



Premier Gary Doer
204 Legislative Building
450 Broadway
Winnipeg, MB R3C 0V8

August 12, 2008

Re: Provincial support for “Yellow Ribbon” and “Red Friday” campaigns

Dear Premier Doer,

We write to ask you to remove the “Yellow Ribbon Garden” from the grounds of the Manitoba Legislature and to refrain from lending provincial support to the “Red Shirt Rally” planned for August 15, 2008 on the grounds of the Manitoba Legislature.¹

We do so because the “Yellow Ribbon” and “Red Friday” campaigns in Canada signify support for militarism and war. They do so under the guise of caring and compassion for “our troops.” But in reality, these campaigns are code for supporting a war of aggression being carried on in the name of, and against the will of, the majority of Canadian people. (A June 2008 poll suggests that only 36 per cent of Canadians agree with Parliament's decision to extend Canada's military intervention in Afghanistan through 2011. That is down from 41 per cent in a similar poll done in May, according to Angus Reid Strategies.²)

We object strenuously to the war in Afghanistan and to the use of Canadian soldiers in that war. In no way is the participation of Canadians in the ongoing carnage in Afghanistan supportable by informed people of conscience.

In March, you announced provincial support for the Yellow Ribbon Campaign.³ You followed this up with the planting of the “Yellow Ribbon Garden” in the front of the Legislature. Most recently, you agreed to host a “Red Shirt Rally” with MLA, Bonnie Korzeniowski, Special Envoy for Military Affairs as one of the featured speakers. While you are entitled to express your personal opinion about

1 http://www.redfridays.ca/news/MA-Manitoba_0915.htm

2 <http://www.cbc.ca/canada/story/2008/07/07/afghanistan-poll.html>

3 <http://www.winnipegfreepress.com/local/story/4120395p-4715458c.html>

the war (one which is diametrically opposed by the federal New Democratic Party), you do not have the right to use provincial resources to promote it.

A mythology has grown over the past several years that paints the war in Afghanistan as a just war, a good war, a war that must be fought to bring peace, security and democracy to the people of Afghanistan and to prevent terrorism from striking Canadians where we live.⁴ Canadian governments (Liberal and Conservative) have lied to Canadians about the reasons for this conflict.

We invite you to review the facts laid out on the following pages and to join us in denouncing the war in Afghanistan.

Myths and Realities

The invasion and occupation of Afghanistan are based on lies. Following are the three most common.

1. The invasion was necessary to capture and punish Osama bin Laden for the September 11, 2001 attacks on the Twin Towers in New York and the Pentagon in Washington.

This is untrue. Before the start of the war, the Government of Afghanistan demanded evidence of bin Laden's involvement in the attack and offered to try him before an Islamic court inside Afghanistan; the US promptly rejected these offers. After the bombing began, they said they would turn bin Laden over for trial in a neutral country if the Americans would provide evidence of a case against him.⁵ The US Government rejected this proposal and the rest is bloody history. Curiously, the FBI has not indicted bin Laden for the 9/11 attacks, though it does list him as one of America's "Ten Most Wanted."⁶

2. The overthrow of the Government of Afghanistan (also known as "the Taliban") was justified because the Taliban are terrorists dedicated to sponsoring terrorist attacks abroad and oppression at home.

The Taliban support a form of fundamentalist Islam that would be highly unpopular in the West, but in this they are hardly unique. The Government of Saudi Arabia, for example, is no less authoritarian, but no one has said we should invade Saudi Arabia.

There is no evidence that the Government of Afghanistan was involved in 9/11. Nor was it in a position to threaten the United States; in 2001, Afghanistan was emerging from decades of war and civil war, politically unstable, economically bankrupt, with little infrastructure remaining intact.

