primary responsibility for international peace and security, can disagree with that. The Council equally cannot and does not accept, as it has demonstrated in a number of resolutions, that Israel may flout the United Nations Charter by invading and occupying another state or any part of its territory.*¹⁹⁵⁴

Thus Operation *Enduring Freedom* cannot be reconciled with customary international law as it stood before September 2001.

d) “Instant custom”

The question that must now be examined is whether the international reaction to the attacks of September 11, 2001, in the run-up to, and the aftermath of the launch of Operation *Enduring Freedom* must be seen as what Slaughter -in a different context- has referred to as an “international constitutional moment”.¹⁹⁵⁵ In other words, does

¹⁹⁵⁴ Statement by UK Representative to the UN, Sir John Thomson, before the Security Council on January 17, 1986; extracts reprinted in BYIL 1986, Vol. 57, 620.

¹⁹⁵⁵ Slaughter, Burke-White, “An International”, 1-21; although the authors do discuss the conflict in Afghanistan, they do so in the context of creating improved international legal instruments to deal with

the reaction by the international community justify the conclusion that customary international law was created instantaneously, that “instant custom” was created?

There is some controversy whether customary international law can ever be created “instantaneously”.¹⁹⁵⁶ Needless to say, the concept of “custom” on the one hand, and the concept of its creation by one single event on the other basically seem irreconcilable. After all, the term “customary law” implies that a specific rule has developed over a longer period of time and been confirmed by its regular application in a number of cases. “Instant” customary international law does not fulfil either criterion.¹⁹⁵⁷ Some, nevertheless, argue that it is sufficient for a new rule in customary international law to be created if a major event takes place, and the legal justification put forward by the actor is subsequently accepted by the overwhelming majority of states, or by those states “whose interests are directly affected”.¹⁹⁵⁸ It has been claimed that this is what happened in respect of the attack on Afghanistan.¹⁹⁵⁹

When examining the legality of attacking Afghanistan in the aftermath of 09/11, the very contentious issue of the existence of “instant custom” can be put aside for the moment. Analysing the situation some ten years after the event it is possible to have a

terrorists, and states harbouring them in the future. They do not discuss the legality of Operation *Enduring Freedom* in any detail.

¹⁹⁵⁶ Cassese, “Terrorism”, 997.

¹⁹⁵⁷ Meesen, “Unilateral”, 349; he argues that the “actual interventions in Afghanistan and Iraq” do not “suffice to establish a new rule of customary law”.

¹⁹⁵⁸ Very often the concept of “instant” international customary law is traced back to Bin Cheng’s article “United Nations Resolutions on Outer Space: ‘Instant’ International Customary Law?”, *Indian Journal of International Law*, Vol. 5, 1965, 23-112, esp. 45; Cheng developed the concept in the context of outer space. Only the Soviet Union and the USA were technologically able to exploit outer space. Once their views on the applicable law had been reconciled, *usus* was of little relevance. Some also point to the Judgements of the ICJ in the *North Sea Continental Shelf Cases* as evidencing that the ICJ had at least not ruled out the concept of “instant custom” (Judgements, *Federal Republic of Germany v. Netherlands and v. Denmark*, 20/02/1969, I.C. J. Reports 1969, 3). When analysing whether a treaty norm could become binding for non-signatories as a rule of customary international law, the ICJ stated that such a development was in exceptional cases possible “even without the passage of any considerable time” (para. 73, see also for the quote); for further discussion, see, for example: Farhard Talaie, “The Importance of Custom and the Process of its Formation in International Law”, *James Cook U. L. Rev.*, Vol. 5, 1998, 27-45, esp. 38 and fn. 47; Hiram E. Chodosh, “Neither Treaty Nor Custom: The Emergence of Declarative International Law”, *Tex. Int’l L. J.*, Vol. 26, 1991, 87-124, 100-105.

¹⁹⁵⁹ Johnstone, “The Plea”, 372.

look at subsequent, comparable incidents and international reactions to them. Only if states continued to apply the same rules to comparable events can it be argued that Operation *Enduring Freedom* created new customary international law.

Before turning to subsequent events it is, however, first necessary to explain why many commentators came to the conclusion that “instant” custom had been created by the international community’s reaction to Operation *Enduring Freedom*.¹⁹⁶⁰

The starting point for this argument is the Security Council’s reaction. By unanimously passing Resolutions 1368 and 1373, which “recognized” or “reaffirmed” the right of self-defence in response to the terrorist attacks against the USA, it could be argued that the international community came to accept the use of force in self-defence against non-state actors, and, possibly, against the state “harbouring” them.¹⁹⁶¹

As has been argued here, this view cannot be reconciled with Article 51, or customary international law as it stood prior to 09/11, so that it might be possible to conclude that the international community, aghast at the monstrosity of the Al Qaeda attacks, had come to the conclusion that a broader, more generous right of self-defence was necessary and in accordance with international law. This is seemingly further

¹⁹⁶⁰ Arai-Takahashi, “Shifting”, 1093-1095, 1098-1101; Müllerson, “Jus ad Bellum”, 181-182; Moir, *Reappraising*, 64-68 (by implication; after explaining his doubts as to Operation *Enduring Freedom*’s conformity with Article 51, as understood prior to 09/11, and his further doubts as to whether the use of force was necessary, as far as the Taliban themselves were concerned, he concludes that near universal acceptance of the USA’s actions had rendered them legal); Stahn, “Terrorist Acts”, 35, 37, 40 (his position remains unclear. He poses the question, whether instant customary law was created by the reaction to 09/11, then seems to answer in the negative, because he believes there was no big change in the law. Subsequently he, however, frequently refers solely to the reactions to the events of 09/11, in order to describe what the current state of the law allegedly is (based on what he refers to as “Article 51 ½”).

¹⁹⁶¹ Stahn, “Terrorist Acts”, 35; Ratner, “Jus Ad Bellum”, 909-910; Johnstone, “The Plea”, 370-371; Arai-Takahashi, “Shifting”, 1094, 1100-1101; Rothwell, “Anticipatory”, 340-342; he, however, expressly mentions two alternatives: the events after 09/11 had either led to an “evolving” interpretation of Article 51, or to “new customary international law”; Wouters, Naert, “Shockwaves”, 459-460; they discuss the possibility that 09/11 had “expanded” the right of self-defence; Dinstein, “Terrorism”, 46; Dinstein argues that the reactions by the UN, NATO, and others had confirmed his long-held, expanded view of Article 51, and had thus made the previous “scholarly arguments” on the issue “moot”.

confirmed by similar Resolutions adopted by NATO and the OAS.¹⁹⁶² Additionally, many states actively or passively participated in the military action and the subsequent attempts at rebuilding Afghanistan.¹⁹⁶³

Furthermore, the international reaction to the launch of Operation *Enduring Freedom* was generally positive, with only the “usual suspects”, such as Iran and Iraq, claiming that the action was contrary to international law.¹⁹⁶⁴ Since the launch of Operation *Enduring Freedom* states such as Australia and Russia have themselves laid claim to a more expansive right of self-defence as far as non-state actors are concerned.¹⁹⁶⁵

Apart from the fact that the Security Council never explicitly declared the allied actions in Afghanistan to be legal -despite having numerous opportunities to do so in the many resolutions on Afghanistan passed by the Council in the aftermath of the initial military strikes-¹⁹⁶⁶ there can be little doubt, that there were, at the time, grounds for the assumption that the international community had come to a near-

¹⁹⁶² Statement by the North Atlantic Council, Press Release (2001) 124, September 12, 2001; available at: <http://www.nato.int/docu/pr/2001/p01-124e.htm>; last accessed 26/10/2011; OAS Resolution RC.24/RES.1/01, September 21, 2001; available at: http://avalon.law.yale.edu/sept11/oas_0921a.asp; last accessed 26/10/2011; Murphy, “Terrorism”, 48; Stahn, “Terrorist Acts”, 35; Johnstone, “The Plea”, 371; Gray, *International Law*, 193; Wouters, Naert, “Shockwaves”, 446-450, 454-455; Gazzini, *The changing*, 77; Ratner, “Jus Ad Bellum”, 909; although citing the OAS’s support, Ratner does make an interesting observation regarding the OAS’s statements: in OAS Resolution RC.23/Res.1/01, September 21, 2001 (available at: http://avalon.law.yale.edu/sept11/oas_0921b.asp; last accessed 26/10/2011), the OAS declared that it was (emphasis by author) “noting that those responsible for aiding, supporting, or harboring the perpetrators, organizers, and sponsors of these acts are equally complicit in these acts”; Ratner makes the point that in his view the OAS did thus not accuse the Taliban of direct responsibility for the terrorist attacks.

¹⁹⁶³ Murphy, “Terrorism”, 49; Stahn, “Terrorist Acts”, 35; Myjer, White, “The Twin Towers”, 8-9; Johnstone, “The Plea”, 371; Ratner, “Jus Ad Bellum”, 909-910; Gray, *International Law*, 206.

¹⁹⁶⁴ Moir, *Reappraising*, 64-65, and fn. 96; Ruys, Verhoeven, “Attacks”, 297; Murphy, “Terrorism”, 49; Gray, *International Law*, 193; Johnstone, “The Plea”, 370, 371; Arai-Takahashi, “Shifting”, 1094-1095; Wouters, Naert, “Shockwaves”, 450-452, 455, 535; Gazzini, *The changing*, 77 and fn. 100; Ratner, “Jus Ad Bellum”, 910 (he adds Sudan, North Korea, Cuba, and Malaysia as opposing, or being critical of the attack on Afghanistan).

¹⁹⁶⁵ Ruys, Verhoeven, “Attacks”, 298; Myjer, White, “The Twin Towers”, 8-9.

¹⁹⁶⁶ Quénavivet, “The World”, 576; she argues the Security Council “preferred to abstain from judging the legality of the British and American intervention”; Myjer, White, “The Twin Towers”, 9-13; they describe the Security Council’s reaction as one of “deliberate ambiguity”, and accuse it of “doing its best to ignore the crucial issue of the legal basis of the US response.”; Quigley, “The Afghanistan”, 553-554; in his view the Security Council reaction was one of “inaction” and “silence” in response to Operation *Enduring Freedom*; Cassese, “Terrorism”, 996; Gray, *International Law*, 206-207.

consensus on viewing military actions against terrorists in other states and against states “harbouring” them, certainly following a terrorist attack, as legal.¹⁹⁶⁷

Subsequent events have, however, severely undermined any such conclusion.

Although there have been numerous terrorist attacks since 09/11, which have been condemned by the Security Council, the Council has avoided referring to the right of self-defence in any of its Resolutions.¹⁹⁶⁸ This is especially significant, because many of these subsequent Resolutions were passed in reaction to attacks also attributed to Al Qaeda (such as the Madrid bombings of 2004, or the London bombings of 2005).¹⁹⁶⁹ Resolutions 1368 and 1373 therefore obviously did not set a precedent, as far as the Security Council’s reaction to terrorist attacks is concerned. As has already been pointed out, even these two resolutions, moreover, avoid any explicit reference to an “armed attack” against the USA having actually taken place.¹⁹⁷⁰

Furthermore, the Security Council, in Resolution 1456 (2003) -which deals with the struggle against terrorism in more general terms- refrained from mentioning the right of self-defence, or the use of force.¹⁹⁷¹ The Council limited itself to the statement that

¹⁹⁶⁷ Arai-Takahashi, “Shifting”, 1093-1095, 1098-1101; Moir, *Reappraising*, 64-68 (by implication; after explaining his doubts as to Operation *Enduring Freedom*’s conformity with Article 51, as understood prior to 09/11, and his further doubts as to whether the use of force was necessary, as far as the Taliban themselves are concerned, he concludes that near universal acceptance of the USA’s actions had rendered them legal); Stahn, “Terrorist Acts”, 35, 37, 40 (his position remains unclear. He poses the question, whether instant customary law was created by the reaction to 09/11, then seems to answer in the negative, because he believes there was no big change in the law. Subsequently he, however, frequently refers solely to the reactions to the events of 09/11, in order to describe what the current state of the law allegedly is (based on what he refers to as “Article 51 ½ “); Ratner, “Jus Ad Bellum”, 910; Ratner refers to the possibility of new rules “emerging” as a result of Operation *Enduring Freedom*.

¹⁹⁶⁸ Ruys, Verhoeven, “Attacks”, 312; Gray, *International Law*, 227-228.

¹⁹⁶⁹ See, for example, UN Security Council Resolution 1440 (2002) in response to the taking of hostages in a Moscow theatre; Resolution 1450 (2003), bomb attack in Kenya; Resolution 1465 (2003), bomb attack in Colombia; Resolution 1516 (2003), bomb attacks in Istanbul; Resolution 1530 (2004), bomb attacks in Madrid; Resolution 1611 (2005), bomb attacks in London.

¹⁹⁷⁰ Ruys, Verhoeven, “Attacks”, 312.

¹⁹⁷¹ Gray, *International Law*, 228.

it was “reaffirming” that “any acts of terrorism are criminal and unjustifiable”¹⁹⁷² and emphasized that

*States must ensure that any measure taken to combat terrorism comply [sic] with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law;...*¹⁹⁷³

The lack of reference to the use of force in response to terrorism is also noticeable in “The United Nations Global Counter-Terrorism Strategy”, passed by the General Assembly in 2006,¹⁹⁷⁴ and in the *Inter-American Convention Against Terrorism*, adopted by the OAS in 2002.¹⁹⁷⁵

State practice, since the launch of Operation *Enduring Freedom*, does not confirm the existence of newly-created customary international law in favour of the use of force in response to terrorism.

Russia /Chechen terrorists in Georgia (2002)

Notably the USA has taken the view that other states should not have the right to resort to the use of force against terrorist bases in third states. When Russia, in August/September 2002, decided to launch airstrikes against Chechen rebel bases in Georgia, and informed the Security Council it would take “necessary measures to defend itself”, it came in for harsh criticism from the USA.¹⁹⁷⁶

¹⁹⁷² UN Security Council Resolution 1456 (2003), preamble.

¹⁹⁷³ UN Security Council Resolution 1456 (2003), op. para. 6.

¹⁹⁷⁴ General Assembly Resolution A/RES/60/288 (2006); passed without a vote; Gray, *International Law*, 228.

¹⁹⁷⁵ *Inter-American Convention Against Terrorism*; available at:

http://www.oas.org/xxxiiga/english/docs_en/docs_items/AGres1840_02.htm; last accessed 26/10/2011.

¹⁹⁷⁶ Gray, *International Law*, 230-231.

Significantly, the USA agreed with the Russian view that the Chechen rebels were terrorists,¹⁹⁷⁷ and acknowledged that Georgia had not dealt with the threat from these terrorists on its territory, despite undisputed repeated Russian warnings.¹⁹⁷⁸ In reaction to the Russian airstrikes on Chechen guerrilla bases in Georgia, the USA, nevertheless, declared it “deplored the violation of Georgia’s sovereignty”,¹⁹⁷⁹ and later informed the Russian government it took “strong exception to the possibility of Russian military intervention against Chechen rebels in Georgia” in the future.¹⁹⁸⁰

Thus it would seem that the USA itself, the victim of the Al Qaeda terrorist attacks of one year earlier, and main perpetrator of the wars on Afghanistan and “on terror”, was extremely reluctant to acknowledge any rule in customary international law, which allowed states to attack terrorist bases in other states. This reluctance was visible even in a situation in which the USA itself had acknowledged that the host state was not effectively dealing with the acknowledged terrorist problem which was threatening its neighbour.¹⁹⁸¹

Israel/Palestinian terrorists in Syria (2003)

In October 2003, following a terrorist attack on a restaurant in Haifa, Israel launched an air raid against Syria on the grounds that it was targeting *Islamic Jihad* bases

¹⁹⁷⁷ Lieven, “The Secret”, 252; this is also confirmed by the former US Secretary of State, Condoleezza Rice, in her memoirs (*No Higher*, 99).

¹⁹⁷⁸ Voice of America, 28/08/02; available at:

<http://www.globalsecurity.org/wmd/library/news/russia/2002/russia-020828-335d9eb7.htm>; last accessed 26/10/2011; “British anti-terror units to train Georgian army: MoD and secret service help to fight rebels linked to al-Qaida”, Nick Paton Walsh, *The Guardian*, 21/11/2002, 17; “Kidnap suspects abound in notorious Pankisi Gorge”, Ian Traynor, *The Guardian*, 08/11/2002, 3; Gray, *International Law*, 230-231.

¹⁹⁷⁹ “US Rebukes Russia for Pankisi raid”, Nick Paton Walsh, *The Guardian*, 26/08/2002, 12.

¹⁹⁸⁰ “US warns Russia over Georgia Strike”, BBC News, 13/09/2002; available at:

<http://news.bbc.co.uk/1/hi/world/europe/2254959.stm>; last accessed 26/10/2011.

¹⁹⁸¹ Gray, *International Law*, 230-231.

there.¹⁹⁸² This military action met with strong international condemnation.¹⁹⁸³ The UN Secretary General declared that he

*strongly deplores the Israeli air strike on Syrian territory earlier today. He is especially concerned that this further escalation of an already tense and difficult situation has the potential to broaden the scope of current conflicts in the Middle East, further threatening regional peace and security. The Secretary-General urges all concerned to respect the rules of international law and to exercise restraint.*¹⁹⁸⁴

Spain, France, Germany, and China explicitly declared the Israeli action to be in violation of international law, as did Mexico and Jordan.¹⁹⁸⁵ The UK referred to the actions as “unacceptable”, while the US limited itself to “calling for restraint”.¹⁹⁸⁶

This negative reaction to the Israeli attack on an *Islamic Jihad* bases in Syria further undermines the notion that Operation *Enduring Freedom* had previously created new customary international law.

Israel/Hezbollah in Lebanon (2006)

Following a cross-border attack on Israel in July 2006, carried out by *Hezbollah*, which resulted in the death of eight Israeli soldiers, and the abduction of another two, Israel, in response, notified the Security Council of its intentions to resort to its rights

¹⁹⁸² Gray, *International Law*, 236.

¹⁹⁸³ Gray, *International Law*, 236-237.

¹⁹⁸⁴ “Secretary-General Strongly Deplores Israeli Air Strike on Syrian Territory”, Press Release (October 7, 2003) of Statement by Kofi Annan (October 5, 2003); available at:

<http://www.unis.univieenna.org/unis/pressrels/2003/sgsm8918.html>; last accessed 26/10/2011.

