

The Expanded Doctrine of Self-Defence & International Security Assistance - The Case of Afghanistan 2001 – 2020

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Abstract

The concept of self-defense in international law has been subject to discussion in recent years particularly in relation to its application on the fight against terrorism. The article re-considers such an application in the light of customary international law and via the use of the case of Afghanistan. More specifically the article aims at demonstrating how the Afghanistan mission informed the development of the classical concept of self-defense in the context of international security assistance. Via a historical presentation of the use of the concept of self-defense the work reveals key developments in the field.

Keywords: self-defense, terrorism, Afghanistan, International law

1. Introduction

The application of the classic concept of self-defence in international law has been challenged by the events of 9/11. Likewise, international terrorism of the scale and effect of 9/11 has led to the development of the idea of invoking the right to self-defence in response to major international terrorism incidents. With reference to Afghanistan, this paper considers the evolution of self-defence in customary international law. In the case of Afghanistan, it is considered that whilst conceptually the use of force for stabilisation and security purposes can be distinguished from the use of force to combat terrorism, keeping the two separate becomes in practice difficult over time and raises legal issues on the authorisation for the use of force. The paper further considers how the concept of self-defence evolved during the Afghanistan mission and it is suggested that in the example of Afghanistan the evolution of self-defence under customary international law should be viewed as having developed in the broader context of international security assistance. As has been pointed out by for example Gill, less attention has been devoted in legal debate to the question of when the right to self-defence ends.¹ Related to this question and the requirements of necessity and proportionality in the exercise of the right to self-defence by States is the duration of the exercise of the right.² The post 9/11 intervention in Afghanistan is cited by Gill as an example of where measures taken by the UN Security Council can be seen as complementary to the exercise by States of the inherent right of self-defence.³ This paper aims to expand on this question of the effect of collective security measures adopted by the Security Council upon the exercise of self-defence by in the case of Afghanistan looking at the relationship between UN mandated security measures and self-defence. The withdrawal of troops from Afghanistan in 2021 following the peace agreements made with Afghanistan, marks an opportune moment to look back over two decades of involvement since 2001 and review how self-defence is part of the overall regulatory framework. The scale of the collective participation of the international community in Afghanistan means this review is condensed and focuses on key developments. The question of when self-defence ends for Afghanistan also raises the topical question of how States withdraw from intervention where the primary reason for intervention

¹ Gill T.D. 'When Does Self-Defence End?' in *The Oxford Handbook of The Use of Force In International Law* ed Marc Weller (2015), chapter 33, p737

² Gill T.D. 'When Does Self-Defence End?' in *The Oxford Handbook of The Use of Force In International Law* ed Marc Weller (2015), chapter 33, pp 745-746

³ Gill T.D. 'When Does Self-Defence End?' in *The Oxford Handbook of The Use of Force In International Law* ed Marc Weller (2015), chapter 33, p747

from the start was self-defence.

2. Literature Review

The literature has been concerned with the issue of whether the use of force in Afghanistan was at the start of the military operations a lawful exercise of the right of self-defence. This has been considered with regard to whether the elements of the lawful exercise of self-defence are present⁴ and the relationship between UN Charter Article 51 and customary international law of self-defence.⁵ The forms self-defence take such as anticipatory self-defence⁶ have been analysed, together with the issue of state responsibility.⁷ This has considered the impact of the 9/11 attacks and the response to those attacks with reference to the legal requirements under the UN Charter and in customary international law.⁸ Moreover, the military operation against Afghanistan has therefore been assessed in terms of where this fits into the classic legal framework as understood at the time of the initial deployment of force. Such an approach to the case of Afghanistan focuses on the invocation of the right of self-defence as a response to armed attack by non-state actors and the question of legal justification for the use of force.⁹

This focus on the justification for the use of force against non-state actors concentrates analysis on the elasticity of the concept of self-defence and the extent to which this can accommodate a change in customary international law practice.¹⁰ The assessment of the international response is of course not limited to the question of invoking the right to self-defence. It is recognised that the international response has required a necessary shift in strategy from an initial military focused response to a broader strategy focused on the long-term and outcomes including regional stabilisation (see for example, Valentina¹¹). The question of whether the intervention in Afghanistan contributed to changes to aspects of the law of self-defence has been considered not only by reference to the traditional view of self-defence and its pre-requisites of state responsibility, necessity and proportionality, and where the limits are drawn.¹² For example, Duffy considers the introduction of culpability of the Afghanistan de facto government to be one such example of this dimension that may have been intended to limit the use of force in the future.¹³ This aspect of the debate recognises there are clearly broader issues and consequences which a study if limited to considering only the question of legal justification will not adequately address the extent of change in customary international practice and the law of self-defence. Despite the recognition of the difference between the exercise of the right of self-defence as an initial response to armed attack as distinct from the continuing use of force as part of a military campaign, the effect on the concept of self-defence by its continuing use within the context of a long-term campaign has been raised as an issue but not studied in-depth. Although the effect of the military operation in Afghanistan has recently been considered by Connah as having been a cyclical and self-reinforcing relationship of violence against violence.¹⁴ Duffy for example considers that there is the issue with the expansion of the military strategy in Afghanistan to removal of the Taliban regime and the challenge this raises to the principles of necessity and proportionality.¹⁵ The intervention in Afghanistan as a matter of both its

⁴ John Quigley (2003), *The Afghanistan War and Self-Defense*, 37 Val. U. L. Rev. 541. Available at: <https://scholar.valpo.edu/vultr/vol37/iss2/7>

⁵ For example, Eric P.J. Myjer, Nigel D. White (2002) *The Twin Towers Attack: An Unlimited Right to Self-Defence?* *Journal of Conflict and Security Law*, Volume 7, Issue 1, April, pages 5-17; Leo Van de hole (2003) *Anticipatory Self-Defence Under International Law*. *American University International Law Review* 19, no. 1: 69-106).

⁶ Leo Van de hole (2003) *Anticipatory Self-Defence Under International Law*. *American University International Law Review* 19, no. 1: 69-106).

⁷ Travalio, Greg and Altenburg, John (2003) *Terrorism, State Responsibility, and the Use of Military Force*, *Chicago Journal of International Law*: Vol. 4: No. 1, Article 9. Available at: <https://chicagounbound.uchicago.edu/cjil/vol4/iss1/9>

⁸ For example, Dr. Yutaka Arai-Takahashi (2002) *Shifting Boundaries of the Right of Self-Defence* *Appraising the Impact of the September 11 Attacks on Jus Ad Bellum*, *The International Lawyer* Vol. 36 No. 4 Winter 2002

⁹ See for example, Raphael Van Steenberghe (2010) *Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?* *Leiden Journal of International Law*, 23 (2010), pp. 183–208 doi:10.1017/S0922156509990380

¹⁰ See for example, Mark A. Drumbl (2002), *Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. Rev. 1 (2002). Available at: <http://scholarship.law.unc.edu/nclr/vol81/iss1/3>; Christian J Tams (2009), *The Use of Force against Terrorists* *European Journal of International Law* Vol. 20 No. 2, 359 – 397

¹¹ Taddeo Valentina (2010) *U.S. Response to Terrorism: A Strategic Analysis of the Afghanistan Campaign*, *Journal of Strategic Security* 3, no. 2: 27-38. DOI: <http://dx.doi.org/10.5038/1944-0472.3.2.3> Available at: <http://scholarcommons.usf.edu/jss/vol3/iss2/3>

¹² Helen Duffy (2015), *The "war on terror" and the framework of international law*, Cambridge University Press, second edition pp 293-306

¹³ Helen Duffy (2015), *The "war on terror" and the framework of international law*, (Cambridge: Cambridge University Press, second edition pp 300-301

¹⁴ Leoni Connah (2021), *US Intervention in Afghanistan: Justifying the unjustifiable?* *South Asia Research* Vol. 41(1) 70–86

¹⁵ Helen Duffy (2015), *The "war on terror" and the framework of international law*, (Cambridge: Cambridge University Press, second edition pp 301-302

nature and scale is considered by Duffy to raise the question of whether necessity was met at all relevant stages.¹⁶ For example, Duffy points out the problem of a continued reliance on self-defence in the case of Afghanistan stretching the boundaries of the law of self-defence. In this respect Duffy makes a distinction between the UN authorisation of an International Assistance Force in Afghanistan and the military operation there under the guise of acting in self-defence¹⁷ and poses the question of what the correct relationship is between self-defence and collective action under the UN charter.