Well documented evidence indicates the US was working toward the overthrow of the Taliban well prior to September 11, 2001. While negotiating with the Taliban about potential pipeline routes to carry oil and natural gas out of Turkmenistan to the Indian Ocean by crossing Afghanistan and Pakistan, it was funding the Northern Alliance to attack the Taliban. Pipeline negotiations broke down in August 2001 after a US negotiator threatened military action against the Taliban, telling them to accept the

4 <http://pm.gc.ca/eng/media.asp?id=1667>

5 <http://www.guardian.co.uk/world/2001/oct/14/afghanistan.terrorism5>

6 <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/27/AR2006082700687.html>

American offer of “a carpet of gold, or you’ll get a carpet of bombs.”⁷

The 9/11 attacks provided the pretext for the invasion, one in which the United States violated several international laws; as its partner, Canada plays a role in these ongoing crimes against humanity. Please refer to Appendix A, which deals, in detail, with some of the legal issues concerning the invasion.

3. Canada is a positive force for change in Afghanistan. People are safer and freer. Democracy has been restored. Life is getting better for ordinary Afghans.

In addition to squandering the lives of its soldiers in an illegal, immoral war, Canada is helping kill thousands of Afghans who pose no threat to us. These dead include Afghan combatants who would not be fighting if Afghanistan had not been invaded, and civilians (men, women and children). Our soldiers are committing murder in our names and it is impossible to conclude this has improved the lives of ordinary Afghans. Consider the following:

Afghan Death Toll

The precise number of Afghans killed since 2001 is difficult to determine, but is safe to assume that tens of thousands have died needlessly.

- Writing in *The Guardian* in 2002, Johnathan Steele suggested that up to 8,000 direct deaths and 20,000 indirect deaths could be attributed to the invasion.⁸ The American *Project on Defense Alternatives*, which speaks of “adapting military policy to the opportunities of the new era”, puts the 2001-02 civilian death toll much lower, between 1,000 and 1,300.⁹
- Dr. Marc W. Herold, of the University of New Hampshire, has estimated that American bombing had killed between 3,100 and 3,600 civilians by Oct, 2003.¹⁰
- According to Agence France Presse, about 1,700 people were killed in 2005, “many of them militants.”¹¹ A report by Human Rights Watch said that 4,400 Afghans had been killed in 2006, more than 1,000 of them civilians.¹² Some 2,077 militants were killed in Coalition operations between September 1 and December 13, 2006.¹³
- More than 7,580 people were killed in 2007, including: 1,980 civilians¹⁴, 926 Afghan policemen and 4,478 militants¹⁵.
- To date, in 2008, about 2,700 Afghans have been killed¹⁶, including 960 civilians^{17 18}.

Let us not forget that Canadians are active participants in the killing of Afghan civilians as well as

7 <http://www.informationclearinghouse.info/article1024.htm>

8 <http://www.guardian.co.uk/world/2002/may/20/afghanistan.comment>

9 <http://www.comw.org/pda/0201oef.html#appendix1>

10 <http://pubpages.unh.edu/~mwherold/AfghanDailyCount.pdf>

11 <http://www.afghanistannewscenter.com/news/2006/february/feb72006.html>

12 http://www.infowars.com/articles/ww3/afghanistan_1000k_civs_killed_in_2006.htm

13 http://www.boston.com/news/world/asia/articles/2006/12/13/2000_killed_in_afghanistan_since_sept/

14 [http://en.wikipedia.org/wiki/Civilian_casualties_of_the_War_in_Afghanistan_\(2001%E2%80%93present\)#cite_note-86](http://en.wikipedia.org/wiki/Civilian_casualties_of_the_War_in_Afghanistan_(2001%E2%80%93present)#cite_note-86)

15 http://www.armytimes.com/news/2007/12/ap_afghanistan_casualties_071231/

16 <http://www.iht.com/articles/ap/2008/08/01/asia/AS-Afghan-Violence.php>

17 http://news.bbc.co.uk/2/hi/south_asia/7502137.stm

18 <http://www.iht.com/articles/ap/2008/08/01/asia/AS-Afghan-Violence.php>

combatants. Reported civilian deaths include a taxi driver,¹⁹ a 10-year old boy,²⁰ an elderly motorcyclist,²¹ two young children (aged 2 and 4,²² a young motorcyclist and his baby brother,²³ an Afghan National Police officer and a homeless beggar,²⁴ a Toyota driver,²⁵ a taxi passenger,²⁶ and a motorist.²⁷ Given the obvious limitations on reporting in a war zone, this likely represents the minimum number of civilians killed by Canadians.