¹⁹⁸⁵ Gray, *International Law*, 236-237.

¹⁹⁸⁶ Gray, *International Law*, 237.

under Article 51 if necessary. This was followed by Israel's launch of a massive assault on Lebanon where *Hezbollah* operates.¹⁹⁸⁷

The international community was divided in its response to the Israeli actions. While many -though by no means all- western states, at least initially, showed some sympathy for Israel's reaction,¹⁹⁸⁸ Arab and other predominantly Muslim states, as well as China and Venezuela, condemned the attack on Lebanon as a violation of international law.¹⁹⁸⁹ The Non-Aligned Movement, representing 118 states, declared:

*The Heads of State or Government expressed strong condemnation of the relentless Israeli aggression launched against Lebanon and the serious violations by Israel of the Lebanese territorial integrity and sovereignty, and in this regard charged Israel with full responsibility for the consequences of its aggression.*¹⁹⁹⁰

¹⁹⁸⁷ Gray, *International Law*, 237-244.

¹⁹⁸⁸ Gray, *International Law*, 238; for US and German reactions, see, for example: "In quotes: Lebanon reaction", BBC news, 13/07/2006; available at: http://news.bbc.co.uk/1/hi/world/middle_east/5175886.stm; last accessed 26/10/2011; for British reaction, see: "Britons warned on Lebanon crisis", BBC news, 14/07/2006; available at: http://news.bbc.co.uk/1/hi/uk_politics/5180116.stm; last accessed 26/10/2011; there were, however, some western states that immediately condemned the Israeli attacks as contrary to international law, such as Spain ("El embajador israeli lamenta la 'completa falta de comprension' de Espana en el conflicto con Libano", *Informativos Telecinco.com*, 14/07/2006; available at: http://www.informativos.telecinco.es/ataque/libano/israel/dn_28559.htm; last accessed 26/10/2011), and Norway ("Norway condemns Israeli attacks on Lebanon", *Aftenposten*, Nina Berglund, 13/07/2006; available at: <http://www.aftenposten.no/english/local/article1387017.ece>; last accessed 25/10/2010; *Aftenposten* has since stopped its English-language service); see also: "Middle East Crisis: Diplomacy: Old Divisions Resurface, *The Guardian*, 18/07/2006, 5).

¹⁹⁸⁹ Gray, *International Law*, 238; Venezuela withdrew its ambassador in protest ("Venezuela Recalls Ambassador From Israel", *The Washington Post*, 03/08/2006; available at: <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/03/AR2006080301386.html>; last accessed 26/10/2011); further examples are: Pakistan ("Pak condemns Israeli aggression against Lebanon, Palestine", International News Network; available at: <http://www.onlinenews.com.pk/details.php?id=99895>; last accessed 26/10/2011) and Armenia ("Armenia Condemns Israeli attack on Lebanon", 14/07/2006; available at: <http://www.armenialiberty.org/content/Article/1583047.html>; last accessed 25/10/2010); as far as Islamic states are concerned: see Final Communiqué of the Annual Coordination Meeting of Ministers of Foreign Affairs of Member States of the Organization of the Islamic Conference, 25/09/2006, para. 32; available at: <http://unispal.un.org/UNISPAL.NSF/0/A9B229D533A120118525726D0053F8A3>; last accessed 26/10/2011.

¹⁹⁹⁰ 14th Summit Conference of Heads of State or Government of the Non-Aligned Movement, Havana, Cuba, 11th to 16th of September, 2006, Final Document, NAM 2006/Doc. 1/Rev. 3, para. 142; available at: <http://unispal.un.org/UNISPAL.NSF/0/0E6B10A08491695E852571ED00534B7E>; accessed 26/10/2011; Gray, *International Law*, 243.

As the Israeli attack continued, moreover, even many of Israel's erstwhile supporters began to view the use of force by Israel as "disproportionate".¹⁹⁹¹

This conflict therefore does again not evidence the existence of rules in customary international law, which allow forcible action against terrorists by attacking the state "harbouring" them. The divisions which immediately surfaced within the international community demonstrate a lack of sufficient support among states in favour of more generous rules on the use of force in terrorist-related situations.

Ethiopia/Somalia (2006/2007)

Ethiopia belatedly attempted to justify its 2006/2007 intervention in Somalia's civil war against the UIC as self-defence, based on alleged UIC plans to launch "terrorist attacks" against Ethiopia.¹⁹⁹² However, there were so many factors that led to Ethiopia's decision to intervene, that it is difficult to assert any of the facts.¹⁹⁹³ For example, Ethiopia's foe, Eritrea, supported the UIC, while Ethiopia supported the virtually powerless Transitional Federal Government.¹⁹⁹⁴ It also remains unclear, whether the UIC could reasonably be classified as a terrorist organization, even though the USA tended to claim that it was.¹⁹⁹⁵ Certainly, the whole episode received

¹⁹⁹¹ See, for example: "Statement of the European Union"; "Russian Government statement"; both available at: "In quotes: Lebanon reaction", BBC news, 13/07/2006; available at: http://news.bbc.co.uk/1/hi/world/middle_east/5175886.stm; last accessed 26/10/2011; Gray, *International Law*, 238-239, 241.

¹⁹⁹² Despite apparently having sent troops to Somalia as early as summer 2006, the Ethiopian government denied having any soldiers there. Only in December 2006 did the Ethiopian government acknowledge the fact, and then proceeded to claim self-defence, without, however, ever reporting its actions to the Security Council, as it would have been obliged to do under Article 51; Gray, *International Law*, 244, 248, 250.

¹⁹⁹³ Gray, *International Law*, 244-252.

¹⁹⁹⁴ Gray, *International Law*, 246.

¹⁹⁹⁵ Gray, *International Law*, 249, 251.

so little international attention and attracted so little comment, that it cannot serve as a precedent in any way.¹⁹⁹⁶

Turkey/Kurdish terrorists (PKK) in Iraq (2007/2008)

In response to repeated terrorist attacks, carried out by PKK terrorists, often based in the Kurdish-controlled areas of Northern Iraq, the Turkish Parliament approved a measure allowing the Turkish government to deploy forces to Iraq without that state's consent.¹⁹⁹⁷ It was not in dispute that Iraq, at the time, was incapable of dealing with the situation in northern Iraq. In late 2007/early 2008 Turkey mounted some air raids on Iraq, and on occasion Turkish ground troops crossed the border into Iraq.¹⁹⁹⁸

Turkey did not report these actions to the Security Council, and did not offer any legal justification for them.¹⁹⁹⁹ It was perhaps for that reason that international reaction was more muted.

However, as far as there was international reaction, it was -in the main- not positive. The EU warned Turkey against using force on Iraqi territory.²⁰⁰⁰ In a statement in reaction to the Turkish parliament's authorization to do so, the EU emphasized:

*The EU and Turkey have regularly reiterated that they remain committed to the independence, sovereignty, unity and territorial integrity of Iraq.*²⁰⁰¹

¹⁹⁹⁶ Gray, *International Law*, 249-251.

¹⁹⁹⁷ Gray, *International Law*, 143; Tom Ruys, "Quo Vadis Jus ad Bellum?: A legal analysis of Turkey's Military Operations Against the PKK in Northern Iraq", *Melb. J. Int'l L.*, Vol. 9, 2008, 334-364.

¹⁹⁹⁸ Gray, *International Law*, 142-143.

¹⁹⁹⁹ Gray, *International Law*, 143.

²⁰⁰⁰ "EU Urges Turkey Not to Attack Kurdish Rebels in Iraq", *Deutsche Welle*, 17/10/2007; available at: <http://www.dw-world.de/dw/article/0,,2828232.00.html>; last accessed 26/10/2011.

²⁰⁰¹ "EU Urges Turkey Not to Attack Kurdish Rebels in Iraq", *Deutsche Welle*, 17/10/2007; available at: <http://www.dw-world.de/dw/article/0,,2828232.00.html>; accessed 26/10/2011.

Even the USA initially opposed Turkish military intervention,²⁰⁰² although it later became increasingly ambivalent. Having just met the Turkish Prime Minister, President Bush Jnr. even seemed supportive.²⁰⁰³

The WEU, too, sought refuge in ambiguities. While reiterating Turkey's respect for Iraq's sovereignty, and emphasizing Turkey's right to "protect its citizens" against terrorist acts carried out by the PKK, it also called on Turkey to "refrain from any disproportionate military action in its fight against PKK terrorism."²⁰⁰⁴

Despite international reaction to Turkish incursions into Iraq in 2007 thus being less adverse than in previous cases, the negative attitude expressed by many states, and the lack of any legal reasoning seem to confirm that even those states most closely associated with the "war on terror" do not find it possible to claim a right to use force against terrorists in other states based on customary international law. The fact Turkey itself refrained from providing any legal justification for its actions further undermines the claim that 09/11 led to the "instant" creation of customary international law.

²⁰⁰² "US Struggles to avert Turkish intervention in northern Iraq", Simon Tisdall, *The Guardian*, 23/03/2007, 21; Gray, *International Law*, 143.

²⁰⁰³ White House Press Release, 05/11/2007; available at: <http://merln.ndu.edu/archivepdf/EUR/WH/20071105-3.pdf>; last accessed 26/10/2011.

²⁰⁰⁴ "Terrorist activities on the Turkey/Iraq border", Report submitted on behalf of the Political Committee, Assembly of West European Union, 04/12/2007; available at: http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2007/1994.pdf; last accessed 26/10/2011; the Report in the following year, dated 03/12/2008, went slightly further in that it, for the first time, "confirmed Turkey's right of self-defence", but then went on to again call on Turkey "to refrain from disproportionate military action"; available at: http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2008/2017.php#P216_56707; last accessed 26/10/2011.

More recent events

In March 2008 Colombian troops attacked alleged FARC camps²⁰⁰⁵ in Ecuador. Colombia claimed to be acting in self-defence.²⁰⁰⁶ Nevertheless, the Permanent Council of the OAS, on March 5, 2008, passed a resolution condemning the Colombian incursion as “a violation of the sovereignty and the territorial integrity of Ecuador and of principles of international law.”²⁰⁰⁷

In a repetition of events described above, Turkey, in 2011, again entered Iraqi territory in order to combat PKK terrorists. Turkey once more refrained from offering a legal justification or informing the Security Council and international reaction was again muted. Furthermore, the attitude of the Iraqi central government and the Kurdish regional government in northern Iraq remained ambiguous.²⁰⁰⁸

In October 2011, Kenyan troops entered Somali territory to combat *al-Shabaab* terrorists, blamed for abductions of foreign tourists in Kenya. Kenya claimed to have received the prior consent of the officially recognized Somali government.²⁰⁰⁹

²⁰⁰⁵ “FARC” stands for “Revolutionary Armed Forces of Colombia”; this group is considered to be a terrorist organization by many states.

²⁰⁰⁶ “Ecuador pulls diplomat from Bogota”, CNN, 02/03/2008; available at: <http://edition.cnn.com/2008/WORLD/americas/03/02/chavez.colombia/index.html?iref=allsearch>; last accessed 26/10/2011; Ruys, “*Quo vadit*”, 357-358.

²⁰⁰⁷ CP/Resolution 930 (1632/08) of March 5, 2008; Convocation of the Meeting of Consultation of Ministers of Foreign Affairs and Appointment of a Commission; available at:

<http://www.oas.org/council/resolutions/res930.asp>; last accessed 26/10/2011; Ruys, “*Quo vadit*”, 358.

²⁰⁰⁸ “Turkey vows to keep up attacks on militants in Iraqi Kurdistan”, Sebnem Arsu, *International Herald Tribune*, 24/08/2011, 3; “Turkey launches raid into Iraq after an attack by Kurdish rebels”, Justin Vela, *The Independent*, 20/10/2011, 34; “Iraqi Politicians Condemn Turkish Bombing of Iraqi Kurds”, *Radio Free Europe*, 20/08/2011; available at: <http://www.rferl.org/articleprintview/24302813.html>; last accessed 26/10/2011; “Turkey-PKK clashes may reignite civil war, says Kurdish presidency”, *AK News*, Karzan Kanabi, 18/08/2011; “Turkey vows to pursue Kurdish attackers”, Sebnem Arsu, *International Herald Tribune*, 20/10/2011, 4; as far as the Iraqi/Iraqi Kurdish attitude is concerned, many reports stress the official protests lodged by both the national and the regional governments in Iraq against the Turkish incursions. On the other hand, the *International Herald Tribune* reported that the Iraqi government was offering the Turkish government a joint offensive against the PKK in northern Iraq, and many reports point out that the Kurdish regional government was attempting to “sit on the fence”, as far as Turkey’s actions in Iraq are concerned.

²⁰⁰⁹ “Kenianische Armee rückt in Somalia vor“, *Frankfurter Allgemeine Zeitung*, 19/10/2011, 6; “Kenya plans fresh assault in Somalia after hostage dies“, Daniel Howden, *The Independent*, 20/10/2011, 39.

Regarding the recent and current “targeted killings” of terrorists in Yemen, and in Pakistan, carried out by the USA, it is generally assumed that both Yemen²⁰¹⁰ and Pakistan²⁰¹¹ have, certainly in the past, given their consent to these actions.

Summary

Based on the analysis of subsequent events it must be concluded that the international community’s reaction to 09/11, and to the military action launched by the USA and the UK on October 7, 2001, did not “instantaneously” create new customary international law. Gray has therefore concluded that those arguing that the international community’s reaction to 09/11 had “changed” the law “have not been able to adduce state practice in support of their argument other than that of Operation *Enduring Freedom*.”²⁰¹²

²⁰¹⁰ For example, on November 29, 2010, *The International Herald Tribune* reported, referring to a cable from the Ambassador at the US Embassy in Yemen to Washington D.C. dated January 4, 2010 (leaked via Wikileaks), the following on a conversation between Yemen President Ali Abdullah Saleh and US Gen. David H. Petraeus (Scott Shane and Andrew W. Lehren, “Behind the Scenes in World’s Hot Spots, U.S. Diplomacy Uncloaked”, 1, 3): “For instance, it has been previously reported that the Yemeni government has sought to cover up the American role in missile strikes against the local branch of Al Qaeda. But a cable’s fly-on-the-wall account of a January meeting between the Yemeni president, Ali Abdullah Saleh, and Gen. David H. Petraeus, then the American commander in the Middle East, is breathtaking...”; See also: Cable ID 10SANAA4 of January 4, 2010, para. 5: “‘We’ll continue saying the bombs are ours, not yours,’ [President] Saleh [of Yemen] said, prompting Deputy Prime Minister Alimi to joke that he had just ‘lied’ by telling Parliament that the bombs in Arhab, Abyan, and Shebwa were American-made but deployed by the ROYG [Republic of Yemen Government].”; available at: <http://cablegate.wikileaks.org/cable/2010/01/10SANAA4.html>; accessed 02/12/2010 (currently unavailable); see also: “Wikileaks cables: Yemen offered US ‘open door’ to attack al-Qaida on its soil”, Robert Booth, Ian Black, *The Guardian*, 03/12/2010; available at: <http://www.guardian.co.uk/world/2010/dec/03/wikileaks-yemen-us-attack-al-qaida>; last accessed 26/10/2011.

²⁰¹¹ Pakistan has officially condemned the American strikes on Pakistani territory (see, for example, the Press Release of the Pakistani Foreign Ministry of March 27, 2009, PR. No. 330; available at: <http://www.pid.gov.pk/press27-03-09.htm>; accessed 26/10/2011); it is, however, widely assumed that Pakistan has privately granted the US permission to carry out such strikes; see, for example, “U.S. Drone Activities in Pakistan”, Report by Greg Bruno, 19/07/2010, *Council on Foreign Relations*, which alleges a possible secret agreement in 2008 between the two states; available at: http://www.cfr.org/publication/22659/us_drone_activities_in_pakistan.html#p6; last accessed 26/10/2011; furthermore, a UN report has called upon states such as Pakistan to “publicly disclose the scope and limits of any permission granted for drone strikes on their territories”; see “U.N. Report Highly Critical of U.S. Drone Attacks”, Charlie Savage, *The New York Times*, 03/06/2010, A10.

²⁰¹² Gray, *International Law*, 194, 201, 231, 252-253; she, in 2008, also points out that the US reaction to the Russian intervention in Georgia in 2002 made it “more difficult” to claim the existence of a new customary rule

Although the USA has shown more tolerance when allies, such as Israel and Turkey, have used force against terrorists in other states, it has opposed a state's right to attack terrorist bases in other states when that state has not been an ally, such as when Russia intervened in Georgia in 2002. The Europeans have been even more reluctant to support a victim state's unilateral use of force against terrorists, and other states, such as the members of the Non-Aligned Movement, have been outspoken in their opposition to any such concept. Lastly, the lack of development of a firm rule in customary international law is also confirmed by former US President Bush's recollections on dealing with Pakistan in 2008:

In the middle of 2008, I was tired of reading intelligence reports about extremist sanctuaries in Pakistan... 'Mr President,' he [an unnamed SEAL] said, 'we need permission to kick some ass inside Pakistan.' I understood the urgency of the threat and wanted to do something about it. But on this issue, Musharraf's judgment had been well-founded...No democracy can tolerate violations of its sovereignty.²⁰¹³

The developments since September/October 2001 therefore disprove the argument that customary international law was created at that time. States remain extremely reluctant to expand the right of self-defence, be it under Article 51 or under customary international law. The question whether customary international law can be created by one singular event, and thus instantaneously, is therefore not relevant in this case.

and claims that states' "willingness" to accept a new "interpretation of Article 51" after 09/11 "later dissipated in the disagreement" over Iraq in 2003; Meesen, "Unilateral", 349; he argues that the "actual interventions in Afghanistan and Iraq" do not "suffice to establish a new rule of customary law". Nevertheless, writing in 2003, he thinks it possible that new customary law may be "emerging", allowing what he describes as "unilateral recourse to military action against society-induced terrorist attacks"; Myjer, White, "The Twin Towers", 16-17; by implication; they argue Operation *Enduring Freedom* "may contribute to a development of international law", thereby obviously denying such a change had already taken place; Byers, "Terrorism", 408, 410; writing in 2002, after Operation *Enduring Freedom* had commenced, he stated that "even today, most states would not support a rule that opened them up to attack whenever terrorists were thought to operate within their territory." He, however, does think it possible the USA may have succeeded in slightly expanding the concept of self-defence.