More recent literature has seen a shift in focus to UN stabilization mandates and the use of force in support of such mandates.¹⁸ In doing so this moves the debate to considering not only the parameters of self-defence in international law but also the interaction between this and long-term objectives of peace and stability. For example, the boundaries between peacekeeping and peace enforcement Gilder refers to as being at risk of becoming blurred.¹⁹ There is scope for looking at how the use of self-defence evolves with reference to the interaction between traditional self-defence and broader international security assistance. For example, Ducheine & Pouw examine the different legal bases for operations in Afghanistan recognising that later developments in international security assistance cannot be understood without considering the preceding military response.²⁰ There is therefore a need to consider how self-defence evolves both in time and space. A contextual understanding of the change in customary international law practice and its impact on shifting boundaries is essential to understanding the evolution of the concept of self-defence. A re-evaluation of the use of self-defence in international law is prompted by the ending of the Afghanistan operations. That is using Afghanistan as a case study to chart the progression from the initial response to armed attack to its use within the broader context of the long-term campaign and where and how it has been situated as a contribution to the literature. The case of Afghanistan merits further study especially as Duffy has considered this as potentially persuasive for supporting assertions that there has been a shift in the law of self-defence but it being less clear whether this will be of lasting effect.²¹

3. The Scope of Self-Defence

The phraseology of Article 51 of the UN Charter that the inherent right applies "if an armed attack occurs against a Member of the United Nations" compared to Article 2(4) of the Charter that States shall refrain from the use of force in international relations raises the issue of the extent to which States can exercise self-defence against non-State actors. There is the view that since 9/11 State practice should now be regarded as clear that at least in the context of international terrorism an armed attack can be by non-State actors based in a foreign State.²² Whilst academic debate has concentrated on the definition of 'armed attack' and the conditions under which states can invoke self-defence, the scope of the right has been less examined.²³ The military operation in Afghanistan ('Operation Enduring Freedom') had been described as 'a self-perpetuating military campaign' based on a broad interpretation of Article 51 stretching the boundaries of self-defence, and as such a departure from the classic self-defence principles.²⁴ Although the facts in *Nicaragua*²⁵ included the conflict to which the case related was a continuing one²⁶ this case does not entirely assist with the question of a continuing use of force. The ICJ did not deal with the issue of the lawfulness of a response to the imminent threat of attack²⁷ and ultimately it was not an

¹⁶ Helen Duffy (2015), *The "war on terror" and the framework of international law*, (Cambridge: Cambridge University Press, second edition pp 304-305

¹⁷ Helen Duffy (2015), The Legal Advice Clinic, over the last 3 years, has trained 148 student advisors advising, on average, 16 clients a week across 4 sessions with the clinic running for 24 weeks each year. *The "war on terror" and the framework of international law*, (Cambridge: Cambridge University Press, second edition pp 305-306

¹⁸ see for example, Alexander Gilder (2019) The Effect of 'Stabilization' in the Mandates and Practice of UN Peace Operations, *Netherlands International Law Review* 66:47-73 <https://doi.org/10.1007/s40802-019-00128-4> Published online: 19 March 2019

¹⁹ Alexander Gilder (2019) The Effect of 'Stabilization' in the Mandates and Practice of UN Peace Operations, *Netherlands International Law Review* 66:47-73, at 70-71 <https://doi.org/10.1007/s40802-019-00128-4> Published online: 19 March 2019

²⁰ Ducheine, P., & Pouw, E. (2012). Legitimizing the use of force: legal bases for operations Enduring Freedom and ISAF. In R. Beeres, J. van der Meulen, J. Soeters, & A. Vogelaar (Eds.), *Mission Uruzgan: collaborating in multiple coalitions for Afghanistan*, Pallas Publications, pp 33-46

²¹ Helen Duffy (2015), *The "war on terror" and the framework of international law*, (Cambridge: Cambridge University Press, second edition pp 339-340

²² Dinstein Y 'Terrorism and Afghanistan' pp 43-57 at p 46 in *International Law Studies*-Volume 85 *The War in Afghanistan: A Legal Analysis* Michael N. Schmitt (Editor).

²³ Tams C.J. *The Use of Force against Terrorists* (2009) *The European Journal of International Law* Vol 20(2) pp 359-397 at p. 389.

²⁴ Tams C.J. *The Use of Force against Terrorists* (2009) *The European Journal of International Law* Vol 20(2) pp 359-397 at p. 390

²⁵ *Nicaragua* [1986] ICJ Rep 14

²⁶ *Nicaragua* [1986] ICJ Rep 14 at p39 para 58

²⁷ *Nicaragua* [1986] ICJ Rep 14 at p27 para 35

issue in the case whether a State may react in self-defence in circumstances other than an armed attack.²⁸ The most that can be said from the *Nicaragua* case is the finding of the ICJ that Article 51 of the UN Charter is only meaningful on the basis of an inherent right to self-defence which is essentially of a customary nature.²⁹ In which case the scope of this inherent right is not limited by the UN Charter. Indeed the ICJ pointed out that a definition of "armed attack" is not provided by the Charter and is not part of treaty law.³⁰ What the ICJ did admit was the possibility that attacks of a cumulative nature could, if of a sufficient nature and gravity as to amount to an armed attack by regular forces, be construed as an armed attack to invoke the right to self-defence.³¹ Although the ICJ has it seems by *Nicaragua* endorsed the view that different attacks may be 'taken cumulatively' to determine whether self-defence is permitted, the ICJ however found there was insufficient information to answer this question.³²

The ICJ in *Nicaragua* also touched on the issue by stating that the provision of arms or logistical or other support was included within the concept of armed attack.³³ This prompted the observation in the *Dissenting Opinion of Judge Schwebel* that the term "logistical support" is by nature "open ended" and that logistical support could be so substantial as to be tantamount to an armed attack.³⁴ This could lead to the two following observations. Firstly, that the scope of the inherent right to self-defence may be limited depending on the nexus between the nature and scale of the "armed attack" and the exercise of the right.

Secondly, the concept of "armed attack" committed by non-state actors has traditionally been understood to be an attack by regular forces. That is clear from the ICJ consideration of the nature and gravity believed to reflect the definition of aggression in Article 3 para. 9 as annexed to the General Assembly resolution 3314.

The traditional approach as embodied by *Nicaragua* is clearly problematic when applied to the features of international terrorism such as terrorist networks, the logistical support underlying the networks encompassing training camps, and the supply of arms and insurgents/foreign fighters. It is difficult to reconcile those features with the notion of "armed attack" and/or imminent threat of "armed attack" when what is in issue is an enduring threat sustained by those features and the strategic answer to counter the threat is to seek to remove by military force those characteristics supporting and enabling terrorism to continue.

It is an unassailable fact that the events of 9/11 were unique and the threat of further terrorist atrocities and the nature of the international response to this is a development in customary international law. A relevant point made in *Nicaragua* by the ICJ was that compliance with principles of necessity and proportionality does not make the exercise of the inherent right of self-defence lawful where there was no justification *ab initio*.³⁵ Therefore where action continues following an armed attack the question of the duration of the response is not resolved solely by examining the use of force as to its compliance with the principles of necessity and proportionality. It is the persistence of the armed attack or threat of armed attack persists that must continue for the exercise of the inherent right to self-defence to continue.

