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# Comments on the Use of Force in Afghanistan

Judith Miller†

Until I listened to Jordan J. Paust's excellent presentation identifying obstacles that international law assertedly presents in the United States' pursuit of the Taliban (as opposed to al Qae'da), I thought the rationale for the use of force in Afghanistan was fairly straightforward—especially when compared to the United States and NATO's experience in Kosovo. For instance, in Kosovo, the United States and NATO did not have the luxury of a United Nations Security Council (“UNSC”) resolution authorizing action or a coalition agreement justifying action as collective self-defense. Instead, NATO decided to take action as a regional organization—the first military action it had ever really taken on its own. Moreover, NATO member countries arrived at their decision to take action in Kosovo in a variety of disparate ways.<sup>1</sup>

Ordinarily, a UNSC resolution, declared under Chapter 7,<sup>2</sup> authorizes countries to take military action. The lack of a specific UNSC resolution authorizing NATO's use of force in Kosovo—or even a precisely unified view among NATO members regarding their legal rationale to use force—made day-to-day decision-making much more complex. Countries had varying notions on what actions were proper and different rationales regarding how and when it was appropriate to act.

By contrast, in the post-September 11th world, there has been a clarity of purpose with respect to United States action against terrorism, and a clarity of backing from the international community that is quite different from the experience the United States had in Kosovo. The UNSC, in addition to adopting Resolution 1373,<sup>3</sup> which invokes Chapter 7, issued several other resolutions quite quickly after the events of September 11th that recognize the right of individual and collective self-defense. Action in self-defense is consistent with the UN Charter.<sup>4</sup> Therefore, the United States did not need additional authorization from the UNSC. Even so, the UNSC has been quite supportive of the need for action against al Qae'da and related terrorist organizations. In fact, the overall unity in the international

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1. See generally David Wippman, *NATO's Bombing of Kosovo Under International Law: Kosovo and the Limits of International Law*, 25 *FORDHAM INT'L L.J.* 129 (2001).

2. Referring to the right of nations to use force to resolve a threat to international peace. See U.N. CHARTER arts. 39, 42.

3. S.C. Res. 1373, V.N. SCOR, 4385th mtg. at 1, U.N. Doc. S/RES/1373 (2001).

4. U.N. CHARTER art. 51; see also S.C. Res 1368, U.N. SCOR, 4370th Mtg., U.N. Doc. S/RES/1368 (2001).

community regarding the legal basis for United States action has been quite remarkable. However, a variety of criticisms have been made regarding whether the United States has used force properly, whether the United States has given adequate consideration to collateral damage, and whether the United States will correctly handle the enemy-combatant/prisoner-of-war issue. Nonetheless, the overall international agreement is that the United States had a proper legal basis for taking self-defensive actions, consistent with the UN Charter, in response to the deliberate attack on thousands of people in New York and Washington, DC.

NATO also did something for the first time in the aftermath of September 11th. It invoked Article V of the North Atlantic Treaty.<sup>5</sup> Simply put, Article V states that an attack on one member is an attack on all NATO members. Many had assumed that the former Soviet Union would commit the first of any such attack on NATO in Europe. To the contrary, in the aftermath of September 11th, NATO invoked Article V for the first time on behalf of the United States, essentially saying: "You have been attacked—that means we have all been attacked." NATO invoked Article V on the presumption that evidence would prove September 11th was an international attack.<sup>6</sup> Thereafter, the United States presented classified briefings with respect to al Qae'da and Taliban activities. These briefings led Lord Robertson<sup>7</sup> to announce NATO was satisfied and that the United States had established a satisfactory underlying factual basis to justify the initial invocation of Article V. Since then, the Organization of American States, Australia and New Zealand have all invoked mutual defense agreements designed for the same purpose as the North Atlantic Treaty. From a parochial perspective, the United States has been very fortunate in receiving broad support from the international community. The international law underpinnings for action in Afghanistan, post September 11th are not only clear, but have been reinforced by our allies' actions.

However, what is becoming increasingly clear is that the usual mechanism for formulating international legal determinations regarding the proper use of force does not neatly fit today's challenges of failed states and roving international terrorist organizations. It is well-known that the United States government employs a fairly robust definition of self-defense. It is obviously in the United States' interest to take this view. For example, the United States acted in self-defense against Libya after the Berlin discò

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5. North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246.