²⁰¹³ Bush, *Decision*, 217 (emphasis by author).

e) Conclusion on the legality of Operation *Enduring Freedom*

The US-led attack on Afghanistan in response to the Al Qaeda attacks on New York and Washington D.C. was contrary to international law.²⁰¹⁴

Attempts at justifying the use of force by arguing it was in accordance with Article 51 are not convincing. Although there can be no doubt that the attacks of September 11, 2001, were of sufficient gravity to be classified as “armed attacks”, they lacked one decisive requirement under Article 51: they could not be attributed to a state.

Although the Taliban government of Afghanistan could be accused of violating international law by tolerating Al Qaeda on its territory, it cannot be successfully argued that the attacks of September 2001 were imputable to the state of Afghanistan.²⁰¹⁵

The war on Afghanistan could not be justified under customary international law either. As far as customary international law, as it stood prior to 09/11, is concerned, comparable examples of state practice have not evidenced sufficient legal support on the part of other states to justify the conclusion that customary international law allows the use of force against states “harbouring” terrorists, or against terrorist bases in other states without their consent.²⁰¹⁶ In fact, in most instances there has been widespread opposition to the assumption of such a right.

²⁰¹⁴ Quigley, “The Afghanistan”, 562; Bowring, *The Degradation*, 57-58; Paust, “Use of Armed Force”, 539-544, 556-557; although he views the attacks on Al Qaeda in Afghanistan as legal, he views the US attacks on the Taliban as “highly problematic”, as far as their legality is concerned; An-Na’im, “Upholding”, 162-171; he does not offer a categorical legal assessment of the intervention, but voices doubts, and points out that there was a definite “lack of procedural and institutional requirements”, and criticizes the “failure of the international community ...to check or to regulate the massive and indefinite unilateral response by the United States.”

²⁰¹⁵ Quigley, “The Afghanistan”, 545; Paust, “Use of Armed Force”, 539-544; Nabati, “International Law”, 780-781 (referring to terrorism and harbouring terrorists in general).

²⁰¹⁶ Paust, “Use of Armed Force”, 539-544 (as far as attacks against states “harbouring terrorists” are concerned).

Irrespective of whether customary international law can be created “instantaneously”, the argument that the international community’s reaction to 09/11 in the run-up and the aftermath of Operation *Enduring Freedom* had done so, also fails to convince. In comparable circumstances states have, since 09/11, mostly, sometimes overwhelmingly, opposed states that have attacked other states because of the presence of terrorists on their territory. At times even the US has stressed that the sovereignty of states has to be respected, whether or not terrorists are able to operate there.²⁰¹⁷ It must therefore be concluded that attacking Afghanistan, in response to 09/11, with the far-reaching goal of deposing that state’s government, could not be reconciled with international law.

That the USA, when reacting to the terrorist attacks of 09/11, did also not pay too much attention to international law, is somewhat confirmed by a detailed analysis carried out by Kerton-Johnson. Having surveyed more than 400 addresses, documents, speeches, and radio addresses by US President Bush in the period between September 11, 2001, and December 31, 2001, Kerton-Johnson comes to the conclusion that arguments relating to international law made up less than 5 % of all arguments put forward by Bush in defence of the attack on Afghanistan.²⁰¹⁸

The world’s reaction to 09/11 and to the American-led attack on Afghanistan is perhaps best explained, not by trying to give it legal meaning, but by recognizing the universal shock felt by people and governments all over the world in the face of such

²⁰¹⁷ Gray, *International Law*, 231, 252-253; she concludes that the US reaction to the Russian intervention in Georgia in 2002 in particular made it “more difficult to claim that the events of 9/11 and the response have established a new customary rule”.

²⁰¹⁸ Kerton-Johnson, “Justifying”, 992-994; Maogoto, “America’s”, 39; Gray, *International Law*, 213; she points out that international law is not even mentioned in the US *National Security Strategy* of 2006; Byers, “Terror and the Future”, 119 (in this context, he refers to a “casual disregard for international opinion and the laws of war” in the USA).

a massive terrorist attack.²⁰¹⁹ Many states wanted to demonstrate their solidarity with the USA, without wanting to create law, and criticism of US actions very likely seemed inappropriate.²⁰²⁰ Some governments might have also attempted to salvage the multilateral organizations, such as the UN and NATO, by acquiescing in US action, realizing that the USA would and could not be stopped from going to war, but that the Americans, on the other hand, would not hesitate to destroy these organizations if they encountered too much opposition there.²⁰²¹

Lastly, it cannot be overlooked that the Taliban regime in Afghanistan was almost completely isolated, and widely disliked within the international community, which made winning support much easier.²⁰²² As the Iraq War in 2003 against the backdrop of Saddam Hussein's widely detested regime demonstrated, that alone will not lead to international support for a war against a state, but it certainly facilitates gaining it.

3. American and British motives

Before having a brief look at further developments in Afghanistan following the attack on it, US/UK motives for going to war against Afghanistan, despite having questionable grounds for doing so, should be examined.

²⁰¹⁹ Quigley, "The Afghanistan", 554; Wouters, Naert, "Shockwaves", 535; Murphy, "Afghanistan", 85-86.

²⁰²⁰ Quigley, "The Afghanistan", 548; Wouters, Naert, "Shockwaves", 535; Murphy, "Afghanistan", 85-86.

²⁰²¹ Reisman, "International Legal Dynamics", 65; he argues the UN simply was "confirming and acceding to ... a fait accompli"; Lievin, "The Secret", 248-249; Lievin describes western support after 09/11 as "conditional"; Kerton-Johnson, "Justifying", 991-997, 1003-1007; Charney, "The Use", 835, 837-838; Quigley, "The Afghanistan", 553, 555-556; he makes the point that the USA and the UK would have vetoed any attempt by the UN to intervene as far as Afghanistan is concerned; Myjer, White, "The Twin Towers", 16; Ratner, "Jus Ad Bellum", 915, 916; Dorransoro, "The Security Council", 452-453.

²⁰²² Lievin, "The Secret", 251-252; he, for example, points out that the Taliban treatment of the Chechen rebels and their recognition of an independent Chechnya made it much easier for Russia to acquiesce in the US-led attack on Afghanistan; Steele, *Ghosts*, 219.

It seems obvious that the USA and the UK, to some extent, intervened in Afghanistan for the reasons given by them in their official justifications.²⁰²³ Afghanistan had refused to move against Al Qaeda, and its leader Osama Bin Laden, despite having been asked to do so by the Security Council. Negotiations with the Taliban had proved fruitless. In order to avert future attacks, and in order to demonstrate that terrorists mount such attacks against the USA at their peril, it seemed necessary to destroy Al Qaeda militarily, and to overthrow the Taliban regime, in order to prevent Al Qaeda resettling there, once the military conflict was over.

Other, perhaps less important and less worthy, motives should, however, not be ruled out either. Afghanistan was and remains a major player in the drugs trade. Although the Taliban, by most accounts, had eradicated the vast majority of poppy-growing in the country,²⁰²⁴ it does not seem far-fetched to assume that western powers thought they would be more successful at preventing the trade.

The issue of pipelines for the transport of oil and gas from the Central Asian Republics to Pakistan and India via Afghanistan, which had surfaced in the mid-1990s and is, currently, again being discussed, might also have provided some additional motivation.²⁰²⁵ With leading politicians, such as Bush and Blair, probably already contemplating military action against Iraq, an encircling strategy in relation to the ever-present threat of Iran must also be a likely strategic motive.

Creating stability within Pakistan was probably considered to be an important goal. Pakistan, after all a nuclear power, was and is on the verge of collapse. Its decision, in the 1980s, to involve itself with Islamic radicals in order to fight the Soviets and gain

²⁰²³ Bush, *Decision*, 183-221, especially at 184; Blair, *A Journey*, 341-370; Quigley, "The Afghanistan", 550; Roy, *Der Falsche*, 21.

²⁰²⁴ Rashid, *Descent*, 19; Maley, *The Afghanistan*, 197-198; Cowper-Coles, *Cables*, 83.

²⁰²⁵ Quigley, "The Afghanistan", 550; Koelbl, *Ihlauf, Krieg*, 22.

influence in Afghanistan, resulted in “blowback”. Already long before the war against Afghanistan, Pakistan had become unstable, veering from short “democratic” episodes to usually more enduring military dictatorships. The frontier region between Pakistan and Afghanistan had long been lost to the government’s control, and Al Qaeda was exploiting that situation.²⁰²⁶ Destroying the organization in Afghanistan would thus help stabilize the neighbouring country.

Lastly, it cannot be ruled out that the American and British governments were indeed attempting to create new, more permissive rules in international law.²⁰²⁷ Following on from the intervention in the Kosovo (based on the very contentious concept of “humanitarian intervention”),²⁰²⁸ Afghanistan (justified as part of the “war on terror”) might have been viewed as a stepping stone to Iraq in 2003 (and the concept of “preventive military action”),²⁰²⁹ thus creating ever more exceptions to the ban on the use of force, to be exploited by the “sole super-power”, the USA.²⁰³⁰ There is some indication of such a motive in Blair’s recollections of the decision to intervene in Afghanistan:

In the Chicago speech of April 1999 I had already set out a doctrine that put intervention -if necessary, military intervention- at the heart of creating a more just international community of nations. I had enlarged the concept of national interest,

²⁰²⁶ Rashid, *Descent*, 24-26, 30-32, 37-39, 48-49; Burke, *Al Qaeda*, 103-104, 109, 115; Coll, *Ghost*, 438-442, 466, 483-485, 553, 556.

²⁰²⁷ Byers, “Terrorism”, 409-410; and “Terror and the Future”, 119, 121, 123-126; Rashid, *Descent*, XLVI-XLVII; Dorronsoro, “The Security Council”, 453-454.

²⁰²⁸ The legality of “humanitarian interventions” is, for example, discussed in: House of Commons, *Foreign Affairs Committee*, Fourth Report, June 7, 2000, (on Kosovo) esp. paras. 126-132; available at: <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmcaff/28/2802.htm>; last accessed 20/07/2012.

²⁰²⁹ As far as “preventive military action” is concerned, a short discussion can, for example, be found in: *A more secure world: Our shared responsibility*, Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, 2004, paras. 188-192; available at: <http://www.un.org/secureworld/report2.pdf>; last accessed 20/07/2012.

²⁰³⁰ Reisman, “The Raid”, 123-124 (referring to the US raid on Baghdad in 1993); Kelly, “Time Warp”, 2, 12, 19-22, 36; and Gazzini, *The changing*, 203-204; both claim the USA (and others) may be attempting to “legalize” armed reprisals; Rashid, *Descent*, XLVI-XLVII; he believes “the neocons used 09/11 as justification for making themselves exempt from American or international law”; Gray, *International Law*, 231; regarding the right to use force in response to terrorism, Gray concludes: “Here, as elsewhere, we see the USA claiming rights for itself that it is unwilling to see exercised by others”.

*arguing that in an interdependent world, our national interest was engaged whenever injustice or danger existed. So I came to this new challenge with what was already a highly developed instinct for the bold approach and for being prepared to intervene rather than let be.*²⁰³¹

Such a law creation approach would help explain why the USA decided to involve most of the multilateral organizations it was a member of in the run-up to the Afghanistan war, but then excluded them when it came to the actual intervention (except for a few trusted allies, such as the UK), and reverted to unilateralism.²⁰³²

As far as British motives are concerned it should be added that there is little doubt that the Blair government sought to enhance its, and Britain's status by being the USA's "preferred" ally.²⁰³³ Referring to Afghanistan, former UK Prime Minister Blair has stated:

*It was also in our national interest to defeat this menace and if we wanted to play a major part in shaping the conduct of any war, we had to be there at the outset with a clear and unequivocal demonstration of support. I believed in the alliance with America, I thought its maintenance and enhancement a core objective of British policy,...*²⁰³⁴

²⁰³¹ Blair, *A Journey*, 368.

²⁰³² Kelly, "Time Warp", 21-22, 36-37; Lieven, "The Secret", 247-249; he describes US policy post- 09/11 as "harshly nationalist"- Lieven points out that the US was unwilling to "heed even a near-unanimous opinion of the 'international community'", when that opinion conflicted with US positions. Only when fighting terrorists was cooperation welcome; Kerton-Johnson, "Justifying", 991-991, 1003-1007; he argues that the USA's decision to, in effect, proceed unilaterally in Afghanistan, despite having the opportunity to act on the basis of international consensus, was confirmation of the fact that the USA was expanding its "exceptionalist model", and was solely focused on its own "national interest" and "national morality"; Charney, "The Use", 835; he describes US foreign policy leading up to Operation *Enduring Freedom* as "an unfortunate failure...to promote the objectives of the United Nations Charter."; Stahn, "Terrorist Acts", 41; Stahn claims the Security Council was "manipulated to meet U.S. interests"; Hassanien, "International Law", 250-253; Maogoto, "International Law", 39, 41; Rashid, *Descent*, LIII, 65; he claims the USA "ignored the UN until after the bombing campaign against the Taliban had begun."; Rogers, *A War*, 28-29, 49, 66-69; Byers, "Terror and the Future", 119; O'Connell, *The Power*, 102.

²⁰³³ Cowper-Coles, *Cables*, XX, 238; the former UK Ambassador to Kabul (2008-2009, 2010) describes British policy as acting "as principal cheerleader for the American-led effort in Afghanistan". A strategy he claims "never" to have "quite understood" (at 238).

²⁰³⁴ Blair, *A Journey*, 352.

By following the USA's lead, the UK government seemed to assume it could increase British influence in the world.²⁰³⁵

D. Further Developments 2001-2011

As was to be expected, and in accordance with outsiders' past experiences in Afghanistan, military victory was achieved comparatively quickly by the USA and its allies.²⁰³⁶ With the support of the Afghan opposition to the Taliban, the Northern Alliance, who initially functioned as the allies' ground forces during the air campaign, the USA and its allies managed to depose the Taliban government within a few weeks.²⁰³⁷ Bombing raids specifically targeted suspected Al Qaeda bases, as well as the Al Qaeda leadership.²⁰³⁸

Following on from the Bonn Agreement of December 5, 2001, a new government was in place in Afghanistan by the end of the year.²⁰³⁹ Hamid Karzai was chosen by the Afghan leaders present in Bonn as the Head of the Afghan Transitional Administration, and formally took over on December 22, 2001.²⁰⁴⁰ In June 2002 a *Loya Jirga* was held, which elected him President.²⁰⁴¹

²⁰³⁵ Rashid, *Descent*, 65-66; Rogers, *A War*, 79.

²⁰³⁶ Rasanayagam, *Afghanistan*, 252; Ekaterina Stepanova, "US-Russia Cooperation in Afghanistan and Its Implications", *E. Eur. Const. Rev.*, Vol. 10, 2001, 92-95, 94; Loyn, *Butcher*, 268-269; Maley, *The Afghanistan*, 219-222; Rashid, *Descent*, 63; Rogers, *A War*, 30; Bush, *Decision*, 198-202, 206-207; Tomsen, *The Wars*, 595-598.

²⁰³⁷ Rasanayagam, *Afghanistan*, 252; Loyn, *Butcher*, 268-269; Rashid, *Descent*, 80-82; Rogers, *A War*, 3; Koelbl, *Ihlau, Krieg*, 137; Rice, *No Higher*, 91-92.

²⁰³⁸ Rasanayagam, *Afghanistan*, 252; Loyn, *Butcher*, 269.

²⁰³⁹ The Bonn Agreement was endorsed by the Security Council in Resolution 1383 (2001); Rasanayagam, *Afghanistan*, 252; Murphy, "Afghanistan", 87; Gray, *International Law*, 204; Maley, *The Afghanistan*, 224-228; Rashid, *Descent*, 95-96, 102-106

²⁰⁴⁰ Rashid, *Descent*, 106.

²⁰⁴¹ Rasanayagam, *Afghanistan*, 257.

First elections took place in 2004, which Karzai won.²⁰⁴² He was re-elected in disputed elections in 2009.²⁰⁴³ A new Constitution came into force in 2004.²⁰⁴⁴

The Bonn Agreement also led to the establishment of ISAF, as confirmed by UN Security Council Resolution 1386,²⁰⁴⁵ which was intended to support the new Afghan government in its attempts to stabilize and pacify the country. NATO took over the command of ISAF in 2003.²⁰⁴⁶

As has so often happened in the past in Afghanistan, however, the overwhelming military victory the allies achieved soon began to turn sour.²⁰⁴⁷ Many of the main objectives of the military campaign were not achieved.

Some of Al Qaeda's leaders, including in 2011 Bin Laden, were killed or captured. Many more, however, were able to flee to Pakistan.²⁰⁴⁸ The same is true of the Afghan Taliban, who often find a ready welcome in the frontier regions of Pakistan, since they are members of the same ethnic group as the locals (the Pashtuns). Consequently, the situation in Pakistan has become increasingly volatile.²⁰⁴⁹ Far from stabilizing the

²⁰⁴² Rasanayagam, *Afghanistan*, 267; Loyn, *Butcher*, 273.

²⁰⁴³ "Runoff ordered in Afghan elections marred by fraud", AP, 20/10/2009; available at:

<http://www.independent.co.uk/news/world/asia/karzai-agrees-to-second-election-showdown-1805921.html>;

"Relief for US as Karzai concedes election run-off", Julius Cavendish, *The Independent*, 21/10/2009; available

at: [http://www.independent.co.uk/news/world/asia/relief-for-the-us-as-karzai-concedes-election-runoff-](http://www.independent.co.uk/news/world/asia/relief-for-the-us-as-karzai-concedes-election-runoff-1806248.html)

[1806248.html](http://www.independent.co.uk/news/world/asia/afghan-chaos-as-abdullah-pulls-out-of-election-1813186.html); "Afghan chaos as Abdullah pulls out of election", Kim Sengupta, *The Independent*, 02/11/2009;

available at: [http://www.independent.co.uk/news/world/asia/afghan-chaos-as-abdullah-pulls-out-of-election-](http://www.independent.co.uk/news/world/asia/afghan-chaos-as-abdullah-pulls-out-of-election-1813186.html)

[1813186.html](http://www.independent.co.uk/news/world/asia/afghan-chaos-as-abdullah-pulls-out-of-election-1813186.html); all last accessed 26/10/2011.

²⁰⁴⁴ Rasanayagam, *Afghanistan*, 267; Gray, *International Law*, 204.