Nonetheless necessity and proportionality continue to be relevant to the question of whether a series or pattern of attacks justifies the use of self-defence. In the *Oil Platforms Case*³⁶ the US contended that there were a series of missile attacks against US flagged and other vessels in Kuwaiti waters and with regard to these series of attacks the missile attack on the Sea Isle City was itself an armed attack.³⁷ Aside from the question of attribution the ICJ's approach was to apply *Nicaragua* and consider the incidents even taken cumulatively were not of a "most grave form" for the use of force to be justified.³⁸ It was also contended by the US that there was a necessity to protect "essential security interests" in its use of force against what it maintained were legitimate military targets.³⁹ It was the ICJ's position that the question of necessity of measures taken in self-defence is "strict and objective" leaving

²⁸ Dissenting Opinion of Judge Schwebel p259 at p347 para 172

²⁹ *Nicaragua* [1986] ICJ Rep 14 at p94 para 176

³⁰ *Nicaragua* [1986] ICJ Rep 14 at p94 para 176

³¹ *Nicaragua* [1986] ICJ Rep 14 at p103 para 195

³² *Nicaragua* [1986] ICJ Rep at p 119-120

³³ *Nicaragua* [1986] ICJ Rep 14 at p104 para 195

³⁴ Dissenting Opinion of Judge Schwebel p259 at p346, para 171

³⁵ *Nicaragua* [1986] ICJ Rep at p 122-123 para 237

³⁶ *Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ Rep 2003 p161

³⁷ *Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ Rep 2003 p161 at pp190-191, para 62

³⁸ *Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ Rep 2003 p161 at pp191-192, para 64

³⁹ *Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ Rep 2003 p161 at pp 196-197 paras 73-74

no room for discretion.⁴⁰ Even if accepted that the evidence supported the US contentions the ICJ felt unable to hold the attacks on the Iranian Oil Platforms could have been justified as an act of self defence in applying necessity and proportionality principles.⁴¹

Applied to the international response to emerging terrorist threats and the intervention in Afghanistan there is apart from broad principles of the exercise of the inherent right to self-defence and necessity and proportionality-no identifiable precedent for the use of self-defence as a justification in response to the threat from international terrorism. As the *Oil Platforms Case* shows there is an issue with mounting and sustaining a response aimed at reducing the military capabilities as opposed to a direct and time limited use of force to repel or hold back an armed incursion, and with regard to the strict and objective test of necessity neither does recourse to the protection of State security provide adequate justification. Customary international law whilst pointing to instances that could be demonstrably regarded as not the legitimate exercise of self-defence, it does not assist with analysing the international response in the case Afghanistan. The question arises whether State practice has permitted a more permissive interpretation of self-defence. The 2001 Authorization for Use of Military Force (AUMF) passed by Congress authorised US counterterrorism combat operations in Afghanistan. The terms of this authorisation in domestic law had authorised the US President to *use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.* The 2001 AUMF remained the domestic legal authority for the US to use military force in Afghanistan. The initiation and continuation by the US and coalition partners of counterterrorism combat operations was on the grounds of self-defence consistent with Article 51 of the UN Charter. Operation Enduring Freedom lasted for 13 years (from 7 October 2001 to 31 December 2014) during which time the overarching legal justification remained the inherent right to self-defence under Article 51 of the UN Charter. The use of force in self-defence to enable enduring measures including the denial of safe haven to terrorists this raises the issue of the extent of the exercise by States of the inherent right to self defence in terms of how much force the state can use and for how long.

4. Operation Enduring Freedom

The stated objective of Operation Enduring Freedom (OEF) was to ensure Afghanistan would never ever again be a sanctuary for any transnational extremists including Al-Qaida. Intervention by military force was the initial response to the 9/11 attacks. The UN's role was to call for a central role in the establishment of a transitional administration and envisaged the deployment of peacekeepers to Afghanistan (UN Security Council Resolution 1378). A state's right to self-defence under Article 51 of the UN Charter had been used before to justify the use of cruise missile strikes against suspected Al-Qaeda bases in Afghanistan (Operation Infinite Reach) authorised by President Clinton 20th August 1998 following the attacks on the U.S. embassies in Nairobi and Dar es Salaam. Presidential action was authorized by section 2377 of the U.S. Code to target international terrorist infrastructure including strikes against a pharmaceutical factory in Sudan. Operation Infinite Reach was the first time the US launched a pre-emptive strike against a terrorist organisation or network. A principal objective of Operation Infinite Reach was to kill Usama Bin Laden although the initial strikes went beyond targeting him to damage other camps believed to be supporting his organisation. Follow-on strikes were actively considered ('Plan Delenda') which envisaged an ongoing campaign of regular precision strikes, though not implemented, as by October 1998 the focus had shifted to finding a more effective strategy.⁴² Comparatively, Operation Infinite Reach was a time limited response to an armed attack. The notification the US made on the 7th October 2001 to the United Nations Security Council reporting its use of military force in self-defence made clear that its response was designed to prevent and deter further attacks on the United States.⁴³ This was on the basis that the Taliban regime had allowed parts of Afghanistan under its control to be used by the Al-Qaeda organisation as a base of operation. The UK notification of the same date was made in terms that its military assets deployed in support as part of a wider international effort to avert the continuing threat of attacks with military action directed against Al-Qaeda and the Taliban regime supporting it.⁴⁴ The objectives of OEF were to both disrupt the use of Afghanistan as a terrorist

⁴⁰ Oil Platforms (Islamic Republic of Iran v United States of America) ICJ Rep 2003 p161 see at p 196 para 73

⁴¹ Oil Platforms (Islamic Republic of Iran v United States of America) ICJ Rep 2003 p161 at p 198 para. 76

⁴² The 9/11 Commission Report Final Report of the National Commission on Terrorist Attacks Upon the United States (22.7.2004) pp 115-121

⁴³ Letter from Ambassador John Negroponte, Permanent Representative of the USA to the UN in New York, to the President of the Security Council, S/2001/946, 7 October 2001.

⁴⁴ 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.

base of operations and to destroy the military capability of the Taliban regime.⁴⁵ OEF was a US-led coalition which conducted operations to oust the Taliban and Al-Qaeda from Afghanistan and its mandate differed from the NATO alliance peace enforcement mission. There were three components to OEF, military, diplomatic, and humanitarian.⁴⁶ The diplomatic component recognised the short term risks of a power vacuum in the event of the loosening of Taliban power.⁴⁷ The military component comprised three distinct objectives. The first was to deny Usama Bin Laden and the Al-Qaeda network the use of training camps; second to exert pressure on the Taliban regime to end its support; and third to set the conditions for a sustained military operation.⁴⁸ Following airstrikes, the military operations against Al-Qaeda and the Taliban were intended to create the conditions for a sustained anti-terrorist and humanitarian operation in Afghanistan.⁴⁹ As can be seen whilst self-defence was the legal justification relied upon for military intervention in response to the 9/11 attacks, it was intended from the outset to create the foundation for a sustained operation against terrorist activity in conjunction with humanitarian measures.

5. UNSCR 1368 (2001) & 1378 (2001)

The question of the extent to which the use of force to counter terrorism was authorised by the UN requires analysis of the UN resolutions. UNSCR 1368 (2001) immediately followed the 9/11 attacks and whilst recognising the inherent right of individual or collective self-defence this does not explicitly authorise military action. Rather this expressed the UN Security Council's readiness to 'take all necessary steps', and to 'combat all forms of terrorism' as part of its responsibilities under the UN Charter. The international community are called upon in the resolution to redouble efforts to prevent and suppress terrorist acts by both increased cooperation and full implementation of relevant international anti-terrorist conventions and UN Security Council resolutions. The next steps taken by the UN acting under Chapter VII of the UN Charter was UNSCR 1373 (2001) adopted 28 September 2001 deciding that all States shall prevent and suppress the financing of terrorist acts. UNSCR 1378 (2001) adopted 14 November 2001 in the preamble supported international efforts 'to root out terrorism' and resolved that the UN should play a central role in supporting the Afghan people to establish a transitional administration leading to a new government to be formed. Member States were called upon in this resolution to provide support to this and encouraged to support efforts to ensure the safety and security of those areas of Afghanistan no longer under Taliban control. The first reference to OEF is not until UNSCR 1510 (2003) which the UN in acting under Chapter VII of the UN Charter to authorise the expansion of the mandate of the International Security Assistance Force called upon that force to also work in close consultation with the Operation Enduring Freedom Coalition in the implementation of the force mandate. This recognition of the Operation Enduring Freedom Coalition as integral to executing the ISAF mandate implies that OEF was seen to continue to have legitimate authority under Article 51 of the UN Charter. The initial deployment of military force in Afghanistan and combat operations under OEF was therefore not under authorisation of a UN Security Council resolution and was instead the exercise of the inherent right of self-defence under the provisions of Article 51 of the UN Charter. The UN role as will be seen below was to authorise force assistance in the context of maintaining security and stabilising Afghanistan and OEF did not have an express UN mandate. Following the US and UK notifications of the use of force the UN in the declaration of its role concentrated on measures to restore security to Afghanistan leaving it to the Operation Enduring Freedom Coalition to decide its measures. The question is the extent to which Article 51 permits an enduring and long-term military operation. As UNSCR 1368 and 1378 do not invoke UN measures under Chapter VII of the UN Charter and refer to the inherent right to self-defence it could be argued that this sanctions the legitimate use of military force under Article 51. The difficulty is that before the coalition commenced military operations in Afghanistan UNSCR 1373 of 28 September 2001 was formal confirmation that the UN had commenced to act under Chapter VII. Article 51 of the UN Charter preserves the inherent right to self-defence in the event of an armed attack against a member of the UN, 'until the Security Council has taken the measures necessary to maintain international peace and security.' The measures taken by members in exercise of the inherent right of self-defence do not affect the UN Security Council authority to take such action at it deems necessary to maintain or restore international peace and security. In effect the two rights (self-defence and UN authority to take measures) co-exist. If all the measures necessary to maintain international peace and security have yet to be taken then arguably the inherent right to self-defence could continue. The use of force however will remain subject to necessity and proportionality.