Refugees

According to Human Rights Watch, in its 2008 World Report: “Insecurity and armed conflict continued to cause new displacement and deter millions of Afghans from returning to their homes. Tens of thousands of Afghans in the southern provinces of Helmand, Kandahar, Oruzgan, and Farah left their homes to escape fighting, leaving them particularly vulnerable to malnutrition and disease and with very limited access to humanitarian aid. Nearly two million Afghan refugees have returned to their country, mostly from Pakistan. But the United Nations continues to report the presence of three to four million Afghan refugees in Pakistan and Iran. Between April and June the Iranian government forcibly deported nearly 100,000 registered and unregistered Afghans living and working in Iran”²⁸

Poverty

According to the Asian Development Bank: “Afghanistan is ranked as the fourth poorest or most deprived country in the world, and the poorest country in the entire Asia-Pacific region, according to the Afghanistan 2007 Human Development Report.”²⁹

According to Afghan government statistics, more than 42 percent of Afghans live in extreme poverty, subsisting on less than \$10 per month.³⁰

According to the World Bank: “Only 13% of Afghans have access to safe drinking water, 12% to adequate sanitation, and just 6% to electricity. Up to 70% of Afghanistan's estimated 26.6 million people are considered food-insecure by the UN Food and Agriculture Organization (FAO), and millions have recently been pushed into "high-risk" food-insecurity because of high food prices. Only 40% of schools have buildings, and most of the country's primary roads need repairs. Life expectancy is 43 years (compared to 59 years for low-income countries worldwide).”³¹

“Five months after a joint appeal by the UN and the Afghan government for US\$77 million to provide emergency food assistance to 2.55 million Afghans affected by soaring food prices, relief has reached only about 38 percent of the targeted population,” the UN World Food Programme said in June 2008.³²

19 http://www.cbc.ca/world/story/2006/03/15/afghanistan_taxi060315.html

20 [http://en.wikipedia.org/wiki/Civilian_casualties_of_the_War_in_Afghanistan_\(2001%E2%80%93present\)#cite_note-16](http://en.wikipedia.org/wiki/Civilian_casualties_of_the_War_in_Afghanistan_(2001%E2%80%93present)#cite_note-16)

21 http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061213/afghan_civilian_061213/

22 http://cnews.canoe.ca/CNEWS/War_Terror/2008/08/01/6331186-cp.html

23 http://cnews.canoe.ca/CNEWS/War_Terror/2008/07/28/6286296-cp.html

24 http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070219/kandahar_ambush_070219/20070219?hub=World

25 <http://www.cbc.ca/world/story/2007/02/27/accidental-shooting-070227.html>

26 <http://www.cbc.ca/world/story/2007/11/16/afghan-investigation.html>

27 <http://www.macleans.ca/world/wire/article.jsp?content=w021037A>

28 <http://hrw.org/englishwr2k8/docs/2008/01/31/afghan17600.htm>

29 <http://www.adb.org/Media/Articles/2008/12356-afghanistan-poverties-discussions/default.asp>

30 <http://www.rawa.org/temp/runews/2008/08/10/ove-42-of-afghan-population-live-in-extreme-poverty.html>

31 <http://www.worldbank.org.af/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/AFGHANISTANEXTN/0,,contentMDK:20154015~menuPK:305990~pagePK:1497618~piPK:217854~theSitePK:305985,00.html>

32 <http://www.reliefweb.int/rw/rwb.nsf/db900sid/PANA-7F9HLD?OpenDocument>

Widespread food shortages have been a chronic problem in Afghanistan for at least a decade and have been only made worse by the war.