²⁰⁴⁵ UN Security Council Resolution 1386 (2001); Murphy, "Afghanistan", 92.

²⁰⁴⁶ NATO, "NATO's Role in Afghanistan"; available at: http://www.nato.int/cps/en/natolive/topics_8189.htm;

last accessed 26/10/2011.

²⁰⁴⁷ Bush, *Decision*, 207; the former US President describes this development as follows: "This strategy [low troop levels] worked well at first. But in retrospect, our rapid success with low troop levels created false comfort...".

²⁰⁴⁸ Rasanayagam, *Afghanistan*, 256; Loyn, *Butcher*, 287; Maley, *The Afghanistan*, 259; Rashid, *Descent*, 61, 91, 93, 98-99; Burke, *Al-Qaeda*, XXIII, 256; Rogers, *A War*, 4, 6, 13, 24, 30, 33, 38, 51, 188-192; Wright, *The Looming*, 371-373; Koelbl, *Ihlaui, Krieg*, 81-92; Bush, *Decision*, 213-215; Tomsen, *The Wars*, 607-610, 612-613; Steele, *Ghosts*, 39.

²⁰⁴⁹ Rasanayagam, *Afghanistan*, 274-275; Stepanova, "US-Russia", 94; Murphy, "Afghanistan", 79, 95-96; Gray, *International Law*, 204-205; Rashid, *Descent*, XXXVIII-XXXIX, 415; Rogers, *A War*, 4, 19, 30, 33, 188-191; Cyrus Hodes, Mark Sedra, *The Search for Security in Post-Taliban Afghanistan*, Adelphi-Paper 391,

country by removing the Taliban government in Afghanistan, it could be argued that the flood of Taliban and Al Qaeda refugees into Pakistan has brought that country to the brink.²⁰⁵⁰ Terror attacks are a common occurrence in Pakistan, and the Pakistan army is hardly able to establish any control in the border regions.²⁰⁵¹ Many assume that leading figures in Pakistan's military and security services do not want to combat the Taliban, having been close allies for many years now.²⁰⁵²

Arguably because the USA and the UK were distracted by the Iraq war, the situation within Afghanistan has been steadily deteriorating since 2003.²⁰⁵³ The Taliban have been resurgent, winning ever more support in rural areas.²⁰⁵⁴ The Security Council has since 2001 repeatedly had cause to deal with the lawless situation in many parts of the country.²⁰⁵⁵ The massive loss of local Afghan support for the West's campaign in Afghanistan is due to civilian casualties caused by NATO bombs, the very bad general security situation, and the intimidation and corruption associated with the

London: International Institute for Strategic Studies, 2007, 25; Bush, *Decision*, 213-215; *9/11 Commission Report*, 368.

²⁰⁵⁰ Loyn, *Butcher*, 289-291; Maley, *The Afghanistan*, 186, 261-264; Rashid, *Descent*, XXXVIII-XXXIX, LVII, 25, 32, 50, 53-54, 415; Koelbl, *Ihlauf, Krieg*, 62-80; Bush, *Decision*, 213-217; the former US President also recalls that US Vice President Cheney, prior to the launch of Operation *Enduring Freedom*, had "worried that the war could spill over into Pakistan, causing the government to lose control of the country and potentially its nuclear arsenal" (at 189); Cowper-Coles, *Cables*, 224.

²⁰⁵¹ Loyn, *Butcher*, 289-291; Maley, *The Afghanistan*, 186, 261-264; Rashid, *Descent*, XXXVIII-XXXIX, 25, 368-383.

²⁰⁵² Rasanayagam, *Afghanistan*, 274; Loyn, *Butcher*, 289; Maley, *The Afghanistan*, 259-261; Rashid, *Descent*, XXXVIII-XXXIX, 46, 52, 77-78; Koelbl, *Ihlauf, Krieg*, 66-67; Hodes, Sedra, *The Search*, 19-21; Bush, *Decision*, 187-188, 214; the former US President claims that the ISI has "retained close ties to Taliban officials"; *9/11 Commission Report*, 368; van Linschoten, Kuehn, "Separating", 7; Tomsen, *The Wars*, XIV, 181, 593-595, 620; the US Special Envoy to the *mujahedeen* (1989-1992) accuses Pakistan of currently conducting its "fourth proxy war in Afghanistan."

²⁰⁵³ Rasanayagam, *Afghanistan*, 273-275; Lieven, "The Secret", 250-251; Lieven, writing in 2002, predicts that the US response to Iraq and Iran might also lead to the collapse of international cooperation, as far as terrorism and Afghanistan are concerned; Gray, *International Law*, 204-205; Maley, *The Afghanistan*, 256-257; Rashid, *Descent*, XLI, XLIX, LVII, 64; according to statements made by him in an interview with Rashid, former UN Secretary General Kofi Annan also agrees with this analysis; Koelbl, *Ihlauf, Krieg*, 24; Roy, *Der Falsche*, 9-10, 11, 161; Cowper-Coles, *Cables*, XXIII; Tomsen, *The Wars*, 633.

²⁰⁵⁴ Rasanayagam, *Afghanistan*, 269-270; Loyn, *Butcher*, 274-281, esp. 277; Burke, *Al-Qaeda*, 292-293; Rashid, *Descent*, 240-261; Koelbl, *Ihlauf, Krieg*, 24, 93-112; Roy, *Der Falsche*, 10; Bush, *Decision*, 210-217; *9/11 Commission Report*, 370; Cowper-Coles, *Cables*, 209, 230, 248-249; Tomsen, *The Wars*, 630-631; Steele, *Ghosts*, 24, 283-310.

²⁰⁵⁵ UN Security Council Resolutions 1589 (2005); 1662 (2006); 1707 (2006); 1746 (2007); Loyn, *Butcher*, 280; according to him the *International Committee of the Red Cross* had by 2006 come to the conclusion that "the security situation was worse than at any time during three decades of conflict".

western-supported Karzai administration.²⁰⁵⁶ Support for the military campaign among the public in western states has also plummeted.²⁰⁵⁷

Especially the USA should not have been surprised by this negative development. In an analysis of October 2, 2001, provided by the US *Defense Intelligence Agency*, it was predicted that:

*Al Qaeda may leave a hard-core dedicated cadre to fight, while the more important parts simply relocate to another country...The Islamic fundamentalist movements would also gain more propaganda value out of any allied mass deployment. If the ground deployment involves mass and duration, there is a strong probability that the ground troops will become the targets of another conflict, even after al Qaeda are eradicated...Air strikes will also involve an inevitable proportion of civilian casualties, probably disproportional to the size of the target. Strikes at these locations weld a bond between al Qaeda, Taliban and the wider Afghani population.*²⁰⁵⁸

In 2007, President Bush Jr., after having outlined the “remarkable success” of the western intervention in Afghanistan, went on to acknowledge:

Across Afghanistan last year, the number of roadside bomb attacks almost doubled, direct fire attacks on international forces almost tripled, and suicide bombings grew nearly five-fold. These escalating attacks were part of a Taliban

²⁰⁵⁶ Murphy, “Afghanistan”, 94-95, 100; Loyn, *Butcher*, 271, 274-281, 294, 296, 307; Maley, *The Afghanistan*, 249-250; Rashid, *Descent*, 106 (as far as the detrimental effect of the many civilian casualties is concerned); Rogers, *A War*, 9, 10, 11, 18, 32, 36-37, 46, 52, 79; Koelbl, Ihlau, *Krieg*, 13, 142; Hodes, Sedra, *The Search*, 12, 14; Bush, *Decision*, 211 (he explicitly refers to “too much corruption” in Afghanistan); van Linschoten, Kuehn, “Separating”, 3; Cowper-Coles, *Cables*, 81 (corruption), 162 (civilian deaths); Tomsen, *The Wars*, 590-591; Steele, *Ghosts*, 43.

²⁰⁵⁷ “Leading article: Our Afghan exit is long overdue”, *The Independent*, 21/11/2010; available at: <http://www.independent.co.uk/opinion/leading-articles/leading-article-our-afghan-exit-is-now-overdue-2139648.html>; “Afghanistan-Umfrage: Deutsche wollen raus”, FOCUS online, 03/12/2009; available at: http://www.focus.de/politik/deutschland/afghanistan-umfrage-deutsche-wollen-raus-aid_459941.html; “CNN Poll: Afghanistan War opposition at all-time high”, Paul Steinhauer, CNN, 01/09/2009; available at: <http://politicalticker.blogs.cnn.com/2009/09/01/cnn-poll-afghanistan-war-opposition-at-all-time-high/>; “Voters turn against war in Afghanistan”, Nigel Morris and Kim Sengupta, *The Independent*, 28/07/2009; available at: <http://www.independent.co.uk/news/uk/politics/voters-turn-against-war-in-afghanistan-1763227.html>; all last accessed 26/10/2011; Tomsen, *The Wars*, 654-655.

²⁰⁵⁸ Defense Intelligence Agency, Cable, “HR (Excised)/Veteran Afghanistan Traveler’s Analysis of Al Qaeda and Taliban, Exploitable Weaknesses”, Secret, October 2, 2010; available at: The National Security Archive, *Volume VII: The Taliban File*, Documents 28; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB97/index.htm>; last accessed 26/10/2011.

*offensive that made 2006 the most violent year in Afghanistan since the liberation of the country.*²⁰⁵⁹

Given such “progress”, many observers expect the western forces to be withdrawn in the near future which in turn means that many Afghans are hedging their bets by supporting the Taliban whom they expect to return to power in the long run.²⁰⁶⁰

NATO has reacted to the deteriorating situation in Afghanistan by pouring more troops into the country, a burden mainly carried by the USA.²⁰⁶¹ Due to the incompetence and weakness of the Afghan government, and the inability of the fledgling Afghan army, the situation has nevertheless not improved.²⁰⁶² Most observers see scant chance of the Afghan army being able to take over responsibility for the security in the country, once western troops leave.²⁰⁶³ The Afghan government, meanwhile, is completely dependent on outside aid, currently mainly provided by the USA.²⁰⁶⁴

While there is little doubt that Al Qaeda’s operations have been disrupted because of its leadership being displaced or killed,²⁰⁶⁵ there is no doubt that the terror organization still exists. It seems that Al Qaeda is still able to inspire some people,

²⁰⁵⁹ “President Bush Discusses Progress in Afghanistan, Global War on Terror”, February 15, 2007; Mayflower Hotel, Washington D.C.; available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2007/02/20070215-1.html>; last accessed 26/10/2011; in 2004, the *9/11 Commission* stated that some aid workers were warning that “Afghanistan is the near the brink of chaos” (*9/11 Commission Report*, 370); in August 2011, the *Independent* published an article entitled “US forces suffer their deadliest month yet in Afghan campaign”, David Lisborne, *The Independent*, 31/08/2011, 25.

²⁰⁶⁰ Former UK Foreign Secretary David Miliband, writing in *The Independent*; “David Milliband: The army alone cannot defeat this Taliban offensive”, *The Independent*, 25/02/2009; available at: <http://www.independent.co.uk/opinion/commentators/david-miliband-the-army-alone-cannot-defeat-this-taliban-insurgency-1631293.html>; last accessed 26/10/2011; Roy, *Der Falsche*, 10; Cowper-Coles, *Cables*, XXII; Steele, *Ghosts*, 24-26.

²⁰⁶¹ Cowper-Coles, *Cables*, XIX-XX, 176; the former UK Ambassador to Kabul claims that the USA, by 2011, was spending \$ 125 billion/year on Afghanistan, while the UK was burdened with about GBP 6 billion/year in costs. Meanwhile, more than 2000 “coalition” soldiers have been killed, and tens of thousands of Afghans have lost their lives; Steele provides similar figures (in: *Ghosts*, 24-25).

²⁰⁶² Murphy, “Afghanistan”, 88, 95, 99; Loyn, *Butcher*, 274-281, 294, 296, 307; Cowper-Coles, *Cables*, XXII, 156 (Karzai’s weakness); Tomsen, *The Wars*, 590-591, 630-631.

²⁰⁶³ Rashid, *Descent*, 203-205; Cowper-Coles, *Cables*, XXII.

²⁰⁶⁴ Murphy, “Afghanistan”, 88; Cowper-Coles, *Cables*, 228; Tomsen, *The Wars*, 590.

²⁰⁶⁵ Rasanayagam, *Afghanistan*, 252; Burke, *Al-Qaeda*, 260-261.

and instigate terror attacks all over the world, even if there has so far been no event of comparable magnitude as 09/11.²⁰⁶⁶

Meanwhile, the drugs trade originating from Afghanistan is once again flourishing.²⁰⁶⁷ Iran, too, has benefited from the situation, trying to increase its influence within the country.²⁰⁶⁸ Lastly, the fact that the USA and its allies, especially the British, have found it so difficult to impose stability in Iraq and in Afghanistan, has led to a loss of influence and respect in the world.²⁰⁶⁹

Afghanistan in 2011 is on the road to becoming a failed state.²⁰⁷⁰ Should western troops depart in the near future, there is little doubt a ferocious civil war will once again erupt. This is why some among the NATO states (and others) have begun suggesting negotiations between the Taliban and the Karzai government.²⁰⁷¹ A stable government without the participation of these erstwhile enemies has become illusory.

²⁰⁶⁶ “Qaeda-linked rebellion spreads in Africa”, Adam Nossiter, *International Herald Tribune*, 19/08/2011, 1, 8; Rashid, *Descent*, XXXVIII-XXXIX, LVII; Burke, *Al-Qaeda*, 262-270, 282-291, 293, 294-296, 296-301; he even concludes “Bin Ladin is winning”; Johnson, *Blowback*, XVIII-XIX, XXI-XXII; Rogers, *A War*, 46, 154-162, 185-187; Wright, *The Looming*, 371-373; Koelbl, *Ihlau, Krieg*, 81-92; Roy, *Der Falsche*, 9, 17; Hodes, Sedra, *The Search*, 31-32; *9/11 Commission Report*, 370; Tomsen, *The Wars*, XIV, XVI.

²⁰⁶⁷ According to TIME Magazine (December 6, 2010, 15) there were 82,000 hectares of land under opium-poppy cultivation in 2000; that area had, by 2010, increased to 123,000 hectares; Rasanayagam, *Afghanistan*, 263, 269; Murphy, “Afghanistan”, 80, 96; Gray, *International Law*, 205; Loyn, *Butcher*, 277-278; Burke, *Al-Qaeda*, 293; Maley, *The Afghanistan*, 249; Johnson, *Blowback*, XVIII; Koelbl, *Ihlau, Krieg*, 153; *9/11 Commission Report*, 370; Tomsen, *The Wars*, 590.

²⁰⁶⁸ Gray, *International Law*, 205; Loyn, *Butcher*, 292-293; Maley, *The Afghanistan*, 265, 267; Maley describes Iran’s regional position, following on from the wars in Afghanistan and Iraq as its “strongest...since the Iranian revolution.”; Roy, *Der Falsche*, 9; Hodes, Sedra, *The Search*, 33; Cowper-Coles, *Cables*, 75-76.

²⁰⁶⁹ Rashid, *Descent*, LVII, LVIII; Roy, *Der Falsche*, 9, 10, 16; Cowper-Coles, *Cables*, 116, 137 (referring to Britain), 283-285 (referring to the USA); Patrick Cockburn, “Wars without victory equal an America without influence”, *The Independent on Sunday*, 11/12/2011, 35.

²⁰⁷⁰ Rashid, *Descent*, XXXVIII, 87; “Afghanistan, Security worst for 10 years, says UN”, *The Independent*, 24/02/2011, 36; Steele, *Ghosts*, 24-26.

²⁰⁷¹ “Hamid Karzai Confirms talks with Taliban”, AP, 11/10/2010; available at: <http://www.independent.co.uk/news/world/asia/hamid-karzai-confirms-talks-with-taliban-2103410.html>; “NATO duped by impostor who posed as Taliban negotiator”, Julius Cavendish, *The Independent*, 24/11/2010; available at: <http://www.independent.co.uk/news/world/asia/nato-duped-by-impostor-who-posed-as-taliban-negotiator-2142105.html>; both accessed 03/01/2011; Maley, *The Afghanistan*, 264.

To add insult to injury, NATO, towards the end of 2010, was forced to approach the Russians for help in dealing with the Afghan situation.²⁰⁷²

The UK's ever-present illusion of "punching above its weight" on the world stage by always and often uncritically following the USA's lead has also received another battering. Rather, the latest (mis-) adventures in the Middle East have served to further underline the UK's diminished status.

Professor Rogers has concluded in respect of Afghanistan:

*Tony Blair sees Britain as playing a bridging role between the United States and Europe on this and other issues. This is a view that is hardly shared in Europe, where the UK is seen perhaps more as a Trojan Horse rather than a bridge, but in any case, Britain is not hugely significant in the wider scheme of things.*²⁰⁷³

This assessment is repeatedly confirmed by Sherard Cowper-Coles, the UK's former Ambassador to Kabul and Special Representative for Afghanistan and Pakistan. He concludes:

*All of these [discussions in London on strategy in Afghanistan] fed two illusions: first, that Britain could somehow have an independent strategy towards Afghanistan, and, second, that British Ministers could direct the military campaign in Afghanistan- in reality the military took their orders from the NATO command chain. But neither illusion stopped us spending many hours in often impassioned debate.*²⁰⁷⁴

²⁰⁷² "Afghanistan: Russia Steps in to Help NATO", Kim Sengupta, *The Independent*, 27/10/2010; available at: <http://www.independent.co.uk/news/world/politics/afghanistan-russia-steps-in-to-help-nato-2117468.html>; "Russia raises its price to rescue NATO from Afghan quagmire", Kim Sengupta, *The Independent*, 28/10/2010; available at: <http://www.independent.co.uk/news/world/politics/russia-raises-its-price-to-rescue-nato-from-afghan-quagmire-2118458.html>; "NATO woos Russia at its talks on Afghan policy", Kim Sengupta, *The Independent*, 19/11/2010; available at: <http://www.independent.co.uk/news/world/politics/nato-woos-russia-at-its-talks-on-afghan-policy-2138112.html>; all last accessed 26/10/2011. That this might happen was to some extent predicted by Stepanova in 2001 ("US-Russia", 92-95).

²⁰⁷³ Rogers, *A War*, 79.