⁴⁵ Address of President Bush to the nation, 7 October 2001 The White House web site, 7 October 2001 at <http://www.whitehouse.gov>

⁴⁶ Statement by Prime Minister Tony Blair, Downing Street, 7 October 2001.

⁴⁷ HC Research Paper 01/81 31 October 2001 'Operation Enduring Freedom and the Conflict in Afghanistan: An Update' at p39

⁴⁸ Secretary of State for Defence, Geoff Hoon, 10 Downing Street web site, 7 October 2001 at <http://www.number-10.gov.uk>

⁴⁹ DoD News Briefing, 29 October 2001 at <http://www.defenselink.mil/news>

6. UNSCR 1386 & the Bonn Agreement

UNSCR 1386 authorised the establishment of the International Security Assistance force (ISAF) initially for a 6-month period. The purpose of ISAF was to assist the Afghan Interim authority with maintaining security in Kabul and surrounding areas.⁵⁰ The extent of the authorisation was for Member States participating in ISAF to 'take all necessary measures' to fulfil ISAF's mandate. Under the approved operational plan ISAF was not mandated to conduct counter-terrorism operations. This contrasts the US-led Coalition which since October 2001 had been conducting counter-terrorism operations to oust the Taliban and Al-Qaeda from Afghanistan as part of the wider Operation Enduring Freedom (OEF). The request for authorisation as set out in the Bonn Agreement (Annex 1) dated the 5th December 2001 was that ISAF was required as an emergency interim measure in recognition that it would take time for the new Afghan security force and armed forces to be set up and function effectively. ISAF's purpose was in the meantime to assist in the maintenance of security for Kabul and surrounding areas. However, at the time it was envisaged that ISAF could be expanded to other areas as appropriate. Therefore, ISAF was a UN mandated force with the objective of providing both security and law and order to Afghanistan as an emergency measure. Annex 1 of the Bonn Agreement included that it '*would also be desirable if such a force were to assist in the rehabilitation of Afghanistan's infrastructure*'. The Bonn Agreement also made clear that the national sovereignty and territorial integrity of Afghanistan should be respected. An Interim Authority was to be established 22 December 2001. The purpose of the Interim Authority was to represent Afghanistan in its external relations until a Transitional Authority had been established by the Emergency Loya Jirga, whereupon the Transitional Authority would then lead Afghanistan until such time as a fully representative government could be elected. The Bonn Agreement provided for the transfer of power from all mujahidin, Afghan armed forces and armed groups in Afghanistan to the Interim Authority. In turn the Interim Authority was required to cooperate with the international community in the fight against terrorism, drugs and organised crime, and to commit to respect international law.⁵¹

7. The Military Technical Agreement

The operating parameters of the ISAF mission is set out in the Military Technical Agreement between ISAF and the Interim Administration of Afghanistan. In this agreement the Interim Administration agreed that ISAF's mission was to assist it in the maintenance of security in a defined area of responsibility for Kabul and its surrounding areas.⁵² The agreement defined 'Coalition Forces' as all those national military elements of the US-led OEF and made clear that ISAF was not part of the 'Coalition Forces'. Further, an 'Offensive Action' was defined as 'any use of armed military force'.⁵³ The use of military force by the ISAF Commander included protecting ISAF and its mission with the Commander authorised to do all that he 'judges necessary and proper'.⁵⁴ It is clear from the technical agreement that the operational scope of ISAF was consistent with the UN mandate considered to be distinct from the US-led international coalition prosecuting the 'war on terrorism' and initially limited to protection of Kabul and its surrounding areas. The scope of ISAF is elaborated on in the agreement under 'Article V: Illustrative Tasks of the ISAF' which set out that this international force would undertake tasks in support of its mission including '*protective patrolling*'.⁵⁵

8. Chapter VII of the UN Charter (Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression)

The deployment in January 2002 of the first contingent of ISAF peacekeepers was under Chapter VII of the UN Charter. Under Article 51 of the UN Charter the inherent right of individual or collective self-defence in response to an armed attack against a Member of the United Nations only lasts 'until the Security Council has taken the measures necessary to maintain international peace and security.' With the deployment of ISAF under the Article 42 and 43 powers this clearly means the decision was that the Article 41 measures not involving the use of armed force had been considered inadequate. Consequently the use of armed force was considered necessary to maintain

⁵⁰ S/RES/1386 (2001)

⁵¹ Bonn Agreement 5 Dec. 2001-see v. Final Provisions

⁵² Military Technical Agreement between the International Security Assistance Force and the Interim Administration of Afghanistan, Article 1 para's 2 and 4(g)

⁵³ Military Technical Agreement between the International Security Assistance Force and the Interim Administration of Afghanistan, Article 1 para's 4 h and i.

⁵⁴ Military Technical Agreement between the International Security Assistance Force and the Interim Administration of Afghanistan, Article IV para 2

⁵⁵ Military Technical Agreement between the International Security Assistance Force and the Interim Administration of Afghanistan, Article V para 1

or restore international peace and security. The significance of this decision is that the exercise of the inherent right of collective self-defence under Article 51 only lasts until such time as the Security Council has taken the necessary measures. But if the taking of measures that are necessary to *maintain* as opposed begin the international peace and security process then this seems to admit the parallel use of Security Council measures and the exercise of the Article 51 right of self-defence until such time as measures maintain international peace and security.

9. UNSCR 1401

The UN security council was also involved with establishing a UN Assistance Mission in Afghanistan (UNAMA). This was with regard to Annex 2 of the Bonn Agreement and the wider role of the United Nations during the interim period, and was intended to assist the Afghan authorities to lay the foundations for sustainable peace and development in Afghanistan. UNSCR 1401 adopted on 28th March 2002 endorsed the establishment of UNAMA. The same resolution requested the ISAF in implementing its mandate in accordance with resolution 1386 (2001) to continue to work in close consultation with the Secretary-General and his Special Representative. The mandate for UNAMA is set out in the report of the Secretary-General of 18 March 2002 (S/2002/278). That report noted a flare up of fighting in the south-eastern region of Afghanistan between coalition forces and Al-Qaida and Taliban fighters and that the struggle against terrorism and its supporters in Afghanistan is closely linked to the peace process and its success.⁵⁶ To that end the report considered that UNAMA would not be able to carry out its functions effectively unless the security situation was addressed.⁵⁷ The creation of UNAMA was seen as the next logical step to ensure United Nations efforts were harnessed by integrating all the existing UN elements into a single mission.⁵⁸

Its mandate was in summary⁵⁹ set out as:

- (a) the fulfillment of the tasks and responsibilities entrusted to the UN in the Bonn Agreement
- (b) the promotion of national reconciliation and rapprochement throughout the country
- (c) managing all UN humanitarian relief, recovery and reconstruction activities in Afghanistan, and in coordination with the Interim Authority and successor administrations of Afghanistan.

What this demonstrates is that a military presence and the role of the ISAF was considered by the UN as integral to the peace process and reconstruction in Afghanistan. At the time there was a concern that security situation had not stabilised sufficiently. The fight against terrorism was in the context of Afghanistan being viewed as not only of international concern in the 'war on terror' but as having consequences for future peace in Afghanistan.

