As I began my work on this article, the news out of, and the commentary about, Afghanistan was grim. For example, a United Nations human rights team has reportedly found “convincing evidence” that ninety civilians, including sixty children, were killed in airstrikes on a village in western Afghanistan. According to a *Time* magazine article:

There has been a dramatic series of recent attacks by the Taliban: a mass assault on jail freed hundreds of prisoners, and a suicide bombing outside the Indian Embassy on July 7 killed 40 and injured over 100. Many of these assaults are planned and supported from safe havens across the border in the tribal areas of Pakistan. Western casualties are climbing: the last two months exceeded the monthly death toll in Iraq. On July 13, nine U.S. soldiers were killed when Taliban fighters swarmed over their base in the eastern province of Kunar—the worst attack in three years.

In response to the Taliban attacks from the tribal areas of Pakistan, President George W. Bush has reportedly authorized attacks by US special operations forces against the Taliban in Pakistan. This in turn has precipitated a strong protest from the newly elected Pakistani government of Asif Ali Zardari, including a promise by Pakistan’s top army officer to defend the country’s sovereignty “at all costs.”

---

*Professor of Law, Villanova University School of Law.*

---

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
There are also recent claims that Afghanistan has become a "narco-State." According to these claims, Hamid Karzai, the President of Afghanistan, and the Afghan government are deeply involved in protecting the opium trade—by shielding it from American-designed policies. While it is true that Karzai’s Taliban enemies finance themselves from the drug trade, so do many of his supporters. At the same time, some of our NATO allies have resisted the anti-opium offensive, as has our own Defense Department, which tends to see counternarcotics as other people’s business to be settled once the war-fighting is over. The trouble is that the fighting is unlikely to end as long as the Taliban can finance themselves through drugs—and as long as the Kabul government is dependent on opium to sustain its own hold on power.

Even if one would not go so far as to agree with a recent statement by a European diplomat with substantial experience in Afghanistan that Afghanistan is “in its worst shape since 2001,” it seems clear that the United States and its allies are currently facing serious challenges in Afghanistan. It is also clear that many of the challenges raised by developments in Afghanistan constitute major challenges to international law and international institutions. The thesis of this article is that these challenges will require the United States and other members of the world community to make hard choices that will significantly affect the future of international law.

I will begin with a discussion of the backdrop to the current crisis in Afghanistan, starting with the events that led to the invasion by US and allied forces in 2001. In this section, as well as in subsequent sections of this article, the focus is primarily, but by no means exclusively, on issues of the jus ad bellum, the law of resort to the use of armed force; the jus in bello, the law regulating the way the armed force is employed, i.e., the law of armed conflict; and international human rights. I will also explore some issues of governance, the roles of the United Nations and NATO, problems created by the use of the tribal areas in Pakistan by the Taliban and al Qaeda as a safe haven, and the impact on Afghanistan of the current unstable political situation in Pakistan.

The Backdrop

It may come as a surprise to some in light of the highly negative images of Afghanistan created by the reign of the Taliban that Afghanistan enjoyed substantial periods of stability and enlightened governance. The period of stability began after King Amanullah Khan (1919–29) launched attacks on British forces in Afghanistan shortly after taking power and won complete independence from Britain, a
reality established by the Treaty of Rawalpindi on August 8, 1919. Reportedly, Khan was considered a secular modernizer presiding over a government in which all ethnic minorities participated. He was succeeded by King Mohammad Nadir Shah (1929–33), and then by King Mohammad Zahir Shah. “Zahir Shah’s reign (1933–73) is remembered fondly by many older Afghans for promulgating a constitution in 1964 that established a national legislature and promoting freedoms for women, including freeing them from covering their face and hair.” He made, however, what was possibly a fatal mistake when he entered into a significant political and purchase relationship with the Soviet Union.

In the 1970s, Afghanistan slid into instability when the diametrically opposed Communist Party and Islamic movements grew in strength. As he was receiving medical treatment in Italy, Zahir Shah was overthrown by his cousin, Mohammad Daoud, a military leader who established a dictatorship with strong State involvement in the economy. The Communist Party overthrew Daoud in 1978, led by Nur Mohammad Taraki, who was displaced a year later by Hafizullah Amin, leader of a rival faction. They tried to impose radical socialist change, in part by redistributing land and bringing more women into government, sparking rebellion by Islamic parties opposed to such moves. On December 27, 1979, the Soviet Union sent troops into Afghanistan to prevent a seizure of power by the Islamic militias, known as the mujahedin (Islamic fighters). During their invasion, the Soviets replaced Hafizullah Amin with an ally, Babrak Karmal.

The Soviet occupation forces failed in their attempts to pacify the country. A major reason for this failure was that the mujahedin benefitted from US weapons and assistance, provided by the US Central Intelligence Agency (CIA) in cooperation with Pakistan’s Inter-Services Intelligence directorate (ISI). Especially useful in combat were portable shoulder-fired anti-aircraft systems called “Stingers,” which proved highly effective against Soviet aircraft. Also useful to the mujahedin was a large network of natural and man-made tunnels and caves throughout Afghanistan, in which they hid and stored weaponry.

As the Soviet losses mounted, Soviet domestic opinion turned against the war. In 1986, after Mikhail Gorbachev came into power, the Soviets replaced Karmal with the director of Afghan intelligence, Najibullah Ahmedzai (known by his first name). On April 14, 1988, Gorbachev agreed to a UN-brokered accord (the Geneva Accords) requiring the Soviet Union to withdraw. The withdrawal was completed by February 15, 1989, leaving in place the weak Najibullah government. On September 13, 1991, the Russian and US governments agreed to a cutoff of military aid to the Afghan combatants. With Soviet backing withdrawn, Najibullah’s position became untenable. His government fell, and the mujahedin regime came into power on April 18, 1992.
There were major differences among the mujahedin factions, however, and civil war ensued (1992–96). Four years of civil war led to increased support for the Taliban as a movement that could deliver Afghanistan from the factional infighting. The Taliban took control of Kabul on September 27, 1996.  

It didn’t take long for the Taliban regime to lose international and domestic support as it imposed strict adherence to Islamic customs in areas it controlled and employed harsh punishments, including summary executions. The Taliban authorized its “Ministry for the Promotion of Virtue and the Suppression of Vice” to use physical punishments to enforce strict Islamic practices, including bans on television, Western music and dancing. It prohibited women from attending school or working outside the home except in health care, and it publicly executed some women for adultery. In March 2001, the Taliban committed the act that gained the most international condemnation: it blew up two large statues called into hills above Bamiyan city that were widely recognized as works of art, as representations of idolatry.

The Taliban’s hosting of al Qaeda’s leaders increasingly concerned the Clinton administration. In April 1998, then-US Ambassador to the United Nations Bill Richardson visited Afghanistan and asked the Taliban to hand over bin Laden, but the Taliban refused to do so. After the August 7, 1998 al Qaeda bombings of US embassies in Kenya and Tanzania, the Clinton administration increased the pressure on the Taliban, imposing US sanctions and gaining adoption of UN sanctions as well. On August 20, 1998, the United States fired cruise missiles at alleged al Qaeda training camps in eastern Afghanistan but failed to hit bin Laden. According to reports, Clinton administration officials said “they did not try to oust the Taliban from power with US military force because domestic US support for those steps was then lacking and the Taliban’s opponents were too weak and did not necessarily hold US values.”