²⁰⁷⁴ Cowper-Coles, *Cables*, 93 (quote); Cowper-Coles repeatedly refers to British "hubris", and British lack of influence on events in Afghanistan (for example, at 7, 50, 93, 101, 105, 143, 179, 191-192, 221, 275). This leads him to the obviously frustrated conclusion (at 101, referring to the new British embassy building in Kabul): "In what might have been a metaphor for British foreign policy in the early twenty-first century, they recommended keeping the grand imperial facade while putting a cheapjack new structure behind it."

It must be concluded that Operation *Enduring Freedom* has so far not resulted in many gains.²⁰⁷⁵ Afghanistan has remained instable, Pakistan has become even more so. Iran has increased its influence, and Al Qaeda still exists and functions. Western prestige has been further undermined by its decision to support Karzai after having won disputed elections in 2009.²⁰⁷⁶

E. Conclusion

Afghanistan's history is one of foreign interventions, of foreign defeats, and of foreign embarrassments. The people of Afghanistan have meanwhile remained mired in poverty and their society, as far as it can be said to exist on a national scale, has remained riven by factionalism. Outside intervention in Afghanistan's internal upheavals has mostly led to an escalation of the conflicts. Afghanistan is thus a show case for the "success" of allegedly benevolent interventions undertaken by the Great Powers.

The Soviet intervention, in 1979, in Afghanistan's pre-existing civil war, was then only the last example of what has traditionally been referred to as the "Great Game". Having by then been involved in three Anglo-Afghan wars, and persistent Russian/Soviet meddling, the Afghans, also accustomed to Iranian and Pakistani interest in their affairs, could, as a people, not really be surprised by this latest episode of imperial adventure.

²⁰⁷⁵ Murphy, "Afghanistan", 99; Rashid, *Descent*, LVII; Koelbl, *Ihlau, Krieg*, 154-155; Roy, *Der Falsche*, 9,10, 16.

²⁰⁷⁶ Cowper-Coles, *Cables*, 189, 235-237 (he describes the problematic developments surrounding the elections, without offering a verdict); Tomsen, *The Wars*, 654, 681; he also refers to the parliamentary elections in September 2010, which, according to him, "compiled a record of fraud that surpassed even Karzai's 2009 election."

During the Cold War Afghan dependence on the Soviet Union had increased to such an extent, that by the late 1960s the Soviets were providing around 40-50 % of Afghanistan's budget. This, of course, also led to ever closer political ties. By 1978 the communists had taken power in Afghanistan, and civil war had erupted. This was to lead to the Soviet Union's military intervention in late 1979.

As has been demonstrated, this move was not motivated by affection for Afghanistan. It was motivated by worries the Soviet leadership had in relation to Afghanistan's strategic position at the far end of the Middle East, and bordering the Soviet Union's central Asian republics. Losing "socialist" Afghanistan was seen as losing face, but more importantly, China and the USA would undoubtedly exploit such a situation and threaten the Soviet Union. Islamic militants, if in power in Afghanistan, might destabilize the Soviet Union by inciting its own Muslims, a sizeable minority, to rebel. Therefore the communist government in Kabul had to be saved from the Islamic fundamentalists, whatever the Afghan government's wishes, a government with which relations had anyway badly deteriorated.

As released Soviet documents demonstrate, the Soviet leadership knowingly violated international law by invading Afghanistan. Foreign Minister Gromyko himself emphasized in internal discussions that international law did not allow intervention in a civil war, even at the beleaguered government's request, an analysis found to be correct in this chapter. Relying on outside interference was also deemed insufficient to justify intervention, because, as Gromyko put it, in Afghanistan it was essentially "one part of the population" that was fighting "another". Nevertheless, in the end the Soviet Union decided to intervene, and invaded Afghanistan, most likely at that point

not having received a request from the official government of the state. This intervention was a clear violation of Article 2 (4).

This gave the United States the excuse to massively intervene in the conflict in Afghanistan. Following the Soviet invasion, the USA massively stepped up its support of the so-called *mujahedeen*, the Afghan rebels. Using it as a conduit for weapons, and leaving most of the decision-making as to who was to receive the aid to Pakistan, the USA, in the mid-, and late 1980s, supported the Afghan resistance to the tune of 600 million \$/year, a sum matched by the Gulf kingdoms.

American motives, though superficially more attractive, were not superior to the Soviets'. Of course, supporting a suppressed nation against an aggressor is popular, and there is no doubt some supporters of the *mujahedeen* in the west believed they were supporting freedom in that country. Given the radical views of most of the *mujahedeen* leaders, however, there can be little doubt that most American decision-makers were aware that human rights and freedom were alien concepts to the Afghan rebels. As Robert Gates, CIA Director, put it, "our mission was to push the Soviets out of Afghanistan. We expected post-Soviet Afghanistan to be ugly...".²⁰⁷⁷ American politicians were motivated by teaching the Soviets a lesson; they were supposed to experience their Vietnam. Having just suffered the humiliation in Iran, the US was also anxious to demonstrate strength in the Middle East, lest any of their regional allies would start to wobble. And, lastly, some also worried that the Soviets were planning to expand into the Gulf region, thereby threatening western oil supplies.

²⁰⁷⁷ Gates, *From*, 349; Gates, US Defence Secretary until recently, was Deputy Director of the CIA at the time of the Soviet invasion of Afghanistan.

This massive intervention, too, though popular in the western media, was contrary to international law. Since no body which could officially claim to represent the Afghan people had requested assistance, the USA intervened in a civil war in order to achieve strategic goals. The USA was supporting rebels against the government in another state, an intervention that has traditionally been, and is currently overwhelmingly regarded as illegal. Because the operation was “covert”, no legal justification had to be provided, but the marked lack of discussion -as to the legality of supporting the Afghan rebels- in American journals and books is striking. The few legal analyses that can be found rely on far-fetched arguments, such as that the USA was supporting a “war of national liberation”, a concept the USA had for decades vehemently opposed. It can also not be overlooked that the government that came to power as a result of the Soviet invasion officially represented Afghanistan abroad, and was to negotiate the later peace treaty with Pakistan. The USA, on the other hand, though officially not recognizing the Afghan government, did not recognize the rebels they were supporting as representatives of Afghanistan either.

Following Soviet withdrawal in 1989, Afghanistan descended into chaos. In 1996 the Taliban took power, and soon after Arab Afghan war veterans returned to the land of their glory. Among them were Osama Bin Laden, and his Al Qaeda organization. On September 11, 2001, Al Qaeda organized the devastating terrorist attacks on the USA. In response to these attacks the USA and the UK, on October 7, 2001, launched Operation *Enduring Freedom*, their attack on Afghanistan. There is little doubt that the USA and the UK were primarily interested in rooting out Al Qaeda and the Taliban regime that had tolerated the organization’s presence in Afghanistan. Nevertheless, other motives should not be ignored either: stabilizing Pakistan,

pressurizing Iraq, and very possibly the attempt to create a more generous approach to the use of force in international law, to be exercised by the “sole superpower”.

Although supported or accepted by the overwhelming majority of states at the time, it has been shown that the attack on Afghanistan was contrary to international law.

Neither Article 51, nor customary international law offered sufficient justification. As subsequent events and international reactions to them have demonstrated, the argument that customary international law was created “instantaneously” by the events surrounding 09/11, though not devoid of merits, does not convince either.

Notably the USA has been extremely reluctant to allow a more generous use of force in response to terrorist attacks, certainly when non-allies have been the target of the terrorists.

And what have been the results of these frequent, illegal outside interventions in Afghanistan?

As far as the outside intervenors are concerned, it can be safely concluded that the interventions have resulted in failure. The Soviet Union was humiliated in Afghanistan, which arguably contributed to the downfall of its socialist system.²⁰⁷⁸

The USSR’s inability to suppress the Afghan resistance demonstrated its weakness to its own people, but also, perhaps more importantly, to the outside world. 15,000 Soviet soldiers lost their lives for a lost cause, not to mention the huge amount of money and weapons wasted. Soviet withdrawal precipitated the fall of Afghanistan’s

²⁰⁷⁸ Braithwaite, *Afgantsy*, 329-331.

communist government, and the country remained mired in civil war. There can be no doubt that the USSR had suffered a major strategic defeat.²⁰⁷⁹

The analysis provided by a civil servant in the Soviet Union's Foreign Ministry in early 1980 thus proved entirely correct:

A few days ago we moved our troops into Afghanistan. What an exceptionally ill-considered decision! ...In reality it is an act of weakness, of despair... Why on earth should we get mixed up in a lost situation...What's more we seem to be getting mixed up in civil war, even though it is being fed from outside. Did we learn nothing from Vietnam? ...The terrible thing is that this is not what concerns our leaders. Their concern is to hold on to power, to engage in domestic manoeuvres, to demonstrate their high ideological principals, which incidentally we no longer understand ourselves...²⁰⁸⁰

In a rare show of humility, as far as Great Power intervenors in the Middle East are concerned, the Soviet parliament, in December 1989, consequently passed a resolution stating that the intervention in Afghanistan deserved "moral and political condemnation."²⁰⁸¹

Superficially, it could be argued that the USA was more successful in its illegal endeavour to aid the Afghan rebels. After all, defeating the USSR was one of the major goals of the covert operation. Overall it can, however, not be overlooked that many of the same people who benefitted from the American taxpayers' largesse

²⁰⁷⁹ Maley, *The Afghanistan*, 135-136; Johnson, *Blowback*, 13.

²⁰⁸⁰ Anatoli Adamishin; quoted by Braithwaite, *Afgantsy*, 110-111; Braithwaite also quotes from an analysis, provided to the Central Committee by Oleg Bogomolov of the Institute of the Economy of the World Socialist System in Moscow on January 20, 1980, which comes to very similar conclusions, albeit in more "politically correct" language.

²⁰⁸¹ "Soviet congress condemns Afghanistan intervention", *Toledo Blade*, 25/12/1989, 2; "Soviet Deputies Denounce '79 Afghanistan Invasion", Marsha Hamilton, *Los Angeles Times*, 25/12/1989; available at: http://articles.latimes.com/1989-12-25/news/mn-732_1_afghanistan-invasion; last accessed 26/10/2011; Braithwaite, *Afgantsy*, 328; the resolution was adopted by the Soviet Congress of People's Deputies in a 1678:18:19 vote.

would return to attack the USA,²⁰⁸² as also acknowledged by the *9/11 Commission* in the United States:

*Bin Ladin and the "Arab Afghans" drew largely on funds raised by this network [the so-called "Golden Network"], whose agents roamed world markets to buy arms and supplies for the mujahideen or "holy warriors." Mosques, schools, and boardinghouses served as recruiting stations in many parts of the world, including the United States...The international environment for Bin Laden's efforts was ideal. Saudi Arabia and the United States supplied billions of dollars worth of secret assistance to rebel groups in Afghanistan fighting the Soviet occupation.*²⁰⁸³

Many of these "holy warriors" believed that ridding Afghanistan of the Soviets was only the first step; the USA was going to be the next target.²⁰⁸⁴

The hostility of the Taliban government should certainly not have come as a surprise to the USA. In 1988 already the CIA had offered the following assessment:

*We believe Moscow has made a firm decision to withdraw from Afghanistan...We cannot be confident of the new government's orientation toward the West; at best it will be ambivalent and at worst it may be actively hostile, especially toward the United States.*²⁰⁸⁵

²⁰⁸² Johnson, *Blowback*, XXII-XIX, 10, 13; Wright, *The Looming*, 106, 179. Wright describes the following development (at 179): "For years, the United States had been one of the main fund-raising destinations for Arab and Afghan mujahideen. Sheikh Abdullah Azzam blazed a trail through the mosques of Brooklyn, St. Louis, Kansas City, Seattle, Sacramento, Los Angeles, and San Diego- altogether there were thirty-three cities in America that opened branches of bin Laden and Azzam's organization, the Services Bureau, in order to support the jihad. The war against the Soviet Union had also created an international network of charities, especially dense in the United States, which remained in operation after the Soviet Union broke into splinters and the Afghans turned against each other. Zawahiri hoped to tap this rich American vein for al-Jihad." ; Koelbl, *Ihlaul, Krieg*, 21; Hodes, Sedra, *The Search*, 25; they point out that the Taliban are currently greatly benefitting from the experiences of the veterans and commanders of the *jihad* against the Soviets.

²⁰⁸³ *9/11 Commission Report*, 55, 56.

²⁰⁸⁴ Wright, *The Looming*, 160-161; this is also acknowledged in the *09/11 Commission's* report: "...Bin Ladin remained credible as other leaders and symbols faded. He could stand out as a symbol of resistance -above all, resistance to the West and to America. He could present himself and his allies as victorious warriors in the one great successful experience for Islamic militancy in the 1980s: the Afghan jihad against the Soviet occupation" (*09/11 Commission Report*, 54); Tomsen, *The Wars*, 252-253, 512; the US Special Envoy to the *mujahedeen* (1989-1992) provides an example of such a development. Referring to the rebel leader Hekmatyar, he first states that "he was the ISI's favourite Mujahid and therefore the CIA's favourite Mujahid." Later he quotes from a statement released by Hekmatyar's spokesman on October 7, 1992: "Afghanistan is the graveyard of the British and the Russians and insha'allah it will also become the graveyard of the arrogant Americans. The Afghans will rub the American pigs' snout in the ground in Afghanistan...".

²⁰⁸⁵ CIA, *Special National Intelligence Estimate*, 11/37/88, "USSR. Withdrawal from Afghanistan", March 1988, Key Judgements, The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, U.S. Analysis of the Soviet War in Afghanistan: Declassified*, Document 1 (at 14); available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/us2.html>; accessed 02/01/2011.

Furthermore, the lawless situation left behind in Afghanistan, once the superpowers had lost interest, turned out to destabilize an important US ally, Pakistan, and to bolster a US enemy, Iran. Needless to say, the group that eventually took power in Afghanistan with moderate success, the Taliban, was very far removed from the purported western ideals of freedom, democracy, and human rights. Regarding western support of the *mujahideen*, Tony Blair has therefore concluded:

*I examined how in Afghanistan we had supported what became the Taliban in order to stop the Russians, precisely in the name of managing the situation; ... and how in each case the consequence of such 'realism' had been simply to create a new, and potentially worse, source of instability.*²⁰⁸⁶

This disappointing result and Afghanistan's chequered history did, however, not deter the US and its allies from again, this time openly and massively, intervening in Afghanistan. Deposing the Taliban was the easy part, but now, ten years after the launch of Operation *Enduring Freedom*, NATO troops have become bogged down.

The Taliban are resurgent, and the Karzai administration, originally imposed by the west, is corrupt, inefficient, and therefore distrusted. Although it undoubtedly suffered a blow, Al Qaeda and its ideology still exist, and are able to inspire others to stage terror attacks. Nuclear-armed Pakistan, meanwhile, is on the brink, torn apart by the Taliban and other Islamic fundamentalists, many originating from Afghanistan. Iran, the USA's principal regional foe, has been strengthened by having had two neighbouring regimes removed it detested: Iraq's Saddam Hussein, with whom Iran fought an eight-year-war (1980-1988), and the radical Sunni Taliban regime, that

²⁰⁸⁶ Blair, *A Journey*, 369; the former British Ambassador to Kabul (2008-2009, 2010), Cowper-Coles, has provided a similar assessment: "I felt that, like us and the Americans, the Saudis had something of a conscience over their support for the anti-Soviet *jihād*, sowing the dragons' teeth from which Osama bin Laden and his monstrous terrorist engine had sprung." (*Cables*, 78); Rice, *No Higher*, 345; referring to discussions with the government of Pakistan, the former US Secretary of State states: "Nonetheless, they [the Pakistanis] rightly pointed to the United States' support for the *mujahideen*'s struggle against the Soviet Union as playing a large role in Pakistan becoming a transit point for *jihādists*...Pakistanis knew that they were responsible for the deeply rooted extremism in their country, but the United States had contributed to it."

despised and maltreated Afghanistan's Shiite minority. Iran is currently busy buying influence with Karzai, while NATO has had to turn to Russia for help. If that is not a defeat in the making, it would be a surprise.²⁰⁸⁷ In 2011, the former British Ambassador to Kabul, Cowper-Coles, concluded:

*The enterprise has proved to be a model of how not to go about things, breaking all the rules of grand strategy... As Rodric Braithwaite's book *Afgantsy* suggests, without ever saying so explicitly, the parallels with the tragedy of Soviet Russia's failed attempt to stabilize Afghanistan are too many and too close to comfort. Most troubling of all, intervening in Afghanistan in such haste in 2001 may not have been necessary, any more than Britain should have attacked the Irish Republic in the wake of, say, the Birmingham pub bombings.. Bin Laden's death has shown how the war in Afghanistan has indeed been, in Richard Holbrooke's words, against 'the wrong enemy in the wrong country.'*²⁰⁸⁸

This has led Lawrence Wright to indicate that the West has fallen into Bin Laden's trap. Following the American decision not to retaliate for the strike against the *USS Cole* in 2000, Wright claims

*Bin Laden was angry and disappointed. He hoped to lure America into the same trap the Soviets had fallen into: Afghanistan. His strategy was to continually attack until the U.S. forces invaded; then the mujahideen would swarm upon them and bleed them until the entire American empire fell from its wounds. It had happened to Great Britain and the Soviet Union. He was certain it would happen to America.*²⁰⁸⁹

If that is indeed a true description of Bin Laden's strategy, it cannot be denied that he has, to some extent at least, been successful in his endeavours.

²⁰⁸⁷ Cowper-Coles, *Cables*, XX, XXII, 7, 9, 14, 17, 32, 41, 53, 54, 59, 115, 140, 166, 223, 289-292; the former British Ambassador to Kabul (2008-2009, 2010) and British Special Representative for Afghanistan and Pakistan (2009-2010) is deeply sceptical as to the final outcome of the intervention in Afghanistan; Tomsen, *The Wars*, 590-591, 630-631; the US Special Envoy to the *mujahideen* (1989-1992) is similarly unimpressed by the progress in Afghanistan so far, although he believes it is still possible to turn things around.

²⁰⁸⁸ Cowper-Coles, *Cables*, 289, 290, 292; Tomsen, *The Wars*, 590; the US Special Envoy to the *mujahideen* (1989-1992) offers a similarly down-beat assessment: "The Camp David meeting [post-9/11] set the pattern for the Bush administration's ill-fated engagement with Afghanistan over the next seven and a half years. With the best of intentions, the approach undermined America's ability to succeed in Afghanistan. When Bush relinquished office in January 2009, nearly all indicators of progress in Afghanistan...were trending downward."