10. UNSCR 1510

On the 13th October 2003 the UN Security Council determined by resolution that the situation in Afghanistan still constituted a threat to international peace and security. As a result UNSCR 1510 authorised the expansion of the ISAF mandate to the maintenance of security in areas of Afghanistan outside of Kabul and its environs. It is clear from the terms of UNSCR 1510 that the purpose of this expansion acting under Chapter VII of the UN Charter was to both provide security to enable the Afghan Authorities including UN personnel and other international civilian personnel engaged in reconstruction and humanitarian efforts to operate in a secure environment, and to provide security assistance for the performance of other tasks in support of the Bonn Agreement. At the same time the authorisation of the ISAF, as defined in resolution 1386 (2001) and this resolution, was extended for a twelve month period. Member States participating in ISAF were authorised to take all necessary measures to fulfil ISAF's mandate. This expansion of ISAF was with reference to annex 1 of the Bonn Agreement which provided for the progressive expansion of the ISAF to other urban centres and other areas beyond Kabul and in recognition of the constraints upon the full implementation of the Bonn Agreement resulting from concern about the security situation in Afghanistan. The issue is what ISAF's mandate was. With reference to UNSCR 1386 (2001) the original authorisation was for ISAF to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations could operate in a secure environment. Annex 1 of the Bonn Agreement is in broad and similar terms of the deployment of force to assist in the maintenance of security which for the first six months of deployment was limited to Kabul and surrounding areas. The agreement does not set out what a progressive expansion would mean in practice although it would seem from UNSCR 1510 and the terms of the extended authorisation that this continued to be

⁵⁶ report of the Secretary-General of 18 March 2002 (S/2002/278) at para 47.

⁵⁷ report of the Secretary-General of 18 March 2002 (S/2002/278) at para 130.

⁵⁸ report of the Secretary-General of 18 March 2002 (S/2002/278) at para 95.

⁵⁹ report of the Secretary-General of 18 March 2002 (S/2002/278) at para 97.

limited to the maintenance of security. With regard to the authorisation of participants to take all necessary measures to fulfil ISAF's mandate this in effect provided a broad mandate. The interpretation of the mandate was left to the participants.

11. The Involvement of NATO

The involvement of NATO followed Article 5 of the North Atlantic Treaty (the Washington Treaty being invoked on the 4th October 2001 following the 9/11 attacks. The NATO allies agreed at the request of the U.S. to take measures to assist with counter-terrorism operations. Article 5 of the Washington Treaty is the principle of collective defence and provides that an armed attack against one NATO Ally is considered an attack against all members of the Alliance. This was the first time in NATO history that Article 5 had been invoked. In particular the NATO allies agreed to provide logistical support and assets including access to ports and airfields within NATO nations for the purpose of operations, and assistance to Allies and other states which are or may be subject to terrorist threats as a result of their support for the campaign against terrorism. On 11 August 2003 at the request of the UN and the Afghanistan government NATO took the lead of ISAF. ISAF was one of the largest coalitions in history involving at its peak troops from 51 NATO and partner nations.⁶⁰ Shortly after NATO assumed leadership, ISAF's mandate was extended by the UN to cover the whole of Afghanistan (UNSCR 1510). The involvement of NATO in ISAF is however distinct from the exercise of its Article 5 power of collective defence. A significant phase of expansion followed endorsement by NATO minister 8 December 2005 of a plan to expand ISAF's role and presence in Afghanistan with the expansion in 2006 to the southern region and then eastern region of Afghanistan. With the implementation 5 October 2006 of the final stage of the expansion east the NATO-led ISAF took responsibility for the entire country. The revised operational plan led to a greater role for ISAF. The revised operational plan for NATO's expansion of the ISAF mission⁶¹ illustrates the differences between ISAF and the US-led OEF. At the forefront of NATO's effort in Afghanistan were the Provincial Reconstruction Teams (PRT) with ISAF stability operations used to create a secure environment to enable reconstruction and national building activities to continue. In summary the revised plan identified ISAF's key military tasks included

- Assisting the Afghan government to extend its authority across the country;
- Conducting stability and security operations in co-ordination with Afghan national security forces;
- The mentoring and support of the Afghan national army;
- Supporting Afghan government programmes to disarm illegally armed groups.

NATO's strategic focus was therefore to create the conditions for stabilisation and reconstruction in partnership with the Afghan Government. A recognised challenge was coordination and deconfliction between the ISAF stabilisation and security mission and the US-led military operation in Afghanistan under OEF. The operational challenge was therefore maintaining clear separation between the two missions.

12. Military Force and the Relationship between ISAF and OEF

The differences between the two missions can be characterised as doctrinal differences of Counterinsurgency (COIN) and Counterterrorism (CT). NATO doctrine for COIN advocates balance in the use of force tailoring the use of lethal and non-lethal force to the situation with the overarching aim to secure the population. Military participation requires the ability to be flexible and adaptable over time as the insurgency changes shape and direction.⁶² US Counterterrorism doctrine as developed post 9/11 saw an increasing role for conventional forces within the definition of CT as "*actions taken directly against terrorist networks and indirectly to influence and render global and regional environments inhospitable to terrorist networks.*" That is whilst CT missions had been traditionally viewed by the US Government as special forces operations the "global war on terrorism" required a different approach because of the need for expanded CT capabilities beyond the capabilities of CT dedicated special forces.⁶³ The US *National Strategy for Combating Terrorism* envisaged direct offensive efforts to disrupt terrorists' operations including kill or capture of key terrorist leaders.⁶⁴ The direct action approach is considered action which requires *a high degree of discrimination and precise use of force* typically of short duration conducted

⁶⁰ ISAF's mission in Afghanistan (2001-2014) (Archived)

⁶¹ *Revised operational plan for NATO's expanding mission in Afghanistan News and Press Release* originally published 18 May 2006.

⁶² NATO Allied Joint Doctrine for Counter-Insurgency (COIN) July 2016 Section VIII-The Forces Conducting COIN Operations paras 0118-0119.

⁶³ Counterterrorism Joint Publication 3-26 13 November 2009; see executive summary and I-1 to I-2

⁶⁴ Counterterrorism Joint Publication 3-26 13 November 2009, I-6

in an area where a terrorist enclave may exist. The long-term effectiveness of the direct approach as a sole means of countering terrorism is considered to be limited by the resilience of terrorist organisations and networks. An indirect approach is described as including actions (for example, stability operations) to shape and stabilise environments as a means to erode the capabilities of terrorist organisations and deny safe haven and support.⁶⁵ It is clear that whilst there are differences between the NATO COIN approach and the US CT approach reflecting that the terms 'counter-terrorism' and 'counter-insurgency' are analytically discrete concepts, there is an overlap between the two missions, ISAF and OEF. On the one hand it is recognised that OEF operated with a different mandate to ISAF in terms of direct military offensive operations conducted by the US under CT to target terrorist leaders and terrorist organisational infrastructure. On the other hand, with reference to the NATO revised operational plan for ISAF and its expansion to the whole of Afghanistan and the military tasks for ISAF in conducting stability and security operations there is an overlap with the US CT doctrine of the indirect approach in terms of stability operations conducted with the common objective of securing territory to deny safe haven to terrorists. The implication of this common overlap of indirect measures is that the evolution of the concept of self-defence and its expansion in customary international law in the "war against terror" should not be viewed in isolation. The duration of the use of force under the self-defence rubric needs to be viewed in the context of the recognised limitations to the long-term effectiveness of the traditional CT direct approach of offensive military action as the sole means of countering terrorism.