For its part, the George W. Bush administration initially largely continued the Clinton administration’s policy toward Afghanistan — applying economic and political pressure while retaining dialogue with the Taliban, and refraining from providing military assistance to the Northern Alliance, the primary opponents of the Taliban. Its major deviation from the Clinton administration’s policy was to intensify talks with Pakistan in an effort to end its support of the Taliban.

Although it was fighting with some Iranian, Russian and Indian financial and military support, the Northern Alliance continued to lose ground to the Taliban after it lost Kabul in 1996. By the time of the September 11 attacks, the Taliban controlled at least 75 percent of the country. The Alliance suffered a major setback on September 9, 2001, two days before the September 11 attacks, when Ahmad Shah
Masud, the leader of the Northern Alliance and a highly respected military strategist, was assassinated by alleged al Qaeda suicide bombers posing as journalists.

The September 11 Attacks and Operation Enduring Freedom

After the September 11, 2001 attacks, the policy of the Bush administration toward Afghanistan changed dramatically: it decided to overthrow the Taliban by military force when it refused to surrender bin Laden to the United States. Prior to the United States taking military action against Afghanistan, the UN Security Council adopted two resolutions: Resolution 1368 and Resolution 1373. In the preamble of Resolution 1368 the Security Council recognizes “the inherent right of individual or collective self-defense in accordance with the Charter” and in its first operative paragraph its determination that such acts (i.e., the terrorist attacks of September 11) are “a threat to international peace and security.” In its fifth operative paragraph the Council “expresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001 . . . .” Declaring the September 11 attacks as a threat to international peace and security brings them within the scope of Chapter VII of the UN Charter and acts as a possible predicate to a UN enforcement action. Expressing its willingness to “take all necessary steps to respond” to the terrorist attacks implies that the Council might in the future, if necessary, establish a peace enforcement force or authorize the use of force by member States.

Recognizing that the inherent right of individual or collective self-defense applies to the September 11 attacks appears at first blush to be mere surplusage, but has significance for two reasons. First, under Article 51 of the UN Charter, the right to individual or collective self-defense is only an interim right—“until the Security Council has taken measures necessary to maintain international peace and security.” The express recognition of the right in this instance arguably implies that the Council has no intention to intervene in such a way as to suspend the right and would, of course, face a certain veto by the United States should it attempt to do so. Second, there are those who argue that the right of individual or collective self-defense applies only to an “armed attack” by a State and not to armed attacks by non-State actors. To the contrary it has been argued that in Resolution 1368 the Security Council has implicitly recognized that the right of individual or collective self-defense applies equally to attacks by non-State actors and attacks by States.

In the preamble of Resolution 1373, the Security Council reaffirms Resolution 1368 and “its unequivocal condemnation” of the 9/11 terrorist attacks, its determination that the attacks constituted a threat to international peace and security, the inherent right of individual and collective self-defense, and “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.” In the rest of this landmark Resolution, however, the Council shifted its focus away from the 9/11 attacks and Afghanistan to actions that States must take to “prevent and suppress the financing of terrorist acts,” a subject outside the scope of this article.

Major combat in Afghanistan began on October 7, 2001. The campaign was given the name “Operation Enduring Freedom.” Even before President Bush’s September 20, 2001 address to a joint session of Congress, in which he issued an ultimatum to the Taliban that it deliver to US authorities all the leaders of al Qaeda “who hide in your land” or “share in their fate,” the United States had entered into extensive diplomatic negotiations with its allies, seeking their understanding of, and ideally cooperation for, a military response. A key breakthrough was with then-president General Pervez Musharraf of Pakistan. Although Pakistan’s intelligence services had supported the Taliban in its rise to power and Islamic groups in Pakistan objected to cooperation with the United States, Musharraf promptly condemned the attacks and the Taliban for harboring bin Laden, and agreed to allow the United States and its allies to use Pakistani airspace and eventually airbases. The former Soviet republics of Uzbekistan, Kyrgyzstan, and Tajikistan, which faced internal threats from al Qaeda–linked Islamist movements, agreed to permit US forces to operate from bases in their territory in exchange for increased US aid and closer political and security ties. Although several European States offered to provide military support, the United States decided to rely primarily on its own forces and those of the Northern Alliance, with limited military assistance from British, Canadian and Australian troops.

Combat operations in Afghanistan initially consisted primarily of US airstrikes on Taliban and al Qaeda forces, aided by joint efforts between small numbers (approximately one thousand) of US special operations forces and the Northern Alliance and Pashtun anti-Taliban forces. At the height of the fighting in October through December 2001, some US ground units (about thirteen hundred Marines) moved into Afghanistan to pressure the Taliban around Kandahar, but there were few pitched battles between US and Taliban forces. Most of the ground combat was between the Taliban and its Afghan opponents.

A key turning point in the conflict came when Taliban forces lost Mazar-e-Sharif on November 9, 2001. The Taliban regime unraveled rapidly thereafter. Northern Alliance forces entered Kabul, the capital of Afghanistan, on November 12, 2001, to “general jubilation.” The Taliban subsequently lost the south and east to pro-US Pashtun leaders, such as Hamid Karzai, the current president of Afghanistan. The end of the Taliban regime is generally dated as December 9, when the Taliban surrendered Kandahar, leaving it under tribal law administered by Pashtun leaders.
Some of the remaining Taliban and al Qaeda troops retreated to tunnel complexes built to house mujahedin fighting the Soviets, such as at Tora Bora, near the Pakistani border. On December 16, supported by US precision bombing, local forces the Americans dubbed the “Eastern Alliance” captured Tora Bora. There was no follow-up, however, by the Eastern Alliance and insufficient US ground forces, to prevent hundreds of al Qaeda members, possibly including bin Laden, from escaping into the relatively lawless tribal regions of Pakistan. A later attack on an al Qaeda cave complex in February and March 2002 was more successful. This time, over one thousand US infantrymen led the assault, called Operation Anaconda, against regrouping al Qaeda in the Shah-i-kot valley, and succeeded in preventing most of the al Qaeda fighters from escaping.

Thereafter, remnants of al Qaeda mostly scattered to tribal areas of Pakistan and Afghanistan. Cooperative combat operations between the US and allied forces and some local warlords continued, but these were small in comparison with the scale of Operation Anaconda or the campaign at Tora Bora. On May 1, 2003, then-Secretary of Defense Rumsfeld announced an end to “major combat operations.”

Before turning to the post-conflict efforts toward stabilization and reconstruction, let us consider a few *jus ad bellum* and *jus in bello* issues that arose prior to or during the major combat operations in Afghanistan. We have already briefly considered the claim that the United States and its allies violated the *jus ad bellum* because Article 51 of the UN Charter does not permit the use of armed force in self-defense against an armed attack by non-State actors. Yoram Dinstein has noted that, “[i]n the past, many commentators admittedly argued that the expression ‘armed attack’ in Article 51 does not apply to every armed attack, ‘regardless of the source,’ but only to an armed attack by another State.” Dinstein goes on to state, however, that given the response of the international community to 9/11, “all lingering doubts on this issue have been dispelled.” The responses of the international community to the 9/11 events cited by Dinstein include Security Council Resolutions 1368 and 1373; the invocation of Article 5 of the NATO Treaty, which provides that an armed attack against one or more of the Allies in Europe or North America “shall be considered an attack against them all,” by the Atlantic Council; and a resolution by the Ministers of Foreign Affairs, acting as an Organ of Consultation, in application of the 1947 Inter-American Treaty of Reciprocal Assistance, stating that “these terrorist attacks against the United States of America are attacks against all American States.”