²⁰⁸⁹ Wright, *The Looming*, 272, 331 (quote); the 09/11 Commission, in its report, quotes from a National Security Council document, which itself quotes Bin Laden as stating in late 1998: "By Allah, by God, the Americans will be amazed. The so-called United States will suffer the same fate as the Russians. Their state will collapse, too." (*9/11 Commission Report*, 123).

Not only have the intervenors suffered major and minor defeats in their repeated illegal interventions in Afghanistan, it should also not be overlooked that the Afghan people have suffered most. Millions of refugees veer back and forth from neighbouring countries, many thousands have been killed, and Afghanistan as a state has more or less been destroyed. As to the latest Western intervention in their country, Braithwaite, the former British Ambassador to Moscow, has provided the following survey of Afghan opinion:

When I visited Afghanistan in September 2008...I was told by almost every Afghan I met that things were better under the Russians.... Najibullah had been one of the best of Afghanistan's recent rulers...People were quietly dismissive of President Karzai, whom they said was a puppet of the foreigners.²⁰⁹⁰

The multiple interventions in Afghanistan, undertaken in the Great Powers' national interest and in violation of international law, have their failure in common. The conclusion should therefore be that it is not international law that requires adjustment to reality, as Glennon has argued, but rather politicians' and some scholars' understanding of their own and their country's best interest that requires a much firmer basis in the real world.

²⁰⁹⁰ Braithwaite; *Afgantsy*, 333-336 (quote at 335); Steele, *Ghosts*, 131; Steele quotes from a "Strategic Conflict Assessment Report for the British Government" from 2008, which concludes: "The Soviet-backed government of Najibullah is remembered today as the last strong and relatively benign leader."

V. Conclusion

*What is at issue is our understanding that international law is a practical need. It is a need as much as domestic law is a practical need. The fact that the law is broken is not evidence of its uselessness, but rather of its necessity.*²⁰⁹¹

*Far from eliminating international law as a concern for US policy-makers, neoconservative policies put into practice have helped remind the world why international law has commanded respect for centuries.*²⁰⁹²

This thesis set out to lay the foundations of a “realist case” in favour of international law.²⁰⁹³ Based on what “realist” international relations scholars view as the motivating force behind states’ behaviour in the international arena, namely the self-interested pursuit of power and influence, the case studies analysed here sought to demonstrate that international law, far from being an irrelevant obstacle, can actually offer useful guidance to “realist” statesmen. In contrast, blatantly disregarding international law will more often than not lead to disappointing results for a state attempting to achieve its goals by doing so.

The important events examined in the thesis have shown that non-adherence to international law has most often ended in failure, or even disaster, for the perpetrator. This is the foundation of the thesis’ argument that international law, far from being idealistic or utopian, is, in most cases, able to offer governments an alternative, rational approach to complex problems that arise in international relations, without, as some realist critics of international law would have it, necessarily harming the national interest.

²⁰⁹¹ Moynihan, “International Law”, 8.

²⁰⁹² O’Connell, *The Power*, 62.

²⁰⁹³ Bowring, *The Degradation*, 64 (quote), 208; Franck, “The Power”, 92, 93, 103, 106.

The analyses of the pivotal events in the Middle East that have occurred since just before the end of the First World War have demonstrated that at no time did the Great Powers of the day follow the rules of international law to the detriment of their perceived national interest when intervening there. Intense Great Power attention since 1917 has, however, not made the Middle East into a peaceable or stable region, despite the many attempts from outside the region to impose a durable settlement.²⁰⁹⁴

It is also true that neither the end of the First World War, nor the end of the Second World War, or the end of the Cold War, each accompanied by promises of the dawn of a new age of justice, have improved the political situation of the peoples living in the Middle East.²⁰⁹⁵

Most importantly, however, the Great Powers, by embarking on a course of demonstrated illegality, have been unable to achieve the strategic goals to which they aspired. Not once in the cases examined here did the violation of international law, allegedly necessitated by the respective power's national interest, in fact further that interest.²⁰⁹⁶

This thesis therefore serves to refute the allegedly "realist" attacks on international law made by influential circles within the United States.²⁰⁹⁷ Enduring instability in the Middle East, and the failure of the United States to achieve its goals in the region, are not, it has been argued here, the result of idealistic adherence to utopian, or non-

²⁰⁹⁴ Kinzer, *Reset*, especially at IX-XII, and 1-15; Quigley, "International Law", 815-835.

²⁰⁹⁵ Allain, *International Law*, 1-12; B. S. Chimni, "The Past, Present and Future of International Law: A Critical Third World Approach", *Melb. J. Int'l L.*, Vol. 8, 2007, 499-515; Anghie, *Imperialism*; Mattei, Nader, *Plunder*; Woollacott, *After Suez*, 72; he concludes: "The assumed Western right to control the Middle East, forcefully or otherwise, is at the centre of the argument. It might be said that the two Anglo-Saxon countries had in half a century hardly moved at all in terms of their attitude to the region. They still saw themselves as possessing not only the right to intervene militarily and to have access on very favourable terms to its energy resources, but as justified in reshaping it geopolitically, lecturing its governments, placing obstacles in the way of its desires and even modifying its religious beliefs."

²⁰⁹⁶ Quigley, "International Law", 815-835.

²⁰⁹⁷ Glennon, "The UN Security Council", 91-112; Bolton, "Is There", 1-48; Delahunty, Yoo, "Great Power", 35-54.

existent, rules of international law, but rather the result of actions that were undertaken in blatant disregard of international law.

Necessarily, as was pointed out in the introduction, this research is by no means exhaustive. There are many other interventions that could be examined, including further events in the Middle East, for a more comprehensive argument to be made. It is, however, believed that, based on a legal and political analysis of the chosen, arguably world-changing, events in the Middle East, the foundations of a “realist” argument in favour of adherence to international law have been laid.

As was also indicated at the beginning of the thesis, it has not been argued here that adherence to international law would have, for example, provided the United Kingdom with a more secure foothold in Palestine, or that it would necessarily have saved Britain’s influence in the Middle East. Nor was it claimed that the Soviet Union or the United States could have achieved their goals in Afghanistan by following a legal course of action. What has, however, been clearly demonstrated is that none of the Great Powers managed to truly further their national interest by acting illegally.

The analyses of the events chosen here have allowed three key arguments to be made in this thesis:

Firstly, since before the end of the First World War, the Great Powers have repeatedly and demonstrably violated public international law when intervening in the Middle East.

Britain’s dealings in Palestine were examined in ***Chapter II***. It was shown that not only had Britain simultaneously “promised” the area referred to as Palestine to the Arabs, the Jews, and the French, but that it had no right do so at a time when the area

was still ruled by the Ottomans. Following on from the Ottoman defeat, Britain occupied the territory and, as of 1920, began implementing the Balfour Declaration, which had promised the Jews a “homeland”. Britain had, at that time, not yet been granted the mandate for Palestine, and no peace treaty with Turkey was in place. It was evidenced that this was a violation of Article 43 of the *1907 Hague Regulations*.

The Palestine Mandate itself, which incorporated the Balfour Declaration, was granted to Britain by the *League of Nations* long before the *Treaty of Lausanne* with Turkey had come into force. This was another violation of Article 43 of the *1907 Hague Regulations*. It was then explained that the terms of the Mandate were in contravention of Article 22 (4) of the *Covenant of the League of Nations*, as -contrary to that article’s provisions- Britain, not a local administration, was running this “A”-Mandate’s affairs.

Following on from Britain’s decision, in 1948, to renounce its role as mandatory for Palestine, it was then explained that Israel in fact seceded from the newly independent State of Palestine. Having established the criteria of statehood and the prerequisites of recognizing a state in customary international law, the fact that Israel fulfilled none of the relevant criteria was explained. Nevertheless, the United States and the Soviet Union immediately decided to recognize the State of Israel. This led to the conclusion that their prompt recognition of the newly proclaimed State of Israel was premature, and therefore inconsistent with international law.

Chapter III then turned to the Suez Crisis in 1956. It was shown that Britain, from very early on, paid scant respect to international law when dealing with Egypt. Initial arguments that Nasser, by nationalizing the Suez Canal Company, had himself violated international law were untenable. Not only had Britain and France both

reverted to widespread nationalizations in the aftermath of the Second World War, but they, as well as Egypt, were well within their rights to do so, as long as compensation was offered, a condition Nasser had immediately acquiesced in.

The subsequent decision to intervene militarily was clearly illegal. It was shown that the facts on the ground in Egypt bore no relation to the official justifications put forward by the British and French governments and that these legal justifications, in any case, could not be reconciled with the UN Charter. Neither the protection of nationals or property, nor the right to conduct a police action on behalf of the international community had been included in its provisions, or in those of contemporary customary international law. Israel's reliance on the right of self-defence was shown to have been no more than a thinly disguised attempt to justify a reprisal, or possibly even a war of conquest, both outlawed by the Charter, and in violation of the Israeli-Egyptian Armistice Agreement, a conclusion also reached by the General Assembly. The *Protocol of Sèvres*, which was concluded by the three states and evidenced the prefabrication of all the legal justifications put forward by them, clearly demonstrates that any attempt to legally justify the tripartite use of force is specious.

Chapter IV then examined the interventions in Afghanistan as of 1979, undertaken mainly by the Soviet Union and the United States. It was shown that the Soviet invasion of that country in December 1979 was illegal. Afghanistan, at that time, had descended into civil war between a communist government, itself riven by dissent, and a large section of the Afghan population. The Soviet intervention thus violated a rule of customary international law, which prohibits the intervention of outside powers in a civil war, even at the request of the government. Soviet claims of acting

in collective self-defence in order to defend Afghanistan against foreign intervention were similarly unconvincing, all the more, given the fact that at the time of the Soviet invasion it seems unlikely that any valid Afghan request had been forthcoming.

The United States subsequently decided to massively support the Afghan resistance against the Soviet occupation. It was shown that this intervention also violated international law. The USA could not claim to be acting in collective self-defence, as no appropriate Afghan body had asked for assistance, and the reliance on a right to support “national liberation movements” in their “wars of liberation” was spurious, as such a right did not exist (primarily, as a result of US-led western opposition to its creation).

In reaction to the massive terrorist attacks of September 11, 2001, the USA itself then decided to attack Afghanistan, the state that had provided safe haven to the leadership of the Al Qaeda terrorist organization. It has been argued here that the use of force against Afghanistan was inconsistent with international law. As the terrorist attacks could not be attributed to the state of Afghanistan, the USA could not rely on Article 51 as a justification. Moreover, it was shown that the use of force could also not be reconciled with customary international law, whether longstanding, or even created “instantaneously”.

These case studies undermine any notion that the Great Powers of the day were led by idealists who put international law before what they perceived as their state’s national interest. They also justify the argument in the thesis’ introduction, whereby the illegal intervention in Iraq in 2003 would appear to be the rule rather than the exception. The consistent disregard of international law evidenced in this thesis certainly refutes any notion that the chaos and failures that followed Great Power interventions in the

Middle East can in any way be blamed on the “incoherence” of international law, as Glennon has implicitly suggested.²⁰⁹⁸

Secondly, the violations of international law were premeditated.

It has been shown in this thesis that leading politicians and their legal advisors were under no illusions as to the legality of their conduct under international law. Rather, the foregoing analysis of events serves to support Chimni’s argument that international law’s content can in most cases be ascertained quite precisely,²⁰⁹⁹ as even the actors responsible for the interventions examined here were well aware of their dubious legality. The violations of international law in the Middle East by the Great Powers analysed in this thesis were thus not due to any perceived indeterminacy in the rules of international law, but to the conscious decision by the respective leaders to ignore those rules in the national interest.

In ***Chapter II*** it was outlined that Arthur Balfour, the British Foreign Secretary, acknowledged early on that the Great Powers had, as far as Palestine was concerned, made “no statement of fact” which was not “admittedly wrong”, and no “declaration of policy” which was not always intended to be “violated”. He therefore concluded that “the contradiction between the letters of the Covenant and the policy of the Allies is even more flagrant in the case of ‘independent’ Palestine than in that of ‘independent’ Syria.”²¹⁰⁰ These statements, made in 1919, were borne out by subsequent events.

²⁰⁹⁸ Glennon, “The Fog”, 539-558.

²⁰⁹⁹ Chimni, *International Law*, 102-105, 143-145, 271-273; similar arguments are put forward by: Henkin, *How*, 39-45, 67; Franck, “The Power”, 94-95, 105; Onuma, “International law”, 131-132; Bowring, *The Degradation*, 41-42 (referring to the UN Charter).

²¹⁰⁰ Arthur Balfour, in a Memorandum to Earl Curzon of August 11, 1919; extracts quoted in Ingrams, *Palestine*, 73.

Regarding the promises made by the British to the Arabs in respect of Palestine in 1915/1916, even the UK representatives on the Arab-UK Committee acknowledged in 1939 that the Arab arguments, whereby Palestine had been promised to the Arabs prior to the issuance of the Balfour Declaration, had “greater force than has appeared hitherto”.²¹⁰¹

In respect of Britain’s attempts to implement the Balfour Declaration before the entry into force of the *Treaty of Lausanne* with Turkey in 1924, the Legal Secretary of the Government of Palestine, Norman Bentwich, admitted in 1922 that British actions were “imperfect” in their “legal foundations”.²¹⁰² The British Government obviously concurred with this assessment, as evidenced by its *Report on the Palestine Mandate to the League of Nations* for 1924. In it, it is stated that the *Treaty of Lausanne* had “finally regularized” the “international status of Palestine as a territory detached from Turkey and administered under a Mandate entrusted to His Majesty’s Government”.²¹⁰³

This “regularization”, unfortunately, came only four years after the first laws on immigration and land ownership, enabling Jewish emigration to Palestine, had been enacted by the British. The knowledge that this amounted to a violation of Article 43 of the *1907 Hague Regulations* seems to have been widespread. As the Military Governor in Palestine, Ronald Storrs, acknowledged, the British, by immediately taking steps to encourage future Jewish settlement in Palestine, had “contravened the

²¹⁰¹ *Report of a Committee set up to consider certain correspondence between Sir Henry McMahon and The Sharif of Mecca in 1915 and 16*, 16/03/1939, Cmd. 5974, paras. 16-18; also available at: http://www.gwpda.org/1916/mcmahon_sharif.html; accessed 22/07/2011.

²¹⁰² Bentwich, “Mandated Territories”, 50, 52.

²¹⁰³ *Report of His Britannic Majesty’s Government on the Administration under Mandate of Palestine and Transjordan for the year 1924*, Section I; for full text, see: <http://www.ismi.emory.edu/PrimarySource/Report%20to%20L%20of%20N%20Pal%201924.pdf>; accessed 22/07/2011.

Status quo”,²¹⁰⁴ which was an “admitted departure from the Laws and Usages of War.”²¹⁰⁵ The Chief Administrator in Palestine, General Bols, obviously concurred, and concluded the British had “exceeded strict adherence to the laws governing the conduct of Military Occupant of Enemy Territory.”²¹⁰⁶ These statements certainly leave little room for the assumption that the British government assumed its actions in Palestine to be in accordance with contemporary international law.

This “tradition” of ignoring international law, when dealing with Palestine, continued after WW II. The United States took the decision, in 1948, to recognize Israel as a state, despite the US State Department repeatedly warning US President Truman that doing so was “premature”.²¹⁰⁷ US Secretary of State Marshall himself agreed with his Department’s assessment that it was wrong to recognize “the Jewish State even before it had come into existence”.²¹⁰⁸ This view was shared, among others, by the British Government, which officially justified its refusal to recognize the new state for a couple of years on the grounds of Israel’s lack of established statehood.²¹⁰⁹

There was also little doubt as to the legal situation during the Suez Crisis, as explained in *Chapter III*. Having come to the conclusion that -contrary to all the official statements- the British Government was “on weak ground” if it argued that

²¹⁰⁴ Storrs, *Orientalism*, 301.

²¹⁰⁵ Storrs, *Orientalism*, 354.

²¹⁰⁶ Letter by General Bols, Chief Administrator in Palestine, to the Foreign Office (1920); reprinted in Ingrams, *Palestine*, 85-86 (PRO. FO. 371/5119).

²¹⁰⁷ *Memorandum of Conversation, by Secretary of State*, May 12, 1948; United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 972-976, 975; available at: <http://digicoll.library.wisc.edu/FRUS/Browse.html>; last accessed 19/07/2011; Allen, *Imperialism*, 394; Salt, *The Unmaking*, 153-155.

²¹⁰⁸ *Memorandum of Conversation, by Secretary of State*, May 12, 1948; United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 972-976, 973, 975; available at: <http://digicoll.library.wisc.edu/FRUS/Browse.html>; last accessed 19/07/2011.

²¹⁰⁹ Brown, “The Recognition”, 620-627; “British Caution”, *The Times*, 18/05/1948, 4; “Britain is aloof to the New State”, *The New York Times*, 15/05/1948, 2

Nasser's nationalization was illegal,²¹¹⁰ the majority of the British Cabinet then went on to ignore the unanimous conclusion by the Legal Advisor to the Foreign Office, the Attorney General, and the Solicitor General that the use of force against Egypt violated international law. Prime Minister Eden wanted to exclude lawyers from the decision-making process in the run up to the attack on Egypt, as they "were against" the British doing "anything".²¹¹¹ Similarly, the Legal Advisor to the French Government concurred, when he was told by the UK Attorney General after the conflict that damages would have to be paid by the two allies if Egypt decided to turn to the *International Court of Justice*.²¹¹² Needless to say the secrecy, not to say untruths, surrounding the *Protocol of Sèvres*, maintained for many years after the Suez Crisis, also strongly implies that the actors concerned were well aware of the illegality of their undertakings.

Regarding the repeated interventions in Afghanistan, *Chapter IV* demonstrated that international law was again consciously violated by the decisive actors. Soviet Foreign Secretary Gromyko, in Politburo meetings, acknowledged that intervening in Afghanistan's civil war was illegal under international law, although there had already been thirteen requests for such an intervention by the Afghan government when he made these comments.²¹¹³

²¹¹⁰ CAB 128/30, Part 2, 469-470 (C.M. 54 (56)); quoted in Marston, "Armed Intervention", 776; Richardson, "Avoiding", 381.

