

**Terrorism, war and international law:
the legality of the use of force against Afghanistan in 2001**

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by

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For ourselves, we shall not trouble you with specious pretences – either of how we have a right to our empire because we overthrew the Mede, or are now attacking you because of wrong that you have done us – and make a long speech which would not be believed; and in return we hope that you, instead of thinking to influence us by saying that you did not join the Lacedaemonians, although their colonists, or that you have done us no wrong, will aim at what is feasible, holding in view the real sentiments of us both; since you know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.

Thucydides, *The History of the Peloponnesian War* Book V, Chapter XVII

ABSTRACT

The thesis examines the international law pertaining to the use of force by states, in general, and to the use of force in self-defence, in particular. The main question addressed is whether the use of force, which was purported to be in self-defence, by the United States, the United Kingdom and their allies against al Qaeda, the Taliban and Afghanistan, beginning on 7 October 2001, was lawful.

The thesis focuses not only on this specific use of force, but also on the changing nature of conflict, the definition of terrorism and on the historical evolution of limitations on the use of force, from antiquity until 2006. In the six chapters which trace the epochs of international law, the progression of five inter-related concepts is followed: limitations on the resort to force generally, the use of force in self-defence, pre-emptive self-defence, the use of forcible measures short of war, and the use of force in response to non-state actors.

This historical analysis includes a particular emphasis on understanding the meaning of the 'inherent right of self-defence', which was preserved by Article 51 of the United Nations' Charter. This analysis is then applied to the use of force against Afghanistan which occurred in 2001. Following the terrorist attacks of 11 September, the US and the UK notified the United Nations Security Council of their resort to force in self-defence under Article 51. Each element of Article 51 is analysed and the thesis concludes that there are significant doubts as to the lawfulness of that decision to employ force. In addition to the self-defence justification, other possible grounds for intervention are also examined, such as humanitarian intervention, Security Council authorisation and intervention by invitation.

This thesis challenges the common assumption that the use of force against Afghanistan was an example of states exercising their inherent right to self-defence. It argues that if this particular use of force is not challenged, it will lead to an expansion of the right of self-defence which will hinder rather than enhance international peace and security. Finally, this thesis draws on recent examples to illustrate the point that the use of force against Afghanistan could become a dangerous precedent for the use of force in self-defence.

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Despite the input of all these individuals, the views found herein are entirely my own and should not necessarily be attributed to those who have supported me. Any errors are entirely my responsibility.

ABBREVIATIONS

| | |
|-------------------------------|---|
| ABC | Australian Broadcasting Corporation |
| AJIL | American Journal of International Law |
| ASIL | American Society of International Law |
| Bevans | Bevans, Charles I. ed <i>Treaties and other International Agreements of the USA 1776-1949</i> |
| Brooklyn J. Int'l L. | Brooklyn Journal of International Law |
| BSP | British and Foreign State Papers |
| BYIL | British Yearbook of International Law |
| Cal. W. Int'l L.J. | California Western International Law Journal |
| Cd | Command Papers (UK) |
| Chi. J. Int'l L. | Chicago Journal of International Law |
| Cornell Int'l L.J. | Cornell International Law Journal |
| COW | Correlates of War Project |
| CTS | Parry's Consolidated Treaty Series |
| DRV | Democratic Republic of Vietnam |
| Duke J. Comp. & Int'l L. | Duke Journal of Comparative and International Law |
| ECOMOG | ECOWAS Military Observer Group |
| ECOWAS | Economic Community of Western African States |
| EJIL | European Journal of International Law |
| EU | European Union |
| FAA | Federal Aviation Administration |
| Fletcher F. World Aff. | The Fletcher Forum of World Affairs |
| FTO | Foreign Terrorist Organisation |
| GAOR | General Assembly Official Records (UN) |
| Harv. J.L. & Pub. Pol'y | Harvard Journal of Law and Public Policy |
| Hastings Int'l & Comp. L. Rev | Hastings International and Comparative Law Review |
| HCT | Hertslet's Commercial Treaties |
| HMSO | Her Majesty's Stationery Office |
| Hous. J. Int'l L. | Houston Journal of International Law |
| ICJ | International Court of Justice |
| ICJ Rep | International Court of Justice Reports |
| ICLQ | International and Comparative Law Quarterly |
| ICTY | International Criminal Tribunal for the former Yugoslavia. |
| IIS | Iraqi Intelligence Service |
| ILM | International Legal Material |
| ILR | International Law Reports |

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| JCSL | Journal of Conflict and Security Law |
| KOSIMO | Conflict Simulation Model |
| LNTS | League of Nations Treaty Series |
| Martens | Martens, G F de, <i>Nouveau recueil général des traités</i> , 2 nd Series |
| MEPV | Major Episodes of Political Violence |
| Mich Law Rev | Michigan Law Review |
| NAC | North Atlantic Council |
| NATO | North Atlantic Treaty Organization |
| NSA | National Security Agency (US) |
| NSC | National Security Council (US) |
| NSS | National Security Strategy (US) |
| OAS | Organisation of American States |
| OAU | Organisation of the African Union |
| P | Parliamentary Papers (UK) |
| PACE | Parliamentary Assembly of the Council of Europe |
| PCIJ | Publications of the Permanent Court of International Justice |
| PLO | Palestine Liberation Organization |
| QUTLJJ | Queensland University of Technology Law and Justice Journal |
| Rec.des Cours | Recueil des cours de l'Académie de droit international |
| RIAA | Reports of International Arbitral Awards |
| SCOR | Security Council Official Record |
| SCR | Security Council Resolution |
| Trócaire Dev. R.. | Trócaire Development Review |
| UAE | United Arab Emirates |
| UCDP | Uppsala Conflict Data Project |
| UK | United Kingdom |
| UNCIO | UN Conference on International Organization |
| UNGA | United Nations General Assembly |
| UNSC | United Nations Security Council |
| UNTS | United Nations Treaty Series |
| US | United States of America |
| USSR | United Soviet Socialist Republic |
| Va. J. Int'l L. | Virginia Journal of International Law |
| Val. U.L. Rev | Valparaiso University Law Review |
| Vand. J. Transnat'l L | Vanderbilt Journal of Transnational Law |
| Wash. U. J.L. & Pol'y | Washington University Journal of Law and Policy |
| Yale J. Int'l L | Yale Journal of International Law |
| Yrbk. ILC | Yearbook of the International Law Commission |

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