Assuming that the shocking nature of the attacks of 9/11, and the international community’s response to them, dispels any doubts that they constituted an armed attack within the scope of Article 51, it does not necessarily follow that any use of armed force by terrorists constitutes such an “armed attack.” This remains a
debateable issue, and we shall return to it later in this article when we consider the legality of the US use of armed force against the Taliban and al Qaeda in Pakistan.27

The increased use of high-technology warfare in Afghanistan, especially the use of so-called "smart bombs," guided by Global Positioning System satellites, resulted in relatively low civilian casualties. Nonetheless, there were some mistakes made,28 and the US military was criticized for some operations that resulted in civilian casualties.29 As noted at the beginning of this article, the issue of allegedly excessive civilian casualties has become especially acute recently, and we will return to it later.

Another self-defense issue arising out of Operation Enduring Freedom is whether the right of self-defense encompasses "regime change" or the removal of the government in power, in this case the Taliban. In the case of the Persian Gulf conflict of 1991 against Iraq, there was no "march to Baghdad" to remove the Saddam Hussein regime. Rather, President George H.W. Bush made the political decision to stop the attack in Iraq well short of an invasion of Baghdad. It is debatable whether Security Council Resolution 678, which authorized member States to use armed force against Iraq if it failed to comply fully with its resolutions on or before January 15, 1991, could have been interpreted to allow the removal of the Saddam Hussein regime.30

With respect to Operation Enduring Freedom, some have questioned whether self-defense under Article 51 of the UN Charter permitted the removal of the Taliban from power.31 Arguably, while it was permissible for Enduring Freedom to eliminate the military capacity of the Taliban and al Qaeda, in order to prevent a future attack by them, "[e]liminating the whole government structure created by the Taliban, as a war aim, was beyond necessary self-defense" and therefore a disproportionate use of force.32

Interestingly, US Secretary of State Colin Powell reportedly indicated that the United States would not seek to eliminate the Taliban entirely33 and that Northern Alliance forces had promised US officials they would not enter Kabul.34 Under these circumstances, the United States "may not be responsible for a disproportionate use of force."35

From this account, however, it appears that, although the United States may not have intended to eliminate the Taliban entirely, because it hoped to attract moderate Taliban to the US side, it did intend to replace the radical Taliban leaders and to ensure that the new government of Afghanistan would not follow the policies of these Taliban leaders. It is questionable, at best, whether this goal would be incompatible with the right of self-defense.
Despite George W. Bush's sharp criticism of "nation building" during his 2000 election campaign, it was immediately apparent to the Bush administration that nation building was urgently required in Afghanistan. Moreover, despite the distrust of the United Nations by many in the administration, President Bush called on the United Nations to help rebuild a post-war Afghanistan. During the 1990s, after playing a major role in ending the Soviet occupation, the United Nations employed a succession of mediators in an effort to achieve a government selected by a traditional assembly, or loya jirga. These efforts were unsuccessful, however, because UN-mediated cease-fires between warring factions always broke down. Non-UN initiatives also made little progress, particularly the "Six Plus Two" multilateral contact group, which began meeting in 1997.

Although he had resigned in frustration in 1999, immediately after the September 11, 2001 attacks, former UN mediator Lakhdar Brahimi was brought back. On November 14, 2001, the Security Council adopted Resolution 1378, which called for a "central" role for the United Nations in establishing a transitional administration and invited member States to send peacekeeping forces to promote stability and the delivery of aid. After the fall of Kabul in November 2001, the United Nations invited major Afghan factions, most prominently the Northern Alliance and that of the former king—but not the Taliban—to a conference in Bonn, Germany.

On December 5, 2001, the factions signed the Bonn Agreement. It was endorsed by the Security Council on December 6, 2001. Ironically, the Agreement was reportedly forged with substantial Iranian diplomatic help because of Iran's support for the Northern Alliance. According to Katzman, the Agreement, among other things:

- formed the interim administration headed by Hamid Karzai.
- authorized an international peacekeeping force to maintain security in Kabul and directed Northern Alliance forces to withdraw from the capital. (Security Council Resolution 1386 (December 20, 2001) provided formal Security Council authorization for the international peacekeeping force.)
- referred to the need to cooperate with the international community on counter-narcotics, crime and terrorism.
- applied the Afghan Constitution of 1964 until a permanent constitution could be drafted.

Inside the United Nations, there was strong sentiment in favor of democratic reforms. During the 1990s, successive UN resolutions on Afghanistan called for
“broad-based, representative government with a commitment to human rights and, increasingly, women’s rights.” This sentiment, which was strongly supported by the US government, is reflected in the Bonn Agreement. Yet the international commitment to democratization was potentially a liability, as well. As noted by one commentator:

The post-Taliban democratization process was from the outset more heavily internationalized than other reforms in Afghan history except under the communists. Reforms during the monarchy in the 1920s were certainly influenced by foreign ideas, but apart from a small number of foreign advisors they were very much an Afghan operation. The same applied to Zahir Shah’s democratic reforms in 1964. This time, by contrast, the UN launched a visibly internationalized democratization process. Foreign experts virtually flooded into the country to help implement the transition schedule of the Bonn Agreement. The visibility of the foreign hand in the reforms was exemplified during the 2005 elections, when the UN had 40 million ballot papers printed in Europe and Australia and flown into Afghanistan. The foreign role was accentuated by the widespread presence of international consultants in the new administration as a whole. While many experts were Afghans returning from exile, often temporarily, they worked for international salaries. This hardened the distinction between “the locals” (on local salary) and “the internationalists” (on international salaries).

This anti-foreigner sentiment continued and intensified to the point Afghans soon referred to foreign non-governmental organizations (NGOs) as “cows that drink their own milk.” Perhaps the most important policy impact of foreign involvement in Afghanistan was “the extreme dependence of the emerging Afghan state on international assistance.” The size of the US economic and military contribution in particular gave it paramount influence. By 2004, US aid accounted for over half of all recorded donor assistance to the government budget. As a result of its large financial contribution and extensive presence in Afghanistan, the United States “effectively underwrote the very survival of the government, as President Hamid Karzai publicly admitted, and wielded an implicit veto over all issues it considered important.”

President Karzai exercised decisive influence over the process of promulgating a new constitution. In accordance with established tradition, a small committee of experts prepared a first draft, which was reviewed by a larger commission. The final step would be the calling of a loya jirga to deliberate and approve a text. During the early drafting process, a critical issue emerged as to the form the government should take: a purely presidential system or a mixed structure with a prime minister. The debate divided along ethnic lines. The non-Pushtun minorities, including the Tajik, Uzbek, Hazara, Turkmen and Qizilbash, strongly favored the traditional position of a prime minister as a way to counter the influence of a Pushtun
president. They, therefore, wanted a power-sharing mechanism and favored a mixed system with a president and a prime minister, the latter preferably to be elected by the parliament. The Pashtuns argued, however, that Afghanistan needed a strong executive in order to overcome the catastrophic divisions of the past and to provide a unifying leadership for the future. Hence, in their view, a purely presidential system was best. After a period of time, the drafting process was removed from the commission and “proceeded in a ‘secretive and unaccountable manner’ in the office of Karzai.”

When the document was made public a couple of months later, in November 2003, the position of prime minister had been eliminated; instead, two vice presidents selected by the president had been added. Karzai’s success in overcoming a “varied and collectively powerful opposition during the constitutional process derived primarily from his relationship with the United States,” but “the parliamentary issue left a deep scar among the minorities.”