²¹¹¹ Prime Minister Eden to Sir Anthony Nutting, Under-Secretary of State at the Foreign Office during the Suez Crisis, on October 16, 1956; quoted by Marston, "Armed Intervention", 798; in a conversation with the Law Officers after the Suez Crisis the Prime Minister declared that "the Government's decision was taken on grounds of policy, not of law"; FO 800/749; quoted by Marston, "Armed Intervention", 812.

²¹¹² *Minutes from a meeting of the British and French legal advisors* on December 5, 1956 (LO 2/825); quoted by Marston, "Armed Intervention", 817.

²¹¹³ Soviet Foreign Secretary Andrej Gromyko, at the *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1 (at 14); available at:

No such “smoking gun” has been found in regard of the US support for the *mujahedeen*. However, the lack of any legal justification on the part of the USA, even many years after the intervention, and the lack of discussion in academic journals implies awareness of the problematic legal nature of the massive support for the Afghan rebels. Even Reisman, very often a steadfast supporter of US actions abroad, had to endorse the right to forcefully support “national liberation movements” in their “wars of liberation” in his attempt to find a legal justification,²¹¹⁴ a concept the USA had, as has been shown, at all times and explicitly opposed.²¹¹⁵

As far as the US-led attack on Afghanistan in 2001 is concerned there is also some evidence of doubts as to its legality within US government circles. The Congressional Research Service, in two reports, from 1998 and 2001, which dealt with the US attacks on Sudan and Afghanistan in 1998, claimed that one of the disadvantages of attacking terrorist bases in other states was that the USA was “undermining the rule of law” by “violating the sovereignty of nations” it was “not at war with”.²¹¹⁶

Furthermore, in 2002, the USA was vocal in its opposition to Russia’s decision to attack Chechen terrorist bases in Georgia, claiming this to be a violation of Georgia’s sovereignty. This was despite the fact that the Americans had acknowledged that the

<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html>; last accessed 26/10/2011; a sentiment echoed by Soviet Prime Minister Kosygin at the same meeting (at 19).

²¹¹⁴ Reisman, “The Resistance”, 906-909.

²¹¹⁵ Statement by Mr. Gimer, US Alternate Representative to the UN General Assembly, before Committee VI (Legal), Declaration on Principles of Friendly Relations, 24/09/1970; Dept. of State Bulletin, Vol. 63, 1970, 623-627, 626.

²¹¹⁶ Congressional Research Service, Report for Congress, Raphael F. Perl, “Terrorism: U.S. Response to Bombings in Kenya and Tanzania: A New Policy Direction?”, September 1, 1998, 4; available at: The National Security Archive, *Volume I: Terrorism and U.S. Policy*, Chapter II, Document 6; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/index1.html>; last accessed 26/10/2011; Congressional Research Service, Report for Congress, Raphael F. Perl, “Terrorism, the Future, and U.S. Foreign Policy”, September 13, 2001, 8; available at: The National Security Archive, *Volume I: Terrorism and U.S. Policy*, Chapter II, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/index1.html>; last accessed 26/10/2011.

Chechens based in Georgia were “terrorists”, and that the Georgian government was incapable of dealing with them.²¹¹⁷

The US attacks on Sudan and Afghanistan in 1998, and Russia’s on Georgia in 2002, all of whose legality was called into question in the USA, were, of course, much less intrusive than Operation *Enduring Freedom* with its regime change agenda. In view of this, it seems very likely that there were significant doubts as to the legality of the use of force against Afghanistan within the USA. Certainly Glennon, a one-time advisor to the Bush Administration’s State Department, concluded that the war on Afghanistan was (unfortunately) illegal, something, as already mentioned, he blamed on the “incoherence” of the UN Charter.²¹¹⁸

Based on the internal legal analyses just outlined it becomes obvious that the governments spearheading the interventions were under no illusions as to the legality of their actions. The violations of international law in the Middle East analysed here were not due to international law’s content being malleable, with multiple competing interpretations being “arguable”, but to the respective government’s conscious decision to put the alleged national interest before adherence to international law.²¹¹⁹

This finding vindicates Chimni’s argument that international law’s content is determinate,²¹²⁰ an argument similar to Henkin’s, which is that “there is wide

²¹¹⁷ Gray, *International Law*, 230-231; Lieven, “The Secret”, 252; Voice of America, 28/08/02; available at: <http://www.globalsecurity.org/wmd/library/news/russia/2002/russia-020828-335d9eb7.htm>; last accessed 26/10/2011; “British anti-terror units to train Georgian army: MoD and secret service help to fight rebels linked to al-Qaida”, Nick Paton Walsh, *The Guardian*, 21/11/2002, 17; “Kidnap suspects abound in notorious Pankisi Gorge”, Ian Traynor, *The Guardian*, 08/11/2002, 3.

²¹¹⁸ Glennon, “The Fog”, 539-558.

²¹¹⁹ Chimni, *International Law*, 143-145; Onuma, “International law”, 131-132.

²¹²⁰ Chimni, *International Law*, 102-105, 143-145, 271-273.

agreement in the content and meaning of law and agreements, even in a world variously divided.”²¹²¹

Thirdly, illegal interventions in the Middle East, undertaken in the Great Powers’ “national interest”, have repeatedly failed.

All the events examined here have in common that the decision by the respective intervenor to violate international law was taken consciously because treaty provisions and customary international law, if adhered to, were believed to endanger the national interest. In order to further or secure the intervenor’s influence, security, or even survival, it was deemed necessary to ignore legal restraints. To some extent therefore, this thesis confirms the view of international law, held by most “realist” international relations scholars, whereby states will ignore the rule of law in their conduct of foreign policy when it is in the national interest.²¹²²

By establishing whether it is true that the respective intervenor’s national interest -as ascertained on the basis of the actor’s original motives- was *actually* furthered by violating international law, this thesis has, however, questioned the traditional “realist” approach to international law.

Rather, this result-based analysis has enabled the conclusion that in none of the cases examined can it be plausibly claimed that the Great Power intervention *truly* served the national interest of the respective intervenor. In fact, it was shown that these illegal endeavours repeatedly resulted in “blowback” or, at the very least, in the defeat of the original objective. Any initial success of the respective intervention proved to

²¹²¹ Henkin, *How*, 320 (quote), 39-45, 67; a similar argument is made by: Franck, “The Power”, 94-95, 105; Onuma, “International law”, 131-132; Bowring, *The Degradation*, 41-42 (referring to the UN Charter).

²¹²² One of the earliest, and most influential, advocates of this view of international law was Morgenthau; see: “Positivism”, 260-284.

be short-term, and was time and again followed by threats to the intervenor's national interest far greater than the ones it had initially set out to combat.

This was first shown, in *Chapter II*, by analysing what Britain had hoped to achieve in Palestine. By issuing the Balfour Declaration, Britain had sought to improve its chances of victory in WW I by gaining Jewish support. Furthermore, Palestine was to become a British-dominated outpost in the vicinity of the Suez Canal. For Britain the Suez Canal was the vital link to India. However, the overwhelmingly Arab population in the area appeared to the British Government to be significantly less trustworthy than European Jews. Creating a "Jewish homeland" therefore seemed a strategically beneficial move.

Unfortunately for Britain, the hoped-for success of its dealings in Palestine failed to materialize. There is no evidence to suggest that the Balfour Declaration influenced the outcome of the war. As far as the war effort was concerned, Jewish citizens continued to support their respective home countries. Furthermore, there is also no evidence to suggest that the entry of the USA into the war was made more or less likely by promising a "Jewish homeland" in Palestine. Far from securing a stable outpost, Britain, soon after the end of the First World War, was confronted with a tumultuous and constantly rebellious population in Palestine. As soon acknowledged by British officials, the promises made to the various groups proved irreconcilable, and caused both Arab revolts and Jewish resistance. Instead of securing the Suez Canal via Palestine, Britain was damaged by a continuous drain on its declining resources caused by its attempts to somehow maintain control of the area. Palestine became an uncomfortable burden which the British eagerly relinquished in 1948.

The premature and therefore illegal recognition of the State of Israel by the USA and the Soviet Union cannot be deemed a success either. The Soviet Union, hoping for a new left-leaning ally in an extremely conservative region, was the first of the two superpowers to see its hopes vaporize. Israel not only became one of the USA's closest allies in the region, but was also prepared to support US interests in other parts of the world.²¹²³

Although the USA, at first sight, therefore seemed to have been more successful in the pursuit of its national interest by immediately recognizing the State of Israel, the lasting instability in the whole of the Middle East, which was caused by this non-negotiated imposition of a state on the region, and which resulted in widespread suffering for the Arabs originally living in Palestine, has to this day severely curtailed the USA's ability to pacify the region. Widespread hostility towards the USA in the Middle East and acts of terrorism have arguably been the long-term results of this flawed strategy.

Chapter III then outlined the even more pronounced "trilateral" failure at Suez in 1956. Ignoring international law and attacking Egypt was allegedly in the three states' national interest. Safeguarding Britain's continued hold on the Canal was seen as vital to maintaining the UK's influence in the region and its trade links, and Nasser had to be reduced in stature, as both his charisma and his rhetoric were inflaming Arab

²¹²³ As Chomsky has explained, Israel sent military advisors to Central American and African countries in lieu of American advisors, who could not be sent due to the US Congress' disapproval. Furthermore, Israel was the conduit for secret weapon deals with Apartheid South Africa in contravention of a UN arms embargo; see: Noam Chomsky, *Fateful Triangle, The United States, Israel and the Palestinians*, London: Pluto Press, 1999 (Updated Edition), 67-68; Kinzer, *Reset*, 157, 161-165; Kinzer describes Israel's "work" in Honduras, Guatemala, Nicaragua, and Angola. He quotes General Peled, a member of the Israeli Knesset, as saying that Israel had, in Central America, become "the 'dirty-work' contractor for the U.S. Administration." Kinzer also describes an incident in 1956, when Israel managed to obtain a copy of Khrushchev's speech denouncing Stalin via an agent in Poland, and subsequently handed it over to the United States. Of course, Israel also served as conduit for the secret deals between the USA and Iran, which enabled the US government to channel money to the Nicaraguan *Contras* in contravention of a ban imposed by the US Congress (the infamous Iran-Contra scandal); Kolko, *Another*, 33.

public opinion. Meanwhile France, also deeply worried by Nasser's anti-imperial, nationalist rhetoric, viewed Nasser as an obstacle in its attempts to hold on to Algeria. Israel disliked Nasser's nationalism, his blockage of the Suez Canal, and the Straits of Tiran for Israeli shipping, and his success in obtaining Soviet weapons that might endanger Israel.

Motivated by these "realist" assumptions, the three allies struck and failed. Britain and France were humiliated. The Suez Canal remained nationalized, Nasser emerged as a more popular leader than before the conflict, and the anti-French rebellion in Algeria continued. In the end France, predictably, was forced to relinquish the country. Suez 1956 has become a symbol for the decline of both countries, and the loss of their worldwide influence. Israel did a little better, by opening up the Straits of Tiran for its shipping, but the conflict arguably set in train a set of events that was to lead to another two wars in the next 17 years. It had also failed to enlarge its territory. Furthermore, its international reputation, just as Britain's and France's, suffered significantly.

This history of Great Power failures was continued in *Chapter IV*, where events in Afghanistan were analysed. The Soviet invasion of the country in late 1979 was meant to prop up the communist government in Kabul, the survival of which had already cost the Soviet Union dearly. The Soviet leadership wished to prevent regime change in Kabul at all costs, because it believed that Afghanistan, under fundamentalist rule, might easily become a spring-board for the Chinese and/or the Americans. Allowing the fundamentalist rebels in Afghanistan to succeed might also encourage Soviet Muslims to rebel against communist rule in the USSR.

The Soviet Union failed spectacularly in securing any of its goals. By invading Afghanistan, the Soviet Union was dragged into a civil war it was not able to win. Having lost huge amounts of money, and about 15,000 soldiers' lives, the Soviet Union withdrew in 1989, leaving Afghanistan in a continued state of turmoil. The communist government in Kabul outlasted the Soviet withdrawal by three years. The Soviet Union itself survived this fiasco by only two years, and many of the predominantly Muslim Soviet republics subsequently became independent. Even then, Russia faced Muslim rebels within its borders. There can be no doubt that, certainly in comparison to the USA and China, the USSR's influence and reputation was severely undermined by this misadventure, certainly among the influential non-aligned states.

The United States got involved in this Afghan conflict early on. By the late 1980s the US was pouring \$ 600 million/year into the country in support of the *mujahedeen*, funds matched by Arab countries. Having forced the Soviet Union, after all the "Evil Empire",²¹²⁴ to withdraw from Afghanistan would imply that the US action was a striking success, even if its compatibility with international law was extremely questionable.

That was, however, not how it turned out to be. Once the communist government had been toppled in 1992, Afghanistan became a failed state. At first, that development did not unduly perturb the USA. Once the Taliban came to power in 1996, and it became clear that Afghanistan was becoming a safe haven for Al Qaeda terrorists, the USA, however, became increasingly concerned. Many of the Arab terrorists, who were now resettling in Afghanistan and intent on wreaking havoc on the USA, were the same Arab fighters who had been massively supported by the US taxpayer in the

²¹²⁴ President Ronald Reagan, Speech to the House of Commons, 08/06/1983; available at: <http://www.fordham.edu/halsall/mod/1982reagan1.html>; last accessed 19/11/2011.

war against the Soviets. The illegal US venture to massively intervene in Afghanistan on the side of the Afghan *mujahedeen* and their Arab supporters had, by the late 1990s, begun to boomerang.

Following on from the embassy bombings in Africa in 1998, blamed on Al Qaeda and punished by US attacks on Sudan and Afghanistan, Al Qaeda managed to strike a massive blow against the USA: on September 11, 2001, about 3000 civilians were killed in New York and Washington D.C. The Soviet Union's erstwhile enemies had now become their sponsor's arch-enemy. A swift, US-led military attack followed. On October 7, 2001, Operation *Enduring Freedom*, first episode in the still on-going "War on Terror", was launched. Arguably, international law was not even considered by the decision-makers in Washington D.C., by then heavily influenced by advisors such as Glennon, Bolton, and Yoo. Military success was swift, a triumph in the national interest.

More than ten years later, this assessment has proved to be inaccurate. Far from routing the terrorists, Al Qaeda still exists in some form or other, notably in Yemen, Pakistan, and parts of Africa, and terrorist acts are still being planned and committed world-wide. Afghanistan has again descended into chaos, and the erstwhile US enemy, the Taliban, is resurgent. Meanwhile, the "War on Terror", with its resulting exodus of refugees into nuclear-armed Pakistan, has destabilized that country to such an extent that many worry it could become the next failed state. Iran, currently one of the main enemies of the USA, has arguably been strengthened considerably by the American decision to depose two governments the Iranians despised: Saddam Hussein in Iraq, and the Taliban in Afghanistan. A successful end to the conflict in Afghanistan is not in sight. To argue that the intervention in Afghanistan furthered the

American national interest (not to mention its allies’) therefore seems to become more far-fetched by the day.

Palestine’s Military Governor’s conclusion, in 1943, as to the success of British strategy regarding Palestine thus seems a suitable assessment of all the Great Power interventions analysed in this thesis:

*We may record with relief that even if these material inducements had influenced the decision, the Balfour Declaration was on results utterly clean from such profit.*²¹²⁵

The three key arguments just outlined can be summarized as follows: Britain, France, the USA, and the Soviet Union have, in relation to the Middle East, repeatedly and knowingly violated international law. They have done so in pursuit of those states’ elusive national interest. In the medium and long term, however, these illegal interventions set in train a chain of events that, according to any reasonable understanding of the term, was actually detrimental to their states’ national interest.²¹²⁶ It therefore seems more than justified to conclude that the events described in this thesis evidence the Great Powers’ “doomed pursuit of national interest in violation of international law” in the Middle East.

By demonstrating the failure of the Great Powers to further their national interest by reverting to illegality, a key weakness of the “realist” assumption in respect of international law has been revealed. By focusing exclusively on the event (the illegal intervention in the national interest), and foregoing any analysis of the results, “realist” critics of international law, especially among international relations scholars,

²¹²⁵ Storrs, *Orientalisms*, 344.

²¹²⁶ Kinzer, *Reset*, IX-XII, 1-15; Johnson, *Blowback*, XI-XXII.

regularly refuse to answer the decisive question, which is whether the illegal intervention actually *did* ultimately further the national interest.

It has been shown in this thesis that repeated and persistent violations of international norms in the pursuit of power, resources, and strategic goals have not paid off. Not only have the intervenors' aims not been realized, but the resulting loss of reputation and influence has often aggravated an already precarious or volatile situation.²¹²⁷ As Bill Bowring has concluded, this is quite possibly due to the fact that

*international law contains within its principles and concepts the content of world-shaking movements, a content that is capable, sometimes unpredictably, of reappearing with a terrible vengeance for injustice.*²¹²⁸

It is therefore submitted here that the traditional, currently mainly American, "realist" criticism of international law and its role in foreign policy is misconceived. Even from a viewpoint sceptical of international law, the foregoing analysis of the failed Great Power interventions in the Middle East clearly demonstrates that the issue that needs to be debated is not whether international law can or cannot be reconciled with a state's national interest. Rather, what should be debated is who defines what the national interest is. As Henkin wrote in response to Morgenthau's critical appraisal of international law's role in foreign policy:

*The issue of law observance, I would suggest, is never a clear choice between legal obligation and national interest; a nation that observes law, even when it 'hurts', is not sacrificing national interest to law; it is choosing between competing national interests; when it commits a violation it is also sacrificing one national interest to another.*²¹²⁹

²¹²⁷ Johnson, *Blowback*, XI-XXII; Bingham, *The Rule*, 112; Moynihan, *Loyalties*, 67, 94, 96; and *On the Law*, 149, 176-177; Franck, "The Power", 93; Krisch, "International law", 375; Onuma, "International law", 138; Watts, "The Importance", 7; John Quigley, "International Law", 815-835; Henkin, *How*, 29.

²¹²⁸ Bowring, *The Degradation*, 208.