Status of Women

According to Amnesty International: “Amnesty International welcomes advances in respect for women’s rights since the fall of the Taliban, notably through the establishment of the Ministry for Women’s Affairs, the National Action Plan for Women, improved access to education and representation of women in parliament. But Afghan women and girls still encounter discriminatory laws, policies and practices, which include physical attacks on them as women. Women and girls face endemic domestic violence, trafficking, forced marriages, including child marriages, and being traded in settlement of disputes. The police, the courts and other justice sector officials seldom address women’s complaints of abuses, including beatings, rape and other sexual violence. Women victims and defendants have little recourse to justice and are discriminated against in both the formal and informal justice systems.”

According to the Revolutionary Association of the Women of Afghanistan, commenting in 2007: “Human rights violations, crime, and corruption have reached their peak, so much so that Mr. Karzai is forced to make friendly pleas to the ministers and members of the parliament, asking them to “keep some limits”! Accusations about women being raped in prisons were so numerous that even a pro-warlord woman in the parliament had no choice but to acknowledge them.”³³

Drugs

According to the Canadian government: “Notwithstanding an ambitious campaign by the ruling Taliban against poppy cultivation in 2001, opium has been an important cash crop in Afghanistan for years. However, in the turmoil surrounding the US-led invasion, poppy cultivation soared, and Afghanistan is now the world’s largest producer of opium, accounting for over 90% of the global supply.”³⁴

A major barrier to ending opium production has been President Hamid Karzai, himself, who, to maintain the loyalty of his cronies, has steadfastly refused to implement more than token poppy eradication programs.³⁵

Depending on who you listen to, increased opium production benefits either the Karzai government or the insurgents. The key point here is that the war has resulted in more illicit narcotics.

Human Rights

According to Human Rights Watch: “The US military operates in Afghanistan without an adequate legal framework, such as a Status of Forces Agreement with the Afghan government, and continues to detain hundreds of Afghans without adequate legal process.”³⁶

33 http://www.rawa.org/events/dec10-07_e.htm

34 <http://www.parl.gc.ca/information/library/PRBpubs/prb0729-e.htm>

35 <http://www.nytimes.com/2008/07/27/magazine/27AFGHAN-t.html?pagewanted=1>

36 <http://hrw.org/englishwr2k8/docs/2008/01/31/afghan17600.htm>

While acknowledging “progress,” Amnesty International³⁷ has been extremely critical of the Karzai government's human rights performance, noting

- “the Afghan judiciary suffers from systemic corruption and a lack of qualified judicial personnel across the country and remains susceptible to pressure by public office holders and armed groups affiliated with the government.”
- “The Afghan National Police (ANP) is poorly paid and trained and notorious for corruption and abusive behaviour.”
- “The Afghan intelligence service, the National Directorate of Security (NDS), faces credible allegations of abusing detainees and operating secret detention facilities.”
- The conduct of international military forces, in particular the United States, helps aggravate a climate of impunity. US forces continue to detain Afghans without clear legal authority and without adequate legal process. Hundreds of Afghans remain in detention at the US base at Bagram airport without facing a proper trial in “security internment” of indefinite length. People captured by International Security Assistance Force troops and handed over to the Afghan authorities are at risk of torture and other ill-treatment while in Afghan custody, particularly the custody of the NDS. Detainees have little recourse to the law, and government officials, particularly in the NDS, violate Afghan and international law with impunity.

Governance

Transparency International ranked Afghanistan 172nd out of the 179 countries surveyed last year on its corruption-perceptions Index.³⁸ This is not surprising. Writing in the *New York Times*, Thomas Schweich, a senior American official in anti-drug eradication efforts in Afghanistan, said that in January 2007 Karzai appointed a convicted heroin dealer, Izzatulla Wasifi, to head his anticorruption commission. He also appointed several corrupt local police chiefs. There have been numerous diplomatic reports that his brother Ahmed Wali, who was running half of Kandahar, is involved in the drug trade.³⁹

Supporters of the Karzai government do not hesitate to mention that it is an elected government. However, critics of this government are not tolerated. A case in point is that of Member of Parliament Malalai Joya, who was expelled from the Afghan parliament for denouncing government corruption. Joya, has survived four assassination attempts, and has been openly threatened with rape and murder by other Afghan MPs. The Karzai government refuses to provide her with protection.⁴⁰

Why is Canada in Afghanistan?