Speaking of parliament, a controversial issue arose regarding the election system to be employed to select members of the parliament for Afghanistan. Although political parties were allowed—about sixty were registered with the Ministry of Justice—the government chose a system that prevented political parties from formally fielding candidates. The election system chosen is called the single non-transferrable vote (SNTV). In the 2005 elections its use meant that voters could choose among individual candidates in multi-member constituencies, but there were no party lists and no party identification of candidates on the ballot. With no formal party affiliations allowed, there was no proportional representation according to party strength. As one commentator noted:

As an institution of political democracy, the SNTV was deeply flawed. Without electoral recognition of political parties, the parliament was likely to be fragmented and weak, with little capacity to aggregate local interests, address national-level issues, provide clear lines of accountability to the voters and thus, in the end, check the power of the executive branch... The limitations of a non-party election system were common knowledge. Most of the diplomatic community in Afghanistan, the UN mission in Kabul (UNAMA), and virtually all resident international experts and civil society groups warned against adopting the SNTV... Yet Karzai resisted, and after a year-long debate pushed the SNTV through a final Cabinet decision in February 2005.

The public argument made in favor of the SNTV by Karzai was that Afghanistan had historically had many bad experiences with political parties. The Communist Party had left a legacy of extreme violence, as had the civil war among the political factions during the early 1990s. According to Karzai, an election system that strengthened the role of political parties would likely institutionalize ethnic
divisions and work against national reconciliation and unity. Therefore, it was preferable to have an election system where voters would vote for individuals rather than parties. Karzai's ability to have the SNTV adopted was reportedly dependent upon strong US support, including a brusque intervention by American Ambassador Zalmay Khalilzad at a meeting with UN officials and diplomats in Kabul, who declared that "he had just spoken to President Bush, who said 'SNTV is the choice. SNTV is going to happen.'" Arguably, "[t]he institutional arrangement suited Washington's primary policy objective in Afghanistan, which was not to promote political democracy but to eliminate terrorists and Al Qaida." In any event, the process resulted in the election of a substantial number of alleged war criminals and drug traffickers in the parliament, which undermined the legitimacy of the democratic system. Moreover, as previously noted, the national budget was heavily dependent upon foreign funding. In 2005, around 90 percent of the total budget was based on foreign receipts. "Only the operating budget, which represented about one-fourth of the total, was managed by the government. The rest was the development, or 'external' budget, which the donors controlled more directly. As a result, the power of the parliament was extremely limited with regard to both taxation and spending."

Not surprisingly, relations between Karzai and parliament have often been contentious. Nonetheless, they are both trying to improve and expand governance throughout the country. In testimony before the Senate Armed Services Committee on February 28, 2008, Director of National Intelligence Mike McConnell stated that the Karzai government controls only 30 percent of the country, while the Taliban controls 10 percent, and tribes and local groups control the remainder. US and NATO officials in Kabul, however, told CBS in March 2008 that they disagreed with this assessment because it is too pessimistic. There is a debate in Afghanistan over whether the focus should continue to be on strengthening the central government—the approach favored by the Karzai government and the United States and most of its partners—or to promote local solutions to security and governance problems, an approach some international partners, such as Great Britain, would like to explore.

Despite its relatively weak position, parliament has asserted itself on several occasions. For example, it exercised its prerogatives in the process of confirming a postelection cabinet and in forcing Karzai to remove several prominent conservatives from the Supreme Court and replacing them with jurists more experienced in modern jurisprudence. In mid-2007, parliament promulgated a law granting amnesty to commanders who fought in the various Afghan wars since the Soviet invasion in an effort to improve the chances for greater stability as Afghanistan attempts to rebuild itself as a modern nation. In the course of debate on the
John F. Murphy

legislation, the law was rewritten to give victims the right to bring accusations of past abuses forward. Its status, however, is unclear because, although Karzai did not veto the legislation, neither did he sign it.

In spite of the tensions between them, the executive and the parliament have cooperated with respect to less contentious issues, such as the adoption of a labor law, a mines law, a law on economic cooperatives and a convention on tobacco control. The legislature also confirmed Karzai nominees for a new Minister of Refugee Affairs, the head of the Central Bank and the final justice to complete the composition of the Supreme Court.58

The United Nations has been extensively involved in the post-war stabilization and reconstruction effort in Afghanistan. Some of the debate over the predominant role of the United States and its partners was reflected in a proposal to create a new position of “super envoy” that would represent the United Nations, the European Union and NATO in Afghanistan. The proposal would subsume the role of the head of the UN Assistance Mission in Afghanistan (UNAMA). In January 2008, with US support, UN Secretary-General Ban Ki-moon tentatively appointed British diplomat Paddy Ashdown to this “super envoy” position, but Karzai rejected the appointment, reportedly over concerns about the scope of the authority of Mr. Ashdown, especially whether it might dilute the US role in Afghanistan. There has also been speculation that Karzai wished to show his independence from the international community. Ashdown withdrew his name on January 28, 2008.59

On March 20, 2008, the Security Council adopted Resolution 1608,60 which extended UNAMA’s mandate for another year and expanded its authority to include some of the “super envoy” concept. UNAMA coordinates the joint Afghan—international community coordination body called the Joint Coordination and Monitoring Board, and Resolution 1806 directs UNAMA to coordinate the work of international donors and strengthen cooperation between the international peacekeeping force (ISAF, International Security Assistance Force; see below) and the Afghan government. The head of UNAMA, as of March 2008, is Norwegian diplomat Kai Eide. In April 2008, in Washington, D.C., Eide stated that additional capacity building resources are needed and that some efforts by international donors are redundant or tied to purchases by Western countries.61

There is little doubt that inadequate resources, both for security and reconstruction purposes, have been and remain a primary problem in Afghanistan. The problem, moreover, is lack of both financial resources and human capital in a country that is one of the poorest on earth, with a literacy rate estimated at only 30 percent. The recent deterioration in the security situation is especially disquieting.
Afghanistan: Hard Choices and the Future of International Law

Post-War Security Operations and Force Capacity Building

As noted previously, after the negotiation of the Bonn Agreement, the UN Security Council adopted Resolution 1386 on December 20, 2001, which established ISAF to aid the Afghan Interim Authority in maintaining peace and security in Kabul and its surrounding areas, "so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment." To this end, the Resolution authorized ISAF to take "all necessary measures" to fulfill the peacekeeping mission. Everyone recognized that "all necessary measures" might include the use of force. The Resolution also called upon member States "to contribute personnel, equipment and other resources to the [ISAF]," and "calls on Member States participating in the [ISAF] to provide assistance to help the Afghan Interim Authority in the establishment and training of new Afghan security and armed forces."

It is important to note that Resolution 1386 envisaged that ISAF would be a peacekeeping force in the classic sense. Although ISAF was authorized to take "necessary measures" to fulfill its mandate, which implied that force might have to be used, the initial limitation of its operations to Kabul and its surrounding areas indicated that the use of force contemplated would be in the nature of actions in self-defense, a use of force characteristic of peacekeeping operations. There is no language in the Resolution that implies the use of force to enforce peace. Rather, peace enforcement responsibility lay with separate US forces who sought to track down Taliban and al Qaeda remnants, which were largely located in the southern and eastern portions of the country near the border with Pakistan.

The composition of ISAF originally consisted of approximately forty-six hundred troops from 122 different States. The leadership of ISAF initially rotated among the Western nations, but NATO took over leadership of ISAF in August 2003. This was NATO's first and so far only mission outside the Euro-Atlantic area in its history. At the time ISAF's primary goals were "to assist in maintaining security, develop Afghan national security structures, assist the nation's reconstruction, and aid the training of Afghan security forces."