²¹²⁹ Henkin, *How*, 331; a point also made by Franck in respect of the Iraq War in 2003 ("The Power", 103); Watts, "The Importance", 7

This thesis expands on Henkin's argument by suggesting that international law is not merely one national interest competing with others, but a useful guide to safeguarding a state's *overall* national interest.²¹³⁰ It has never been "utopian" international law that threatened the realization of a state's national interest. Rather, as Woollacott has explained by reference to Suez and Iraq, a state's national interest has been harmed when "leaders" believed that their "understanding" of a "crisis" was "beyond argument", and "that certain actions would resolve the crisis". He then concludes that the interventions at Suez and in Iraq were comparable to "magic carpets and Aladdin lamps", employed in the obviously ill-advised pursuit of "magical foreign policies."²¹³¹ The disastrous consequences of such "magical" actions are summarized by Stephen Kinzer in a result-based analysis of US strategy in the Middle East, which, however, can readily be applied to all the Great Powers:

*Nowhere in the world is an overarching strategy more glaringly absent or more desperately needed than in the Middle East. For years, outside powers...have staggered through the region's forbidding deserts, steppes, and oil fields with policies that are manifest failures. During this period, threats emerging from the Middle East have become steadily more urgent and terrifying. Remaining wedded to failed policies is not simply unwise, but deeply dangerous. Albert Einstein famously defined insanity as doing the same thing over and over, but expecting different results. That is what the United States is doing in the Middle East.*²¹³²

This thesis argues that much of public international law, as it has developed over the past century or more, reflects states' overall national interest, even that of the most

²¹³⁰ Johnson, *Blowback*, XI-XXII; Bingham, *The Rule*, 112; Moynihan, *Loyalties*, 67, 94, 96; and *On the Law*, 149, 176-177; Franck, "The Power", 93; Krisch, "International law", 375; Onuma, "International law", 138; Watts, "The Importance", 7; Quigley, "International Law", 815-835.

²¹³¹ Woollacott, *After Suez*, 136; Andrew J. Bacevich, *The Limits of Power, The End of American Exceptionalism*, New York: Holt Paperbacks, 2009, especially 170-182; Bacevich makes a similar point as far as US foreign policy is concerned. He claims George W. Bush's foreign policy was "unworkable and unsustainable", because it was in conflict with "enlightened realism" (at 174-176); McDermott, *The Eden*, 162; referring to the Suez crisis, McDermott, at the time civil servant in the Foreign Office, comes to a related conclusion. Alluding to Eden's memoirs -which had the title "Full Circle"-, McDermott comments: "The wheel had indeed come full circle, but not as Eden conceived it. For after deceiving friends, colleagues, allies and peoples Eden had finally come round to deceiving himself."

²¹³² Kinzer, *Reset*, 15.

powerful.²¹³³ Adherence to international law might thus well provide a good foundation for developing a new, alternative Middle East strategy. This is not because all the rules of international law are inherently just, but rather because, in Henkin's words, "international law does not pretend too much, is not unviable, and bears substantial relation to the facts of international life."²¹³⁴ This rationality and realism has found expression in many of the international law norms examined here:

Recognizing a state prematurely is prohibited because doing otherwise creates instability, as the case of Israel demonstrates. A prematurely recognized state will often remain unstable, be dependent on outside powers to guarantee its existence, or on the repeated use of force in order to survive. Israel is a prime example of the latter. Kosovo, on the other hand, is a contemporary example of a state being recognized, despite being completely dependent on outside powers for its survival. The lack of an effective independent government, and of a resolution of its conflict with Serbia, means that an end to massive foreign involvement in Kosovo is not in sight.²¹³⁵

²¹³³ G. John Ikenberry, "America's Imperial Ambition," *Foreign Aff.*, Vol. 81, 2002, Issue 5, 44-60; Noam Chomsky, *Hegemony or Survival, America's Quest for Global Dominance*, London: Penguin Books Ltd., 2003, especially 11-49. Referring mainly to the Iraq War in 2003, both authors clearly point to the dangers inherent in President George W. Bush's Administration's approach of disregarding international law, which, they argue, could in the end threaten and seriously weaken the USA; Johnson, *Blowback*, XI-XXII; Bingham, *The Rule*, 112; Moynihan, *Loyalties*, 67, 94, 96; and *On the Law*, 149, 176-177; Franck, "The Power", 93; Krisch, "International law", 375; Onuma, "International law", 138; Watts, "The Importance", 7; Quigley, "International Law", 815-835.

²¹³⁴ Henkin, *How*, 48; Bowring, *The Degradation*, 43, 208; Franck, "The Power", 92; Moynihan, *Loyalties*, 67, 69-72.

²¹³⁵ "Kosovo Firebombing Underscores New Ethnic Tensions", Judy Dempsey, *The New York Times*, 27/07/2011; available at: http://www.nytimes.com/2011/07/28/world/europe/28kosovo.html?_r=1&scp=2&sq=Kosovo&st=cse; last accessed 19/11/2011; "Grenzkonflikt Serbien-Kosovo, Belgrad stellt Dialog mit EU in Frage", *Frankfurter Allgemeine Zeitung*, 29/07/2011; available at: <http://www.faz.net/aktuell/politik/ausland/grenzkonflikt-serbien-kosovo-belgrad-stellt-dialog-mit-eu-in-frage-11112682.html>; accessed 19/11/2011; "Grenzkonflikt, Neue Auseinandersetzungen im Kosovo", *Frankfurter Allgemeine Zeitung*, 27/07/2011; available at: <http://www.faz.net/artikel/C31325/grenzkonflikt-neue-auseinandersetzungen-im-kosovo-30474163.html>; last accessed 19/11/2011; "Kosovo and the myth of liberal intervention", Neil Clark, *The Guardian*, 15/12/2010; available at: <http://www.guardian.co.uk/commentisfree/2010/dec/15/balkans-report-blairs-liberal-intervention>; last accessed 19/11/2011; "Schießereien an serbisch-kosovarischer Grenze", *Frankfurter Allgemeine Zeitung*, 28/09/2011, 1; "2 NATO soldiers shot in Kosovo", *International Herald Tribune*, 29/11/2011, 4.

The *rule of non-intervention* in a civil war has been developed, because experience has shown that intervening on either side often, as in Afghanistan's case, leads to counter-interventions, which in turn can lead to international armed conflicts. Furthermore, a party to a civil war that cannot win on its own is unlikely to be able to provide stable government in the future, leading to never-ending interventions and possibly to further conflict. In Afghanistan, both its communist government, as well as the disparate *mujahedeen* groups fighting it, proved unable to govern without foreign support.²¹³⁶ The events in Afghanistan further illustrate that outside intervenors often do not understand the parties, or the policies they are supporting, because they are completely unaware of the internal political and cultural dynamics. Jonathan Steele has therefore convincingly concluded:

*The biggest lesson of recent Afghan history is that it is wrong for foreigners to arm factions engaged in a civil war. For foreigners then to intervene with their own army with their own troops is even greater folly.*²¹³⁷

As many commentators have suggested, it seems likely that Saudi Arabia's and the Gulf Cooperation Council's recent intervention in Bahrain's internal conflict will prove to be similarly ill-advised, because the underlying conflict between the Sunni rulers and the Shiite majority remains unresolved.²¹³⁸ The wisdom of some NATO member states' decision to arguably go beyond protecting civilians in the internal

²¹³⁶ Tomsen, *The Wars*, 391; the US Special Envoy to the *mujahedeen* (1989-1992) makes a similar observation.

²¹³⁷ Steele, *Ghosts*, 16.

²¹³⁸ Fareed Zakaria, "A New Middle East", *TIME Magazine*, 16/05/2011, 18; Ethan Bronner, "Security forces in Bahrain expel protesters from heart of the capital", *International Herald Tribune*, 18/03/2011, 1, 6; Elisabeth Bumiller, "Saudis and U.S. seek to dispel tensions", *International Herald Tribune*, 07/04/2011, 6; Patrick Cockburn, "The divided Kingdom", *The Independent*, Viewspaper, 08/08/2011, 2-3; Anthony Shadid, "Bahrain emerges as cornerstone of counterrevolution", *International Herald Tribune*, 16/09/2011, 5; Shadid concludes that the "harsh crackdown" has turned Bahrain "into a tinderbox."

Libyan conflict,²¹³⁹ as authorized by Security Council Resolution 1973, by actively supporting regime change there, is also becoming increasingly questionable.²¹⁴⁰

The same kind of rational approach to international relations can be found in the strict *rules on the use of force and self-defence*, developed in the aftermath of WW II. These norms were not utopian, but based on the experience of decades of powerful states putting forward specious claims of self-defence, protection of nationals, or protection of property, which repeatedly led to catastrophe. Hitler had repeatedly relied on the excuse of protecting Germans, or on a form of humanitarian intervention, in order to justify his wars of conquest in Central and Eastern Europe, as had Japan in regard of Manchuria.²¹⁴¹ Suez offers a prime post- WW II example of where the abuse of an alleged right to protect nationals can lead. Operation *Enduring Freedom* and its aftermath, meanwhile, serve to demonstrate that destroying terrorist bases in other states will not, on its own, eradicate terrorism, and that toppling foreign governments

²¹³⁹ “Putin attacks Britain and the US for ‘violating Libya resolution’”, Mary Dejevsky, *The Independent*, 12/11/2011; available at: <http://www.independent.co.uk/news/world/europe/putin-attacks-britain-and-us-for-violating-libya-resolution-6261163.html>; accessed 25/11/2011; Putin accused the UK and the USA of “taking the side of one of the warring parties”, thereby “committing a crude violation of the UN resolution.”; Hugh Roberts, “Who said Gaddafi had to go?”, *London Review of Books*, 17/11/2011; available at: <http://www.lrb.co.uk/v33/n22/hugh-roberts/who-said-gaddafi-had-to-go/print>; accessed 29/11/2011; Reinhard Merkel, “Völkerrecht contra Bürgerkrieg, Die Militärintervention gegen Gaddafi ist illegitim“, *Frankfurter Allgemeine Zeitung*, 22/03/2011; available at: <http://www.faz.net/aktuell/feuilleton/voelkerrecht-contre-buergerkrieg-die-militaerintervention-gegen-gaddafi-ist-illegitim-1613317.html>; accessed 29/11/2011.

²¹⁴⁰ UN Security Council Resolution 1973 (2011); “Revealed: Libya’s new reign of terror”; “UN: abuses of human rights rife in lawless new Libya”; Kim Sengupta, *The Independent*, 24/11/2011; 1-3.

²¹⁴¹ “Wir wollen gar keine Tschechen!“, Speech by Adolf Hitler on September 26, 1938; in the speech, Hitler claims that thousands of Germans living in Czechoslovakia are being forced to flee to Germany, while their possessions are being burned to the ground by the Czechoslovakians. This behaviour had necessitated German intervention; available at: <http://www.ns-archiv.de/krieg/1938/tschechoslowakei/wollen-keine-tschechen.php>; accessed 12/08/2011; *Statement issued by the Japanese Government on September 24, 1931, in regard to the Recent Incident in Manchuria*; League of Nations O. J., Vol. 12, 1931, 2280-2281; in the statement the Japanese government refers to “unpleasant incidents” in Manchuria and Mongolia. Attacks against the Japanese railway in South Manchuria and against Japanese railway guards there had necessitated the deployment of Japanese troops: “Hundreds of thousands of Japanese residents were put in jeopardy. In order to forestall an imminent disaster, the Japanese army had to react promptly.”; Goldsmith, Posner, *The Limits*, 168, 179-180.

in the name of self-defence can have wide-ranging and unforeseen negative consequences.²¹⁴²

Even *Article 22 of the Covenant of the League of Nations*, violated repeatedly by the League of Nations itself and by the UK, can be seen as an attempt to solve the conflicting demands and political disagreements prevalent at that time. The norm represented a compromise, firstly, between the aspirations of dependent peoples for self-determination, and the desire of the still powerful victorious European WW I allies to hold on to their colonies and, secondly, between the various victorious powers who had differing views on self-determination.²¹⁴³ Admittedly, Article 22 was, as acknowledged earlier, already behind the times when it came into force, as subsequent unrest in virtually all the Arab areas not granted full independence demonstrated. Nevertheless, it was the minimum dependent people could be offered after WW I. The unrest that erupted in areas such as Syria or Iraq, where France and Britain more or less adhered to Article 22, was thus relatively minor, and certainly much more short-lived, than the catastrophe that would engulf Palestine, in respect of which Britain and the League of Nations had decided to ignore the provisions of Article 22.

²¹⁴² Steele, *Ghosts*, 224-225; Cowper-Coles, *Cables*, 289; referring to Operation *Enduring Freedom*, the former British Ambassador to Kabul has concluded: "Acts of anti-state terrorism, even on the obscene scale of 9/11, seldom in themselves do significant objective damage to the interests of their target state. But real harm can be done when, as the terrorists hope, the attacked state is provoked into an irrationally disproportionate reaction, doing in the long run far more damage to that state's interests than the original terrorist attack."; H.D.S. Greenway, "9/11 blowback", *International Herald Tribune*, 02/09/2011, 9; in his column, Greenway concludes that "like other victims of terrorism, the United States believed that somehow the answer could be found in brute force. But ideas seldom yield to force,..."; Rogers, *A War*, 41-42; Rogers quote's Britain's then Chief of Defence Staff, Admiral Sir Michael Boyce, expressing a similar view in December 2001; according to Rogers, Boyce "warned against the idea that a war on terrorism could be won by intensive military action while failing to recognise the root causes of the problem. More than that, he warned that the use of excessive force could even tend to radicalize Islamic opinion."

²¹⁴³ Kattan, *From Coexistence*, 48-49; Anghie, *Imperialism*, 139-140; Mansfield, *A History*, 195; Barr, *A Line*, 74.

The indisputable failures of the Great Powers, when acting contrary to the rules of international law in the pursuit of the elusive national interest, seem to confirm the common sense that is reflected in many of the key provisions of public international law. Even though perhaps not offering a path to achieving powerful states' goals, international law usually does at least offer even the Great Powers a way to protect themselves from further damage. Not international law, but rather the almost contemptuous disregard shown by the Great Powers' leaders towards it, has in this thesis been found to be what Franck has described as "fantasy realism, at best."²¹⁴⁴

This is also the true lesson of the Iraq War in 2003. As O'Connell has pointed out, American neo-conservatives had, in the run-up to the conflict, "depicted" international law as a "dangerous obstacle to United States power". The sobering results of that military effort, which was undertaken in disdain of international law, and can fairly be described as "neoconservative policies put into practice", have, as O'Connell correctly concludes, in fact "helped remind the world why international law has commanded respect for centuries."²¹⁴⁵

International law is in truth a compromise between different values, and usually a realistic reflection of power relations, which in turn means that violations often result in punishment for the violator. As explained earlier, the way treaties are drafted, and customary international law is created, ensure that in most cases the participating states, represented by their governments, have gone through a lengthy process of assessing what is possible and what is not possible in international relations.²¹⁴⁶

²¹⁴⁴ Franck, "The Power", 103.

²¹⁴⁵ O'Connell, *The Power*, 62.

²¹⁴⁶ Moynihan, *On the Law*, 15-79; Schachter, *International Law*, 6; Henkin, *How*, 30

Public international law thus rarely embodies utopian notions, but is instead regularly based on a pragmatic, hard-headed evaluation of realities and past experiences.²¹⁴⁷

It is for that reason that this thesis maintains that public international law in large parts enables a foreign policy guided by “enlightened realism”, as defined by Bacevich. According to him “state policy” is driven by a nation’s “self-interest”, but those interests can best be advanced only when “compatible with the interests of others”. Therefore the “essence” of a successful foreign policy is “locating ‘the point of concurrence between the parochial and the general interest, between the national and the international common good.’” Bacevich concludes that only a state which conducts its international relations in accordance with “enlightened realism” will, in the end, be successful in achieving its foreign policy goals.²¹⁴⁸

Because international law is created by states that are pursuing their national interest, without at the same time losing sight of reality while doing so, international law, in large parts, embodies, it is argued here, “enlightened realism” as defined by Bacevich. As Henkin has explained, international law “affords a framework, a pattern, a fabric for international society” which has “grown out of relations”.²¹⁴⁹ This is also why the UN Charter, arguably the bedrock of modern international law, is neither utopian nor incoherent, but rather based on its drafters’ experience of two horrific, all-consuming world wars.

“Realist” critics of international law regularly ignore one recurring phenomenon in international relations: after every cataclysmic event, during which international law

²¹⁴⁷ Henkin, *How*, 4, 28-38; Schachter, *International Law*, 6, 11-12, 30-31; Moynihan, *Loyalties*, 67; and *On the Law*, 15-79; Onuma, “International law”, 112-113, 116, 124; Krisch, “International law”, 380.

²¹⁴⁸ Bacevich, *The Limits*, 174-175; in his definition of “enlightened realism” Bacevich relies on Reinhold Niebuhr’s description of statecraft, which he quotes.

²¹⁴⁹ Henkin, *How*, 5.

had arguably failed, such as before and during both World Wars, leaders from all over the world come together to actually strengthen, not dismantle international law.²¹⁵⁰

This thesis has provided a possible explanation for the phenomenon.

As the former UK Ambassador to Moscow, Rodric Braithwaite, has pointed out, “leaders take their countries into foreign wars for reasons of ambition, greed, moral or messianic fervour, or on a calculation of national advantage which may or may not be flawed.”²¹⁵¹ The events analysed in this thesis would seem to imply that the “calculation of national advantage” undertaken by leaders turns out to be flawed more often than not. Against that backdrop, strengthening international law in order to further curtail “leaders” direct influence on world affairs, would thus seem to be *the* “rational choice”²¹⁵² for those who are obliged “to clean up the mess” previous “leaders” have left behind.²¹⁵³ If consulted, there is little doubt that there would be few indeed among the general public who would disagree with that choice.

International law, due to its compromising nature, is often disappointing to those wishing to act immediately in order to satisfy their own and their population’s emotional needs. But the conclusion of this thesis is that it reflects mankind’s experiences, and is therefore an indispensable and rational guide for any leader keen on truly furthering his/her state’s national interest.

²¹⁵⁰ Henkin, *How*, 30; Anghie, *Imperialism*, 123-124; O’Connell, *The Power*, 78, 105.

²¹⁵¹ Braithwaite, *Afgantsy*, 335; Tomsen, *The Wars*, 453; the US Special Envoy to the *mujahedeen* (1989-1992) also refers to multiple “foreign-policy failures committed by Great Powers.”

²¹⁵² Franck, “The Power”, 106.

²¹⁵³ Reza Marashi, “America’s real Iran problem”, *The International Herald Tribune*, 11/11/2011, 6; Marashi, a former Iran desk officer in the US State Department, and currently Director of Research at the National Iranian American Council, makes that point in respect of what he views as the wrong approach adopted by the USA *versus* Iran.

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