13. A Merger of Mandates?

At meeting of Defence ministers in Romania 13-14 October 2004 the future of the relationship between ISAF and the US-led OEF was discussed at the same time as reviewing the state of preparations for the expansion of the NATO-led ISAF force.⁶⁶ The US proposed to merge the mandates for OEF and ISAF and integrate the ISAF force within OEF. This was opposed by the German defence minister on the grounds the NATO mandate in Afghanistan was to stabilize the country, and was not a mandate to fight international terrorism.⁶⁷ This was not merely a proposal to combine the two missions under a single alliance commander but a broader ambition. The proposal envisaged a merger of mandates with the intention that in time US forces would withdraw and cede the combat mission to NATO, as is clear from the US congressional report expressing uncertainty as to whether NATO was able to conduct the combat mission.⁶⁸

14. NATO Riga Summit 28 - 29 November 2006

At the Riga Summit NATO leaders agreed to remove some of the national caveats and restrictions on how, when and where their forces could be used to further strengthen the effectiveness of the NATO-led ISAF.⁶⁹ It was recognised that security was integral to the long-term stability of Afghanistan and the reconstruction and development of Afghanistan.⁷⁰ NATO's role was described as assisting the Afghan Government through the UN-mandated ISAF to create the conditions for stabilisation and reconstruction. The key military tasks of ISAF were described as assisting the Afghan government in extending its authority across the country, as well as conducting stability and security operations in co-ordination with the Afghan national security forces.⁷¹ The Riga Summit Declaration issued 29th November 2006 referred to the importance of the principle of 'the indivisibility' of Allied security and common action in the face of threats such as terrorism. The Declaration committed to supporting the Afghan government's efforts, in cooperation with other international actors, to build a stable democratic society free from terrorism and narcotics. The Comprehensive Political Guidance endorsed by NATO Heads of State and Government on the 29th November 2006 anticipated that the evolving security environment would over the next 10 to 15 years put a premium on increasing NATO capability. In respect of the threat from terrorism, increasingly global in scope, it was considered the capability requirements for the Alliance would need to include the ability to deter, disrupt, defend and protect against terrorism. Relevant to the Declaration in respect of NATO assistance to the Afghan government through ISAF was the need to being military support to reconstruction efforts across all phases of a crisis.⁷² The Riga Summit Declaration viewed ISAF's role, in cooperation with other international

⁶⁵ Counterterrorism Joint Publication 3-26 13 November 2009, III-5

⁶⁶ NATO Update: Defence Ministers take forward NATO's transformation-13-14 Oct. 2004

⁶⁷ Germany Opposes US Plan in Afghanistan | Europe | News and current affairs from around the continent | DW | 13.10.2004

⁶⁸ Kenneth Katzman 'Afghanistan: Post-War Governance, Security, and U.S. Policy' CRS Report for Congress (March 2005). CRS 26-27

⁶⁹ Riga Summit Readers Guide page 23.

⁷⁰ Riga Summit Readers Guide page 24 and Summit declaration 29 Nov. 2006 para. 6: "There can be no security in Afghanistan without development, and no development without security".

⁷¹ Riga Summit Readers Guide page 24-25

⁷² Riga Summit Readers Guide: Comprehensive Political Guidance Part 3 Guidelines for Alliance Capability Requirements para's 16 c and 16i.

actors, and respecting international law, to provide support to the Afghan authorities in meeting their responsibilities to provide security, stability and reconstruction across Afghanistan.⁷³

15. The Bucharest Summit 3 April 2008

Following the call for broader international engagement at the November 2006 Riga Summit ISAF troop-contributing countries agreed to a "strategic vision" statement on Afghanistan.⁷⁴ This was in recognition that the objective shared with the Afghan authorities was to ensure that extremists and terrorists could not regain control of Afghanistan or use it as a base for terror. The statement made set out that this was guided by four principles: a firm and shared long-term commitment; support for enhanced Afghan leadership and responsibility; a comprehensive approach by the international community, bringing together civilian and military efforts; and increased cooperation and engagement with Afghanistan's neighbours, especially Pakistan.⁷⁵ The strategic vision was for extremism and terrorism to no longer pose a threat to stability. It was envisaged that as Afghanistan's security forces became more capable of leading operations that ISAF's role would evolve to training and mentoring. It was considered that the key to success was the need for a comprehensive approach to be taken across security, governance and development efforts and between local and international partners in support of the Afghan Government. 2008 also marked a significant change in that a full counter-insurgency approach was implemented which integrated the use of conventional and special forces for security, with an increased focus on governance and economic development.⁷⁶

16. The Lisbon Summit 19 - 20 November 2010

The "Lisbon Roadmap" set out a plan to hand over full responsibility for security in Afghanistan from ISAF to Afghan forces by the end of 2014. This was identified as representing the beginning of a new phase in the NATO mission whereby there would be a process of transition to full Afghan security responsibility and leadership in some provinces starting in early 2011 and based on conditions and not dates. NATO in its 20 November 2010 declaration on an enduring partnership with the Government of the Islamic Republic of Afghanistan re-affirmed its long-term commitment to Afghanistan never again being a safe haven for terrorists and terrorism, and to a better future for the Afghan people.⁷⁷ The enduring partnership provided a framework for long-term support intended to continue after the ISAF mission. Afghanistan's security and stability was seen to be of strategic importance directly linked to the NATO alliance security. It was expressed in the Declaration that NATO had no ambition to establish a permanent military presence in Afghanistan and that co-operation activities could include building up the capacity of the Afghan security forces to tackle the threats of both terrorism and narcotics trafficking.⁷⁸

17. Enduring Strategic Partnership 2012

On 2 May 2012 an executive agreement between the Islamic Republic of Afghanistan and the US was signed in Kabul. In the agreement the parties reaffirmed that the presence and operations of US forces since 2001 was aimed at defeating Al-Qaeda and its affiliates. The advancement of long-term security in Afghanistan under the agreement was expressed as being in the interests of not only domestic and regional security and stability but also international peace and stability.⁷⁹ The agreement was made without prejudice to each party's right of self-defence under international law.⁸⁰ Afghanistan was in the agreement designated by the US as a "Major Non-NATO Ally" in order to assist to provide a long-term framework for mutual security and defence co-operation.⁸¹ Afghanistan's ability to combat terrorism and its international obligations in respect of terrorism is in the agreement seen as an imperative long-term goal as the commitment by the US in the agreement to seeking funds beyond 2014 to support

⁷³ Riga Summit Declaration 29 Nov. 2006 para 5.

⁷⁴ Bucharest Summit Declaration 3 April 2008

⁷⁵ "ISAF's Strategic Vision" Declaration 3 April 2008

⁷⁶ Final Report on the International Security Assistance Force Operations in Afghanistan Annex A to 28 November 2014 letter from the Secretary-General to the President of the Security Council (S/2014/856) para 11

⁷⁷ Declaration by NATO and The Government of the Islamic Republic of Afghanistan on an Enduring Partnership 20 November 2010, para. 3.

⁷⁸ Declaration by NATO and The Government of the Islamic Republic of Afghanistan on an Enduring Partnership 20 November 2010, para. 6.

⁷⁹ Enduring Strategic Partnership Agreement Between The United States of America And The Islamic Republic Of Afghanistan, Kabul, 2 May 2012; III Advancing Long Term Security-III.1 & III.2 & also see the Preamble.

⁸⁰ Enduring Strategic Partnership Agreement Between The United States of America And The Islamic Republic Of Afghanistan, Kabul, 2 May 2012; III.2a.

⁸¹ Enduring Strategic Partnership Agreement Between The United States of America And The Islamic Republic Of Afghanistan, Kabul, 2 May 2012; III.3

the Afghan National Security Forces (ANSF) is expressed to be:

*"so that Afghanistan can independently secure and defend itself against internal and external threats, and help ensure that terrorists never encroach on Afghan soil and threaten Afghanistan, the region, and the world."*⁸²

At the same time, Afghanistan was required to provide US forces continued access to and use of Afghan facilities for the purpose of both its combat mission against Al-Qaeda and affiliates, and training the ANSF.⁸³ In essence this agreement was expressed as an equal partnership, founded on respect for the sovereignty and equality of states, with shared interest in the security and stability of Afghanistan.⁸⁴