Although Resolution 1386 initially limited ISAF to Kabul, its area of responsibility had been expanded to include about 50 percent of the country before August 2006, when it further extended its role to take over the lead military role from US troops in southern Afghanistan. In other words, ISAF had evolved from a peacekeeping force to one clearly involved in enforcing the peace against rejuvenated Taliban and al Qaeda forces. As one European official in NATO reportedly stated, "When NATO agreed to expand its control to southern Afghanistan in 2006, no
one really anticipated the difficulty in the fighting. Maybe we were in denial, but this has been a culture shock for a lot of us.”

For their part, US officials have been frustrated by what they perceive as a failure on the part of some NATO members to bear their fair share of the fighting. For example, the United States has been asking its NATO allies to provide more troops to stabilize the military situation in Afghanistan but has discovered that “some allies appear more eager to reduce their forces than to add to them.” US Secretary of Defense Robert Gates has credited the Netherlands, Britain, Australia and Canada with “doing their part in Afghanistan,” but indicated that other NATO members have contributed far less. For its part, Canada threatened to withdraw from the southern province of Kandahar early next year (2009) unless other NATO countries agreed to send one thousand additional combat troops there, a threat that was met when France agreed to contribute the extra troops. Tensions within the alliance have also risen because of the unwillingness of some members, including Germany, Italy and Spain, to send troops to the south of Afghanistan, where the bulk of the fighting is taking place.

Secretary Gates has recently emphasized “the direct threat posed to European security by extremists in and around Afghanistan” in a speech reflecting growing American concerns that weak public support risked undermining NATO’s mission in the country. As evidence of increased danger to Europe from terrorist attacks, Gates cited, among other things, the arrest of fourteen extremists in Barcelona, suspected of planning attacks against public transport systems in Spain, Portugal, France, Germany and Britain. On the reluctance of European States to commit more troops to Afghanistan, or to allow those already there to move to the south and other areas where the fighting was most intense, Gates warned against the alliance becoming a two-tiered coalition, of those willing to fight and those who were not. He reportedly added that “[s]uch a development, with all its implications for collective security, would effectively destroy the alliance.”

The same European official who reported that NATO members suffered “culture shock” when they realized how difficult fighting in southern Afghanistan would be, reportedly recognized the continuing frustration of American officials when he said, “American officials were frustrated when the alliance had 35,000 troops in Afghanistan but only 8,000 troops in the volatile south, and they are still unsatisfied with NATO’s 52,000 troops in Afghanistan and 22,000 in the south.”

Both Barack Obama and John McCain, the contenders in the 2008 presidential elections, supported a troop “surge” in Afghanistan. Senator McCain proposed moving troops from Iraq to Afghanistan, conditional on continued progress in Iraq. Senator Obama’s proposal is much more radical; he argues that we should have sent the 2007 surge to Afghanistan, not Iraq, that Afghanistan is the “central
Afghanistan: Hard Choices and the Future of International Law

front” and that we must rebuild Afghanistan “from the bottom up along the lines of the Marshall Plan.” Secretary of Defense Gates has also supported the idea of a surge in Afghanistan. He has endorsed a $20 billion plan to increase substantially the size of Afghanistan’s army, as well as the role and numbers of Western troops there to aid it.

Serious questions have been raised, however, about the validity of this thesis. For example, although denying sanctuary for terrorists—in Afghanistan and elsewhere—has been put forth as a rationale for increased troop strength, it has been argued that “[a]ccomplishing it . . . requires neither the conquest of large swathes of Afghan territory nor a troop surge there—nor even maintaining the number of troops NATO has in Afghanistan today. Counterterrorism is not about occupation. It centers on combining intelligence with specialized military capabilities.”

Even if one maintains that counterterrorism in Afghanistan requires more troops than suggested by the above argument, the question remains, how many? Dan McNeill, the American general who was NATO’s top commander in Afghanistan until he left in June 2008, reportedly said that “according to current American counterinsurgency doctrine, a successful occupation of Afghanistan, which is larger, more complex, more populous and very much less governable than Iraq, would require 400,000 troops.”

Strictly speaking, NATO is not an occupying force in Afghanistan because ISAF was established by Security Council resolution and President Karzai has given his permission for its presence. As noted previously, however, the large number of foreigners in Afghanistan has raised objections from the Afghans, who have a long-standing distrust of foreigners. Tensions have been greatly exacerbated by civilian casualties caused by NATO bombing. Karzai has demanded an end to civilian casualties. A surge of foreign troops along the lines suggested could greatly intensify these objections and likely provoke a serious backlash.

One possible answer to this objection might be to concentrate greater attention and resources on training an Afghan army and police. This has proven to be a difficult goal to achieve. American commanders remain frustrated by NATO’s failure to deploy the promised number of Operational Mentor and Liaison Teams (OMLTs) (“Omelets” in NATO-speak). These are twelve- to nineteen-person training teams that serve as a vital link between forward-deployed Afghan army and police units and ISAF support such as airpower, medical evacuations and resupply. This is a dangerous mission, as was demonstrated in June 2008, when eighteen police trainers from the Security Transition Command were killed in action. It was the worst month of the conflict for that command.

As a consequence, some NATO States, in particular Germany, now refuse to allow their OMLTs to accompany Afghan units into combat in the southern and
eastern parts of the country. Others have failed to field the training teams at all, apparently because of the financial cost. The result is a shortage of twenty mentoring teams and twenty-three thousand trainers. General John Craddock, NATO’s supreme allied commander in Afghanistan, has expressed his frustration at this situation in vivid terms:

I’ve talked at every meeting of the North Atlantic Council [NATO’s governing body], and at every foreign ministers council. At one [meeting] I brought a big cup and labeled it “Contributions,” and I reminded all the defense chiefs that their respective heads of state agreed to meet this requirement, so where is your bid? And I didn’t get anything! So yeah, I’m frustrated.

Building a quality police force in Afghanistan has so far proven to be a mission impossible because of pervasive corruption. The current seventy-nine thousand members of Afghanistan’s national police force are “better known as shakedown artists than law enforcers.” Major General Robert Cone, who is in charge of the mission to train the Afghan army and national police, points out: “The problem is endemic corruption in a country that had virtually no economy for 30 years other than narco-trafficking, so the way cops made money was to stop vehicles at checkpoints and demand money.” Many of Afghanistan’s governors are former warlords who put their cronies on the police rolls. As a result, they also are lukewarm to police reforms. According to Cone, “[i]f you gave them truth serum and asked if they wanted a good, non-corrupt police force, probably only 30 percent or so would say yes. For years, corrupt police is how they’ve made money.”

Military action against the Taliban and al Qaeda has not been going well the last two years. The toll among foreign troops in Afghanistan has reached a new high, with more than 230 deaths so far in 2008 among more than twenty NATO nations contributing troops. American commanders have said that the level of violence is up 30 percent in the past year. In July 2008, for the first time, American military casualties in Afghanistan exceeded those in Iraq. A major reason for the increase of casualties in Afghanistan has been the ability of the Taliban and al Qaeda to cross the border between Pakistan and Afghanistan, launch an attack in Afghanistan and return to their safe haven in the tribal areas of Pakistan. After months of US criticism, behind the scenes and in public, against Pakistan for not doing enough to prevent such attacks, the United States launched drone strikes against targets in Pakistan and a raid by special operations forces in Pakistan’s tribal areas. Pakistan reacted forcefully to these attacks and the risk grew of an armed confrontation between Pakistani and US forces. But as the Taliban went deeper into Pakistan proper and carried out major terrorist attacks like the Marriot Hotel bombing in
Afghanistan: Hard Choices and the Future of International Law

Islamabad on September 20, 2008, Pakistan reacted and escalated its attacks on Taliban strongholds like Swat, a settled area of the North-West Frontier Province that was once a middle class resort. Fighting has been fierce, and success of the Pakistani effort is by no means assured.