6. See generally Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 568-69 (2002).

7. See Statement by NATO Secretary General, Lord Robertson (Oct. 2, 2001). The Right honorable Lord Robertson of Port Ellen has been the tenth Secretary General of NATO and Chairman of the North Atlantic Council since October 1999. He was Defense Secretary of the United Kingdom from 1997 to 1999 and Member of Parliament for Hamilton and Hamilton South from 1978 to 1999.

bombing in 1986.<sup>8</sup> The United States took action against Libya, not against Libyan agents in Germany.<sup>9</sup> There have been a number of other instances where the United States has justified actions under its own view of proper collective self-defense. That said, even in the horrible aftermath of September 11th and the accompanying horror shared around the world, it is not necessarily the case that other nations now embrace the United States' broad definition of self-defense.

The real problem today is that the whole notion of international law governs the use of force rests on the assumption that there are state actors in control of a defined territory. All of the UN Charter rules stem from this principle. A state's territorial integrity is respected, and unless that state does something really improper, other states cannot threaten that integrity. None of the assumptions regarding statehood embedded in the UN Charter, the Geneva Convention on Prisoner of War Status,<sup>10</sup> and in the various war-related conventions since the early 1900's was present in Taliban-controlled Afghanistan. Even if United States action in Afghanistan is characterized as self-defense, it nonetheless presents very different problems than those experienced under the East versus West paradigm, when we at least had nations resembling traditional states and controlling defined territory. Does that mean that we need to reinvent international law? Reinventing international law could occur incrementally, perhaps similar to domestic interpretations of the U.S. Constitution, or more dramatically through major negotiating efforts aimed at dealing with this new reality.

On the domestic side, it is obvious Congress has not made a Declaration of War, which is a meaningful formality under the U.S. Constitution<sup>11</sup> sometimes lost in the commentary. A lot of the analysis with respect to military tribunals and actions in Afghanistan assumed Congress did make such a declaration. Nonetheless, for whatever reason, there is no such declaration. What does exist is a Joint Resolution of Congress<sup>12</sup> authorizing President Bush to take action in order to deal with the people who were involved in the attacks of September 11th. It is interesting that Congress was institutionally careful in its choice of relatively constrained language. For instance, the Joint Resolution does not authorize pursuit of every terrorist in the world. From the outset, however, President Bush's statements have suggested a broad attack on terrorism. Congress instead focused on the use of force and a variety of other activities against people involved in

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8. Information on the Berlin disco bombing, see *Four Jailed for Berlin Disco Bombing*, BBC News, available at <http://news.bbc.co.uk/2/hi/europe/1653575.stm> (Nov. 13, 2001).

9. *Id.*

10. Geneva Convention on the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.

11. U.S. CONST. art. I, § 8, cl. 11 (stating: "The Congress shall have Power . . . To declare War . . .").

12. Full text of Resolution reprinted online. See *Congress Authorizes President to Use All Necessary Force*, U.S. Department of State, available at <http://usinfo.state.gov/topical/pol/terror/01091706.htm> (Sep. 15, 2001) (authorizing "the use of United States armed force against those responsible for the recent attacks launched against the United States.").

the September 11th attack. Congress has not specifically authorized additional use of force in places like Iran, or North Korea.<sup>13</sup>

One of the other amazing developments—post September 11th and reflected in Resolution 1373—is that the UNSC has been much more forward-leaning than ever before in creating additional obligations for member states to take action against terrorism. Resolution 1373 makes clear that the world cannot deal with terrorism simply through the use of force in Afghanistan. The UNSC has put in place a whole variety of additional concerns and obligations on signatory states. Topics include: sharing intelligence about terrorism, closing borders, considering refugee status of terrorists, requiring stricter compliance with extradition requests, as well as a multitude of issues and duties concerning the financing of terrorism. This is a dramatic shift. It is a strong affirmation that there are many other means by which nations may take action, instead of simply relying on the United States or others to use military force.