18. The Bilateral Security Agreement & Status of NATO Forces Agreement 2014

The Bilateral Security Agreement signed 30 September 2014 addressed the nature and scope of the future presence and operations of US forces in Afghanistan. From September 2014 US military operations and support for Afghan military forces was undertaken under the Bilateral Security Agreement between the US and Afghanistan. At the same time NATO agreed with Afghanistan A Status of Forces Agreement. Collectively these agreements provided the legal framework for a non-combat mission to train, advise and assist the Afghan security forces and institutions from 1 January 2015 onwards. Significantly the US committed that unless otherwise mutually agreed US forces *shall not conduct combat operations in Afghanistan.*⁸⁵ The agreement did not mark the end of US combat operations since in the agreement the parties acknowledge that US military operations *may be appropriate in the common fight against terrorism.*⁸⁶ The change however was the intention of protecting US and Afghan national interests without the unilateral deployment of force by the US and instead moving towards supporting the Afghan National Defence and Security Forces (ANDSF) in its counter-terrorism operations.⁸⁷ Neither did the agreement commit the US to defend Afghanistan against external aggression as sought by Afghanistan. Instead Article 6 of the agreement states the US *shall regard with grave concern any external aggression or threat of external aggression* against Afghanistan's sovereignty, independence, and territorial integrity, with the assurance that in the event of external aggression that the Parties shall consult on an appropriate response.⁸⁸ The Status of NATO Forces Agreement⁸⁹ set out the framework for a new NATO-led non combat mission ("Resolute Support") to succeed the ISAF mission which was to be concluded by the end of 2014. The purpose of the Resolute Support Mission was to train, advise and assist the ANDSF, and included provision for such other mutually agreed activities. It was envisaged by this agreement that the training, advising and assistance delivered by this mission would be focused at the institutional level in Kabul, but also providing continued advice to the Afghan forces at the corps level in the regions. The non-combat training, advising and assistance by NATO Forces at the tactical level in the case of Afghan Special Operations Forces was to only be extended by the request and invitation of the Afghan Government.⁹⁰ The Resolute Support Mission was one of three strands to the future support of NATO to the Afghan Government and security institutions; the other two strands concerned financial assistance to the sustainment of Afghan forces and the NATO-Afghanistan Enduring Partnership to strengthen the NATO relationship with Afghanistan.⁹¹ As set out in the Wales Summit Declaration 5 September 2014 the end of ISAF

⁸² Enduring Strategic Partnership Agreement Between The United States of America And The Islamic Republic Of Afghanistan, Kabul, 2 May 2012; III.5.

⁸³ Enduring Strategic Partnership Agreement Between The United States of America And The Islamic Republic Of Afghanistan, Kabul, 2 May 2012; III.6.

⁸⁴ Enduring Strategic Partnership Agreement Between The United States of America And The Islamic Republic Of Afghanistan, Kabul, 2 May 2012; see the Preamble: "Cooperation between Afghanistan and the United States is based on mutual respect and shared interests-most notably, a common desire for peace and to strengthen collective efforts to achieve a region that is economically integrated, and no longer a safe haven for al-Qaeda and its affiliates."

⁸⁵ Security And Defense Cooperation Agreement Between The Islamic Republic Of Afghanistan And The United States Of America, Kabul, 30 September 2014; Article 2 'Purpose and Scope', 2.1

⁸⁶ Security And Defense Cooperation Agreement Between The Islamic Republic Of Afghanistan And The United States Of America, Kabul, 30 September 2014; Article 2 'Purpose and Scope', 2.4

⁸⁷ Security And Defense Cooperation Agreement Between The Islamic Republic Of Afghanistan And The United States Of America, Kabul, 30 September 2014; Article 2.4

⁸⁸ Security And Defense Cooperation Agreement Between The Islamic Republic Of Afghanistan And The United States Of America, Kabul, 30 September 2014; Article 6.2 and 6.4

⁸⁹ Signed Kabul 30 September 2014 and ratified by the Afghan Parliament on 27 November 2014

⁹⁰ Agreement between NATO and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan, Kabul, 30 September 2014; Article 2 "Activities" & Article 3 "Purpose and Scope"

⁹¹ Final Report on the International Security Assistance Force Operations in Afghanistan Annex A to 28 November 2014 letter from the Secretary-General to the President of the Security Council (S/2014/856).

in December 2014 meant the nature of scope of engagement with Afghanistan would change, and it was envisaged that these strands would be mutually reinforcing.⁹²The Resolute Support Mission was also supported by the UN Security Council Resolution 2189, unanimously adopted on 12 December 2014.

19. Operational Freedom's Sentinel

Operational Freedom's Sentinel (OFS) began on 1 January 2015, when the US formally ended offensive combat operations under Operation Enduring Freedom, on 31 December 2014. Under OFS US forces conducted two complimentary missions: counterterrorism operations against Al-Qaeda and their affiliates in Afghanistan, and a train, advise, and assist (TAA) mission as part of the NATO-led Resolute Support Mission.⁹³ The nature of the counterterrorism operations in Afghanistan was for US forces to work primarily in partnership with the Afghan Special Security Forces to disrupt terrorist threats from remnants of Al-Qaeda to prevent its resurgence and the use of Afghanistan to stage terrorist attacks against US targets or the US homeland. The role of the US in the NATO-led Resolute Support Mission was to lead in the South in Kandahar and East in Jalalabad in support of the TAA mission and provide troops.⁹⁴ The threat described in the First OFS report June 2015 was Afghanistan faced a continuous threat from the convergence of insurgent, terrorist, and criminal networks with the Taliban-led insurgency remaining resilient and presenting a significant challenge to the ANDSF during the fighting season. New threats of concern were also noted in the form of the emergence of Islamic State of Iraq and the Levant (ISIL, or *Daesh*) activity in Afghanistan.⁹⁵ Hence the US position as a matter of international law was the US remained in an armed conflict against Al-Qaeda and its affiliates.⁹⁶ Notwithstanding these threats the scope of US military operations had recognisably reduced so that outside of the counterterrorism mission, US forces were to no longer conduct offensive combat operations.⁹⁷ OFS compared with Operation Enduring Freedom therefore marked a change of US strategy from unilateral use of force to supporting Afghan Special Security Forces, and a realignment to focusing on non-combat missions under the TAA mission.

20. NATO Warsaw Summit July 2016

In the NATO Warsaw Summit Communiqué 9 July 2016 it was set out that NATO and its operational partners had committed to sustain the Resolute Support Mission beyond 2016 through a flexible, regional model. It was declared that NATO's aim remained that Afghanistan will never again become a safe haven for terrorists and that the pathway to a sustainable resolution of the conflict was an "inclusive Afghan-led and Afghan-owned peace and reconciliation process."⁹⁸ NATO's role as communicated in 2016 and reaffirmed in 2021 was clearly to continue in a supporting role that was reliant on a long-term Enduring Partnership with Afghanistan and the commitment of Afghanistan to fulfilling its obligations.

21. Terrorist Groups and the Emergence of Islamic State Affiliates in Afghanistan

A fundamental issue to the question of the use of force against non-state actors is the question of who and what defined "the enemy". There were numerous terrorist and insurgent groups in Afghanistan resulting in complex and often shifting relations and other state and non-state actors.⁹⁹ In January 2015 the Islamic State announced the formation of its Afghan affiliate, Islamic State-Khorasan Province (ISKP, also known as ISIS-Khorasan or ISIS-K) which was in conflict with Taliban fighters. In January 2016, the Obama Administration designated ISIS-K a Foreign Terrorist Organisation (FTO)¹⁰⁰ and gave US forces legal authority to target ISIS-K.¹⁰¹ The Afghan Taliban was not a US designated FTO and was not an affiliate of Al-Qaeda, although the Taliban and Al-Qaeda

⁹² NATO Wales Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales, 5 September 2014, para. 43.

⁹³ US Department of Defense, Report on Enhancing Security and Stability in Afghanistan, June 2015, pp. 1, 11.

⁹⁴ US Department of Defense, Report on Enhancing Security and Stability in Afghanistan, June 2015, see 1.4 'NATO-led Resolute Support Mission' pp 13-18; at the time the US remained the largest force contributor to the Resolute Support Mission providing approximately 6,500 personnel, of a total US force presence in Afghanistan of approximately 9,800 personnel (see at page 14).

⁹⁵ US Department of Defense, Report on Enhancing Security and Stability in Afghanistan, June 2015, p 8.

⁹⁶ US Department of Defense, Report on Enhancing Security and Stability in Afghanistan, June 2015, see 1.3 'U.S. Counterterrorism Mission at p 12.

⁹⁷ US Department of Defense, Report on Enhancing Security and Stability in Afghanistan, June 2015, see 1.3 'U.S. Counterterrorism Mission at p 12.

⁹⁸ Warsaw Summit Communiqué Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8-9 July 2016 para's 86-88.

⁹⁹ CRS In Focus IF10604, Al Qaeda and Islamic State Affiliates in Afghanistan, by Clayton Thomas, Updated January 31, 2020.