For his part, President Karzai has repeatedly sought the intervention of the Saudi royal family to bring the Taliban to peace negotiations, but without success. Karzai has reportedly imposed conditions on bringing the Taliban into the government. These include a renunciation of violence, acceptance of Afghanistan’s democratic constitution and a repudiation of al Qaeda—all terms the Taliban leadership has rejected.

As noted earlier, there are recent claims that Afghanistan has become a “narco-State” and that Hamid Karzai and his government are deeply involved in protecting the opium trade and using proceeds from it to maintain themselves in power. At this writing, there are further reports that President Karzai’s brother, Ahmed Wali Karzai, is heavily involved in the heroin trade in Afghanistan and that President Karzai’s government is protecting him. American officials in Kabul reportedly “fear that perceptions that the Afghan president might be protecting his brother are damaging his credibility and undermining efforts by the United States to buttress his government, which has been under siege from rivals and a Taliban insurgency fueled by drug money.”

I will now turn to a consideration of the international law issues raised by the current situations in Afghanistan and Pakistan, the hard choices faced by decision makers attempting to resolve these issues, and possible impacts on the future of international law of these choices.

Afghanistan, Pakistan, Hard Choices and the Future of International Law

A major problem that decision makers face in dealing with the currently unsatisfactory situations in Afghanistan and Pakistan is that both nations are sovereign States with governments selected in free elections. Although the United States and other foreign governments involved in Afghanistan can urge that President Karzai stop protecting drug lords and narco-farmers, they cannot order him to do so. Much less can they decide to remove him and his government from power. To be sure, they could, as suggested by Thomas Schweich, a former senior US Department of State counter-narcotics official, “inform President Karzai that he must stop protecting drug lords or he will lose US support.” The wisdom of this recommendation, however, is highly questionable. It would seem to call for a “nuclear option” in a situation not calling for it. As one commentator has noted:
Neither [presidential] candidate has mentioned heroin use as a pressing domestic issue, and there is even less reason it should be a major international one. In any case, our demand for heroin is not the fault of the Afghan peasants who would take the financial hit for our interdiction efforts. Liberal democracies cannot win counterinsurgencies against the wills of local populations, and denying a livelihood to the poor farmers of southern and eastern Afghanistan is no way to persuade Afghans to our side.91

Tensions between the Karzai government and the US government over civilian casualties allegedly caused by airstrikes raise somewhat similar problems. Although the law of armed conflict clearly prohibits an intentional direct attack against the civilian population as such, and indeed categorizes it as a war crime,92 “there can be no assurance that attacks against combatants and other military objectives will not result in civilian casualties in or near such military objectives.”93 In the latter case, the civilian casualties are known as “collateral damage” and do not give rise to accountability of the attacker. Nonetheless, as the head of the sovereign government of Afghanistan, President Karzai can order the complete cessation of airstrikes (he has done so on occasion), and, as a matter of international law, the United States and its allies are bound to comply—even though such airstrikes are a crucially important factor in the battle against the Taliban, and the Taliban regularly intermingles among the civilian population in order to use them as human shields (itself a violation of the law of armed conflict) and then uses civilian casualties as part of its war propaganda effort.94 In short, the Taliban has been successfully engaging in so-called “lawfare,” using false accusations of violations of the jus in bello in order to win public opinion to its side.

In a recent interview, Admiral Michael Mullen, Chairman of the US Joint Chiefs of Staff and the nation's highest-ranking military officer, has identified the problem of how to deal with attacks by the Taliban and al Qaeda across the border between Pakistan and Afghanistan, and their use of the tribal areas of Pakistan as a safe haven, as the gravest he faces.95 Although he suggests that more military forces are needed, he states, “It's not just about [sending] additional combat forces to Afghanistan.” Rather, he notes, “Afghanistan has a weak government and economy, a huge opium trade, and an inadequate army. If those problems aren't addressed, more troops won't help.”

There is a serious question, however, whether these problems are surmountable. As raised starkly by one commentator:

But what are the real prospects for turning fractious, impoverished Afghanistan into an orderly and prosperous nation and a potential ally of the United States? What true American interests are being insufficiently advanced or defended in its remote deserts
Afghanistan: Hard Choices and the Future of International Law

and mountains? And even if these interests are really so broad, are they deliverable at an acceptable price? The answers to these questions put the wisdom of an Afghan surge into great question. . . . The invasion of Afghanistan was a great tactical success and the correct strategic move. Yet since then it seems as if the United States has been trying to turn the conflict into the Vietnam War of the early 21st century. Escalating in Afghanistan to “must-win” status means, according to General McNeil’s estimate, deploying three times as many troops as were sent to Iraq at the height of the surge. If Americans really believe—as Senator Obama in particular argues—that Afghanistan is the right war and a place appropriate for Iraq-style nation-building, then they must understand both the cost involved and the remote likelihood of success.96

At this writing, Britain has reportedly backed a statement by a senior military commander that the war against the Taliban cannot be won.97 According to the report, “the UK’s ministry of defense ‘did not have a problem’ with warning the UK public not to expect a ‘decisive military victory’ and to prepare instead for a possible deal with the Taliban.”98 For its part, however, the United States is skeptical about any idea of negotiating with the Taliban. When asked about the British commander’s statement, a White House spokesman reportedly said: “We plan on winning in Afghanistan. It’s going to be tough and going to take some time, but we will eventually succeed.”99

Even if there should be an eventual agreement that success in Afghanistan does not require a complete military victory, US Joint Chiefs Chairman Michael Mullen is surely right in suggesting that the problem along the Afghan-Pakistani border is the one to be most concerned about for the near future and will be “front and center on the agenda of the next president.”100 As noted earlier, US and coalition forces have been frustrated by Pakistan’s failure to prevent Taliban and al Qaeda forces from crossing the border to launch attacks in Afghanistan and have recently attacked targets in the tribal areas of Pakistan either by drones or by special operations forces. Pakistan has protested vociferously and threatened military action against coalition forces. Most recently, however, Pakistan has reacted to Taliban and al Qaeda attacks in Pakistan by intensifying military action against them in Pakistan.101

A major issue arising out of this situation is whether US and coalition forces violated international law restraints on the use of force by launching their attacks in Pakistani territory. The answer to this question has to be a resounding “maybe.” As noted previously, with respect to the 9/11 attacks and the issue of whether Article 51 of the UN Charter applies to armed attacks by non-State actors, Yoram Dinstein has concluded that “all lingering doubts on this issue have been dispelled as a result of the response of the international community to the shocking events” of September 11.102 It is unclear, however, whether this conclusion would apply to
cross-border attacks by “terrorists”—or less pejoratively, “irregular forces” of a non-State character—that do not have the extraordinary features of the 9/11 attacks and the global response to them. Dinstein himself notes that there is considerable scholarly comment in support of the proposition that there is no right of self-defense under Article 51 against an armed attack by a non-State actor. This proposition is also supported by the controversial statement in the 2004 International Court of Justice’s Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. There the court summarily dismissed Israel’s claim that it was acting in self-defense against attacks by terrorist groups. In its view, Israel could not be acting in self-defense because Israel had not claimed that the terrorist attacks at issue were imputable to a foreign State and because those attacks were not transnational in nature, having occurred wholly within territory occupied by Israel. The opinion has been heavily criticized, however, and the court arguably backed off its view in its 2005 case concerning Armed Activities on the Territory of the Congo, where the court stated that, given the circumstances of the case, there was “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-defense against large scale attacks by irregular forces.”