Specifics relating to the use of force in this new environment are still relevant. In the operational law arena, the Department of Defense must ask whether a specific proposal for the use of military force is consistent with requirements of international law governing armed conflict. If not, the United States risks at a minimum a lot of conflict in and consternation from the international community. This will translate into a loss of political capital and good will. Putting the political price aside, the U.S. Department of Defense has an armed conflict directive that military services will follow even in instances where the law of armed conflict technically does not apply.<sup>14</sup> The Department of Defense directive requires everyone wearing a uniform receive training in the Law of Armed Conflict, appropriate to their level of responsibility. This training requires that military personnel report violations of the law of armed conflict.<sup>15</sup> Moreover, it requires legal advice to be given at every level at which force is used and authorized.<sup>16</sup> This legal advice focuses on whether the military force is lawful and whether it is militarily necessary. Will the military force cause unnecessary suffering? Is there a proper military objective? After reviewing these considerations, a proportionality analysis is required that balances potential suffering against the potential military advantage to be realized.

When considering the use of force, it is important to recognize that there are numerous limits on how that force should be deployed, or at least how the United States deploys force. For example, consider reports about a CIA unmanned aerial vehicle (“UAV”) that has allegedly been used for surveillance and combat, armed with a Hellfire anti-tank missile. There have been recent reports that one missile attack from a UAV hit people who were

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13. Since the preparation of this commentary in early 2002, the Congress has of course adopted a Joint Resolution authorizing the use of military force against Iraq. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (H.J. Res 1141, 107th Cong.) (2002).

14. See Directive, Department of Defense, No. 5100.77 (Dec. 9, 1998).

15. *Id.* at § 4.3.

16. *Id.* at § 5.3.3.

not an intended target.<sup>17</sup> This raises a series of questions. Did the CIA control this UAV, or as the law of armed conflict requires, did the Air Force control it?<sup>18</sup> The whole notion of having an UAV take hostile action requires human eyes and judgment assessing the target. There must be some human being, even if he is geographically removed from the target, who obtains information in real-time and decides whether or not the target is legitimate.

The fairly rapid shift to reliance on Afghan Northern Alliance and Special Ops forces to serve as the human eyes responsible for assessing targets is a striking development in this war in Afghanistan. In Kosovo and Bosnia, many of the targets were fixed. Fixed targets offer a great advantage. They do not move. Operatives still can make mistakes in characterizing targets, as the United States sadly did when it mistakenly hit the Chinese Embassy in Belgrade. However, the United States and its coalition partners can ordinarily get extensive information about fixed targets. The Department of Defense can use modern techniques to figure out how and where to hit a legitimate fixed target (i.e., what bombs to use, how many to use, what aim points, etc.). The Department of Defense can evaluate whether to go after the target with hard or soft means. The Department of Defense can also predict the likely outcome of the attack, allowing for assessments of collateral damage. Thus, once the decision is made to use force, and it is legally justified under international and domestic law, there are many day-to-day, very practical but sophisticated decisions made regarding the appropriateness of a given target, and assessments made regarding what information is still required to attack a particular target. Interestingly, in Afghanistan, this fixed target expertise, and the knowledge developed in the last fifteen years about how to deal with and analyze fixed targets, was not really a factor because there were hardly any identifiable Afghan fixed targets worth anything in regards to accomplishing military objectives. Therefore, the United States had to face the much harder task of being able to identify and hit moving targets. Moving targets are a harder assignment unless you have people on the ground whose judgment you trust.

To date, United States reliance on the Northern Alliance and Special Ops has produced some good results. However, judgments about using force directly in the hands of people on the ground, instead of in the hands of headquarters staffs. It is essential that those individuals receive training so they can make the proper assessments, as the Department of Defense's directive requires.

Finally, simply because the use of military force may be technically legal does not necessarily mean it is the right thing to do. There is always an interplay between the law and policy. How will other countries, who are supporting United States efforts to use force proportionately and prop-

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17. See *CIA Tried to Kill Afghan Warlord*, BBC News, available at [http://news.bbc.co.uk/2/hi/world/south\\_asia/1978619.stm](http://news.bbc.co.uk/2/hi/world/south_asia/1978619.stm) (May 10, 2002).

18. See *id.* (implying that the CIA was responsible for the attack):

erly, perceive a given decision to use force? So far the United States has been very fortunate in having a coalition—even if it is a loose coalition—that believes the U.S. has been using force mostly appropriately, and continues to give the United States basing rights, overflight rights and intelligence. These are all types of assistance, no matter how powerful needs in order to effectively use force in the world today.