¹⁰⁰ Foreign Terrorist Organizations-United States Department of State

¹⁰¹ White House Now Allowing U.S. Forces to Target ISIS in Afghanistan (freebeacon.com)

had fought alongside each other in Afghanistan. The Taliban had not been assessed as a threat to the US homeland. In November 2019, a US supported Afghan military campaign targeted ISKP fighters in eastern Afghanistan concurrent with separate Taliban operations against ISKP.¹⁰² By February 2020 the Taliban as part of a US-Taliban agreement had agreed to undertake unspecified counterterrorism efforts in return for the full withdrawal of US and international military forces, to be completed in August 2021.

22. The DOHA Peace Agreements 2020

The negotiations with the Taliban and the resulting DOHA Agreement¹⁰³ concluded between the Islamic Emirate of Afghanistan and the US 29 February 2020 demonstrates the legal difficulties with extricating State(s) from long-term military intervention. This is pronounced where it had been acknowledged (as above) that the political situation in Afghanistan is complex featuring numerous groups and characterised by often shifting relations. The comprehensive peace agreement sought counterterrorism assurances from the Taliban that Afghan soil would not be used by any group or individual against the security of the United States and its allies as a condition for the complete withdrawal of US and international troops. However this agreement was not concluded with a recognised state given the repeat references in the agreement to *the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban*.¹⁰⁴ The 1969 Vienna Convention on the Law of Treaties (VCLT) only applies to international agreements between states. Although the 1986 VCLT governs agreements between states and international organisations this is not in force, and in any event this would not necessarily assist since the Taliban are not recognized. Whilst Article 3(a) of the 1969 VCLT does not affect the legal force of an international agreement concluded between States and other subjects of international law there is the issue of who the agreement is with which is relevant to its longevity and enforcement. Under the 1969 VCLT a "third State" is defined as a State not a party to the treaty.¹⁰⁴ This may affect the obligations and rights created by the treaty since by Article 34 a treaty does not create either obligations or rights for a third State without its consent. A separate and parallel agreement was therefore concluded with the Islamic Republic of Afghanistan, a member of the United Nations and recognised by the US and the international community as a sovereign state. The separate agreement also concluded 29 February 2020 between the Islamic Republic of Afghanistan and the United States mirrors the agreement concluded with the Taliban and creates similar obligations to address the continuing terrorist threat by Al-Qaeda, ISIS-K and other international terrorist groups of individuals continuing to use Afghan Soil.¹⁰⁵ In the context of international terrorism the saving provisions in Article 3 and Article 43 of the 1969 VCLT can also be relied upon. Under Article 43 the invalidity, termination or denunciation of a treaty or withdrawal of a party from it 'shall not in any way impair the duty of any State to fulfil and obligation embodied in the treaty to which it would be subject under international law independently of the treaty'. In Part Two of the DOHA agreement concluded with the Taliban, the Islamic Emirate of Afghanistan are bound to take the following steps (summarised below) to prevent any group or individual from using Afghanistan soil to threaten the security of the United States and its allies:

- 1) Not to allow any of its members, other individuals or groups, including Al-Qaeda, to use Afghanistan soil to threaten such security.
- 2) Instruct its members not to cooperate with groups or individuals threatening such security.
- 3) Prevent any group or individual in Afghanistan from recruiting, training, and fundraising and will not host them in accordance with the commitments made in this agreement.
- 4) Deal with those seeking asylum or residence in Afghanistan according to international migration law and the commitments of this agreement so that such persons do not pose a threat to such security.
- 5) Not provide visas, passports, travel permits or other legal documents to enter Afghanistan to those who pose a threat to such security.

Part One of the agreement concluded with the Islamic Republic of Afghanistan made a similar commitment not to cooperate with, or permit international terrorist groups or individuals to recruit, train, raise funds, transit

¹⁰² CRS In Focus IF10604 'Terrorist Groups in Afghanistan' Updated August 17, 2021

¹⁰³ The reference to 'the DOHA agreement' is shorthand for the treaty officially known as: Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America S/2020/184

¹⁰⁴ Vienna Convention on the Law of Treaties 1969, Article 2(h)

¹⁰⁵ Joint Declaration between the Islamic Republic of Afghanistan and the United States of America for Bringing Peace to Afghanistan (Joint Declaration) S/2020/185

Afghanistan or misuse travel documents, or conduct other support activities in Afghanistan. In both agreements the commitments made are broad and do not set out specific measures to be undertaken. The 1999 International Convention for the Suppression of the Financing of Terrorism obliges State parties to take measures to prevent and counteract the financing of terrorism and criminalizes the act of providing or collection funds directly or indirectly. As yet the Comprehensive Convention on International Terrorism which intends to criminalise or forms of international terrorism and deny safe have to terrorists consensus has not been reached for the adoption of the convention. In the absence of an enforceable treaty between the US and Afghanistan the obligations created set out above are largely a matter of international customary law. The UNSC Resolution 2513 (2020) adopted 10 March 2020 welcomed the conclusion of the agreements and therefore recognised the agreements were appropriate, but this was not a pronouncement by the UN Security Council as to the legal effects of the agreements. An indication of the difficulties can be found in the UN *Twelfth report of the Analytical Support and Sanctions Monitoring Team concerning the Taliban and other associated individuals and entities constituting a threat to the peace stability and security of Afghanistan*.¹⁰⁶ This report contains details that ties between the Taliban and Al-Qaida remain close and that it is impossible to assess with any confidence that the Taliban will live up to its commitment to suppress any future international threat. A scenario whereby Al-Qaida as its long-term core strategy waits for a period of time before resuming the planning of attacks against international targets is considered untested against the stated Taliban commitments to prohibit such activities.¹⁰⁷ In addition Islamic State in Iraq and the Levant-Khorasan (abbreviated in the report to ISIL-K) is considered to remain active and dangerous and a focal point for disaffected Taliban who reject the peace process and other militants.¹⁰⁸ Against the conditions of the broad reach of ISIL-K extending beyond Afghanistan, the report assessment is the stabilization of Afghanistan will take time providing opportunities to terrorists.¹⁰⁹ The future prospects of compliance with the peace agreements are therefore uncertain.

The NATO Brussels Summit Communiqué 14 June 2021 in stating that NATO's military operations in Afghanistan were coming to an end after almost 20 years¹¹⁰ no longer referred to the pathway of conflict resolution by peace and reconciliation as earlier stated in 2016 in its Warsaw Summit. Rather NATO expressed its achievement that it had denied terrorists a safe haven from which to plot attacks.¹¹¹

23. Conclusion

What conclusions can be drawn from the case of Afghanistan? It is clear that a common strategy was pursued to deny safe haven to terrorist organisations and that this involved combat operations as a CT measure and complementary measures to restore peace and security in Afghanistan. The unilateral use of force was intended to give way at an appropriate time to a partnership entered into with the State of Afghanistan to support it in its endeavours to become self-reliant. The UN mandated mission to restore peace and security focusing on improving the conditions in Afghanistan was run in parallel with the US-led Coalition response to the threat of armed attack from terrorism with the two approaches seen to complement each other with regard to the overall common strategy. Expressed in this way the reliance on self-defence as legal justification for enduring military operations as a CT measure has expanded the reach of self-defence. As a demonstration of collective international unity to provide international security assistance the case of Afghanistan has shown that in customary international law there is now a precedent for the use of regulated armed force for the purposes of collective security. This is provided this is consistent not only with the provisions of the UN Charter but where there is in tandem an existing UN mandate for restoring peace and security.

¹⁰⁶ S/2021/486

¹⁰⁷ Twelfth report of the Analytical Support and Sanctions Monitoring Team concerning the Taliban and other associated individuals and entities constituting a threat to the peace stability and security of Afghanistan S/2021/486 para. 44

¹⁰⁸ Twelfth report of the Analytical Support and Sanctions Monitoring Team concerning the Taliban and other associated individuals and entities constituting a threat to the peace stability and security of Afghanistan, S/2021/486 para. 61.

¹⁰⁹ Twelfth report of the Analytical Support and Sanctions Monitoring Team concerning the Taliban and other associated individuals and entities constituting a threat to the peace stability and security of Afghanistan S/2021/486 para 71.

¹¹⁰ Brussels Summit Communiqué Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 14 June 2021: see para. 19 *Withdrawing our troops does not mean ending our relationship with Afghanistan. We will now open a new chapter: We affirm our commitment to continue to stand with Afghanistan, its people, and its institutions in promoting security and upholding the hard-won gains of the last 20 years.*"

¹¹¹ Brussels Summit Communiqué Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 14 June 2021: para. 18

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