Assuming arguendo that there is a right of self-defense against armed attacks by non-State actors, there is still the requirement that the use of force in self-defense be necessary for the object of defense and proportional to the injury threatened. Although the drone attacks and special operations forces attack drew strong protests from the Pakistani government, they were arguably necessary in light of Pakistan’s failure to prevent cross-border attacks and proportional to the injury they threatened. As noted by Admiral Mullen, there is no plan to invade Pakistan, and there is evidence of a favorable shift in the Pakistani military’s outlook after horrendous terrorist attacks on targets in its own country. He is also encouraged that a tribal leader in Bajaur, a Taliban and al Qaeda stronghold along the border, has mobilized several anti-Taliban fighters. At the same time he recognizes that the Pakistani military does not yet have the skills or the equipment it needs. If these can be provided, there is hope that no further cross-border attacks by US and coalition forces will be necessary.

Even a cursory review of the foregoing discussion leads to the unhappy conclusion that efforts toward “nation building” in Afghanistan are going very badly, and hard choices will have to be made that will have a major impact on the future of international law and international institutions. The first choice will have to be whether having a “surge” in Afghanistan of approximately ten thousand troops is a good idea and will contribute to winning the war against the Taliban and al Qaeda. Since both candidates in the US presidential election favor a surge, it is highly
probable that such a surge will take place. As noted, however, the British government believes the war is unwinnable in the sense of a decisive military victory and favors instead President Karzai's efforts to broker a peace settlement with the Taliban—efforts apparently opposed by the US government. Some critics have gone much further and proposed a major drawdown of Western troops to a maximum of perhaps twenty thousand. In their view, this number would be sufficient, if coupled with an intelligence operation sufficient to collect the intelligence needed to allow special operations forces to eliminate terrorist threats as they appear.\footnote{108}

It will also be necessary to decide whether, in light of considerable evidence of pervasive corruption in the Karzai government, and considering the cost in lives and treasure already expended, the efforts toward nation building should be continued. On the topic of nation building in Afghanistan, James Kitfield of the National Journal had the following to say:

The overwhelming theme of the Afghan nation-building at this time is a lack of coordination and coherence. Everyone seems to be doing their own thing based on different and occasionally conflicting or at least clashing agendas. The critical issue of who should be dealing directly with Taliban leaders in proposing reconciliation, and what they can offer them to jump to the government's side, is a case in point. The US pushed hard for the naming of a very high profile rep in Paddy Ashdown, precisely to instill more coherence in the effort. President Karzai apparently viewed that as a reproach and Ashdown as a potential competitor for influence, so he nixed the idea of a high profile UN "czar." The hopes for Ashdown's successor are more modest, but everyone seems to think someone is still needed who can be a one-stop contact for civil, international aid operations. The US military commanders in Afghanistan, and their NATO counterparts, are very anxious that someone fill such a role so that they can get the critical sequencing right in their "clear, hold, build" operations.\footnote{109}

Hard choices will also have to be made as to what to do about the drug lords and narcotics traffickers who are supporting the Taliban and al Qaeda insurgency. General David D. McKiernan, the top American commander in Afghanistan, has announced that ISAF forces will step up attacks on these drug lords and narcotics traffickers in situations where they are linked to the movement of weapons, improvised explosives or foreign fighters into Afghanistan.\footnote{110} American and NATO officials have vigorously rejected the suggestions of some NGOs that international security forces take an active role in eradicating the poppy crops, on the ground that such decisions should be left to the Afghan government, which would also have to develop alternate livelihoods for the farmers. But General McKiernan has proposed that perhaps this position should be reexamined because the fight in Afghanistan is now not only against the Taliban and al Qaeda, but also against "a very
broad range of militant groups that are combined with the criminality, with the narco-trafficking system, with corruption, that form a threat and a challenge to that great country.” The major problem with increasing the mission of the military in this fashion is that there is substantial evidence that the Karzai government and its supporters are also receiving funds from the narco-traffickers.

With respect to the problem of cross-border attacks from Pakistan, the primary issue is whether the new Pakistani government will have the will and the ability to defeat the Taliban and al Qaeda forces in the tribal areas. General McKiernan has reported that he is “cautiously optimistic” that a continuing assault by Pakistani forces against militants in the tribal area of Bajaur could put a “dent in extremist operations in the border region.” He also praised the appointment of the new head of Pakistan’s top spy organization, saying Lieutenant General Ahmed Shuja Pasha was likely to reform the agency, which in the past had “institutional and historical ties to the Taliban and other militant networks.”

If, however, General McKiernan’s cautious optimism turns out to be misplaced, and cross-border attacks by Taliban, al Qaeda and other militants become a major problem, then the choice facing US and coalition forces will be especially hard. As General John Craddock has acknowledged, insurgencies that enjoy uncontested sanctuary have rarely, if ever, been defeated.

Similarly, General McKiernan, in addressing the question whether it is possible to have a positive outcome to the Afghanistan campaign without resolving the problem of insurgent sanctuaries in Pakistan, has answered that “while I won’t say it will be impossible, it will be very, very difficult.” At the same time, McKiernan has stated categorically that “[f]ailure is not an option in Afghanistan.” Hence, the likelihood of US and NATO attacks on targets in Pakistan resuming under these circumstances would be great. Moreover, although Robert Gates has defended earlier such attacks as justified under international law in order to protect US troops in Afghanistan, as we have seen earlier, this is a debatable proposition, and Gates has recognized that “Pakistan probably did not agree that international law permitted unilateral action.” Indeed, as we also saw earlier, Pakistan vehemently objected to the US drone and special operations attacks in the tribal areas.

One should devoutly hope that failure in Afghanistan is in fact not an option. Robert D. Kaplan has recently suggested that “[s]trategically, culturally, and historically speaking, Afghanistan and Pakistan are inseparable.” Also, in his view:

[F]ailure in Afghanistan would do India no favors. In Afghanistan we are not simply trying to save a country, but to give a whole region a new kind of prosperity and stability, united rather than divided by energy needs, that would be implicitly
Afghanistan: Hard Choices and the Future of International Law

The fate of Eurasia hangs in the balance. But how long is this “long war” likely to be? A crucial issue, in both Iraq and Afghanistan, is the time required for a well-run counterinsurgency strategy to work. Sarah Sewall, a former Pentagon official who wrote the introduction to the University of Chicago edition of the new U.S. Army/Marine Corps Counterinsurgency Field Manual, is skeptical that the US public will be willing to "supply greater concentrations of forces, accept higher casualties, fund serious nation-building and stay many long years to conduct counterinsurgency by the book." If Ms. Sewall’s gloomy prognosis should prove correct with respect to Afghanistan, the adverse impact on international law and international institutions would be substantial. Failure in Afghanistan would be a catastrophic failure on the part not only of the United States but of the world community as a whole. It would mean that the Taliban, al Qaeda and other militant Islamic forces had managed to defeat US and other NATO forces in ISAF, as well as US forces engaged in antiterrorism missions under Operation Enduring Freedom. This would call into serious question the future viability of NATO and of UN peacekeeping efforts. Failure in Afghanistan would also call into question the continued viability of nation-building efforts, by the United Nations and others, and arguably support those skeptical of such efforts, such as the Bush administration in its early days.

At this writing, there are reports that the Bush administration has initiated a major review of its Afghanistan policy and that a nearly completed National Intelligence Estimate, a formal report that reflects the consensus judgments of all American intelligence agencies, will set forth an extremely grim assessment of the current situation in Afghanistan, especially of the Afghan leadership and its foreign allies. This should come as no surprise to those familiar with the developments and issues discussed in this article. One must hope, however, that issuance of the report after the 2008 presidential election will stimulate a searching review of these developments and issues. Avoiding failure in Afghanistan will depend in substantial measure upon a successful resolution of the many issues arising out of the situation there.

Notes


6. Id. at 1.
7. See Smale, supra note 1.
9. Id. at 1.
10. After his government fell, Najibullah declined to flee Afghanistan. Instead, he, his brother and aides remained at a UN facility in Kabul until the Taliban movement gained control in 1996 and entered the facility to seize and then hang them. Id. at 4.
11. Id. at 5.
14. Compare the language the Security Council used in Resolution 678, adopted on November 29, 1990, which authorized member States, unless Iraq complied with a series of prior Council resolutions by January 15, 1991, to use "all necessary means" to "uphold and implement" these resolutions and "to restore international peace and security in the area."
15. It is debatable, however, whether the Security Council has ever acted in such a way as to supersede the right to individual or collective self-defense. See, e.g., Eugene V. Rostow, Until What? Enforcement Action or Collective Self-Defense?, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 506 (1991), in which the author argues that the Persian Gulf War of 1990–91 was not a UN enforcement action but rather "a campaign of collective self-defense approved, encouraged, and blessed by the Security Council." To the contrary, see Thomas M. Franck & Faiza Patel, UN Police Action in Lieu of War: The Old Order Changeth, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 63 (1991).
16. For a forceful defense of the proposition that "all lingering doubts on this issue have been dispelled as a result of the response of the international community to the shocking events of 9 [sic] September 2001 (9/11)," see YORAM Dinstein, WAR, AGGRESSION, AND SELF-DEFENSE 206–8 (4th ed. 2005).
17. This discussion of the early combat operations in Afghanistan is based primarily on Katzman, supra note 8, at 7 and BARRY E. CARTER ET AL., INTERNATIONAL LAW 80–84 (5th ed. 2007).
18. See excerpts from the President's speech in CARTER ET AL., supra note 17, at 80–81.
19. According to reports, "some critics believe that U.S. dependence on local Afghan militia forces in the war strengthened the militias in the post-war period." Katzman, supra note 8, at 7.
20. Id.
21. Id.
22. Id.
23. See Dinstein, supra note 16, and associated text.
24. Id. at 206–7.
25. As a condition precedent to its invocation of Article 5, for the first time in history, the Atlantic Council met and agreed that there had to be evidence that the attack against the United
Afghanistan: Hard Choices and the Future of International Law

States was directed from abroad. Evidence to support this condition was presented to and deemed sufficient by the Council.

26. Dinstein notes further that "[t]his must be understood in light of Article 3 of the Rio Treaty, which refers specifically to an armed attack and to the right of self-defence pursuant to Article 51..." Dinstein, supra note 16, at 208.

27. Michael Byers, for example, has described the US "expansion" of the definition of self-defense to include a military response against States, such as Afghanistan, that willingly harbor terrorist groups that have attacked the United States as "dangerous" because it might be extended to situations where the provocation is far less grave than the September 11 attacks. See Michael Byers, War Law: Understanding International Law and Armed Conflict 67 (2005).


29. See Carter et al., supra note 17, at 82.

30. For discussion of this debate, see John F. Murphy, Force and Arms, in 1 United Nations Legal Order 247, 286–88 (Oscar Schachter & Christopher C. Joiner eds., 1995).


32. Id. at 904.


34. Katzman, supra note 8, at 7.

35. O’Connell, supra note 31, at 904.

36. See Katzman, supra note 8, at 7.

37. The “Six Plus Two” group consisted of the United States, Russia, and the six States bordering Afghanistan: Iran, China, Pakistan, Turkmenistan, Uzbekistan, and Tajikistan. Other failed efforts included a “Geneva group” (Italy, Germany, Iran and the United States) formed in 2000; an Organization of the Islamic Conference contact group; and Afghan exile efforts, including one by the Karzai clan (including Hamid Karzai) and one centered on Zahir Shah, the former king of Afghanistan. See id. at 7–8.


39. Katzman, supra note 8, at 8. In most instances where the United Nations has sought to broker a post-conflict peace process, it has relied on existing administrative and political institutions. This could not be the case in Afghanistan, where the Taliban had been removed from power and what little it had in the way of an administrative and political infrastructure destroyed. See Marina Ottaway & Bethany Lacina, International Interventions and Imperialism: Lessons from the 1990s, 23 SAIS Review of International Affairs 71, 82 (Summer–Fall 2003).


42. Katzman, supra note 8, at 8.

43. Id.


45. Id. at 634.

46. Id. at 635.

47. Id.
48. Id. at 638.
49. Id.
50. Id. at 639.
51. Id. at 640.
52. Id. at 641.
53. Id.
54. Id. at 644.
55. Katzman, supra note 8, at 10.
56. Id.
57. Id.
58. Id. at 11.
59. Id.
61. Katzman, supra note 8, at 12.
63. Id., operative para. 3.
64. Id., operative para. 2.
65. Id., operative para. 10.
66. CARTER ET AL., supra note 17, at 86.
67. Id.
70. Id.
72. Id.
74. Id.
75. Kitfield, supra note 68, at 36.
77. Id.
78. Id.
79. See Kitfield, supra note 68, at 36.
80. Id.
81. Id.
82. Id. at 33.
83. Id. at 40.
84. Id.
87. Burns, supra note 85, at A12, col. 1.
88. See Schweich, supra note 5.
Afghanistan: Hard Choices and the Future of International Law

89. See James Risen, Reports Link Karzai’s Brother to Afghanistan Heroin Trade, NEW YORK TIMES, Oct. 5, 2008, at 1.
90. See Schweich, supra note 5, at 9–10.
91. See Bull, supra note 76.
94. See Charles J. Dunlap Jr., Using bad PR is Taliban’s defense against airpower, ATLANTA JOURNAL-CONSTITUTION, Sept. 17, 2008, available at http://www.ajc.com/opinion/content/opinion.stories/2008/09/17dunlap.html. In his op-ed piece General Dunlap quotes a conversation between Taliban commanders, intercepted by US intelligence officers, in which one of the commanders says, “Tanks and armor are not a big deal—the planes are the killers. I can handle everything but the jet fighters.”
96. See Bull, supra note 76.
98. Id.
99. Id.
100. See Rubin, supra note 95, at C1, C6.
101. See Perlez & Shah, supra note 86, and accompanying text.
102. See DINSTEIN, supra note 16, and accompanying text.
103. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).
107. See Rubin, supra note 95.
108. See, e.g., Bull, supra note 76.
109. E-mail from James Kitfield to John F. Murphy (Sept. 30, 2008) (on file with author).
111. Id.
112. Id.
113. Kitfield, supra note 68, at 37.
114. Id. at 38.
115. Id. at 35.
119. *Id.* at xxxviii–xxxix.