According to official sources, Canada is in Afghanistan for noble purposes – the defeat of terrorism and the liberation of the Afghan people.

This opinion is not shared by the Revolutionary Association of Women of Afghanistan⁴¹, a group of women who have been in the forefront of human rights struggles since the 1977.

37 <http://www.amnesty.org/en/library/asset/ASA11/007/2008/en/d7b61614-37d1-11dd-9ec6-1d6085451ee8/asa110072008eng.html>

38 <http://www.time.com/time/world/article/0,8599,1726620,00.html?xid=feed-yahoo-full-world-related>

39 <http://www.nytimes.com/2008/07/27/magazine/27AFGHAN-t.html?pagewanted=6>

40 <http://www.malalaijoya.com/index1024.htm>

41 <http://www.rawa.org/index.php>

According to RAWA, “The reinstatement of the Northern Alliance to power crushed the hopes of our people for freedom and prosperity into desperation and proved that for the Bush administration, defeating terrorism so that our people can be happy, have no significance at all. The US administration plays a funny anti-Taliban game and pretends that a super power is unable to defeat a small, marginalized and medieval-minded gang which is actually her own product. But our people found by experience in the past few years that the US doesn’t want to defeat the Taliban and Al-Qaeda, because then they will have no excuse to stay in Afghanistan and work towards the realization of its economical, political and strategic interests in the region.”⁴²

What might those American interests be? Why is Canada such a staunch partner? We can't claim to be exhaustive, but there are credible accounts that U.S. and Canadian petroleum and natural gas projects in and around Afghanistan, involving former Prime Minister Jean Chrétien, provide part of the answer.⁴³

Additionally, a report recently issued by the Canadian Centre for Policy Alternatives lends credence to the suspicion that control over energy underlies the invasion of Afghanistan. *A Pipeline Through a Troubled Land: Afghanistan, Canada and the New Great Energy Game*⁴⁴ documents the proposed Turkmenistan-Afghanistan-Pakistan-India (TAPI) pipeline, which will transport natural gas 1,680 kilometres from southeast Turkmenistan through southern Afghanistan, to Pakistan and India.

The report, written by international energy economist and former lead economist of PetroCanada John Foster, describes the U.S.-backed pipeline as turning Afghanistan into “an energy bridge” between Central and South Asia.

By citing official sources, the report provides a powerful antidote to the war propaganda emanating from Ottawa and Washington. For example:

“Richard Boucher, U.S. Assistant Secretary of State for South and Central Asian Affairs, said in September 2007: “One of our goals is to stabilize Afghanistan, so it can become a conduit and a hub between South and Central Asia so that energy can flow to the south. . . . and so that the countries of Central Asia are no longer bottled up between two enormous powers of China and Russia, but rather they have outlets to the south as well as to the north and the east and the west.”

“Light was also shed by U.S. Ambassador Thomas Pickering, co-chair of the blue-ribbon Afghanistan Study Group in Washington, D.C. Interviewed on CBC’s *As It Happens* (January 30, 2008), he said: “Afghanistan is of strategic importance, a failed state in the middle of a delicate and sensitive region that borders on a number of producers of critical energy.”

While American desires to access and control energy resources are part of the equation, they are not the whole answer. The United States has been pursuing a multifaceted strategy that seems to include encirclement of Russia; strengthened diplomatic and military relations for a number of the former Soviet republics and attempts to expand the reach of NATO bear this out. The conflict between Russia

42 http://www.rawa.org/events/dec10-07_e.htm

43 <http://www.globalresearch.ca/index.php?context=viewArticle&code=MED20060318&articleId=2125>

44 http://www.policyalternatives.ca/documents/National_Office_Pubs/2008/A_Pipeline_Through_a_Troubled_Land.pdf

and Georgia that has erupted into open war in the last few days was prompted by US initiatives which included arming and training the Georgian military prior to its invasion of South Ossetia.⁴⁵

It is beyond the scope of this letter to offer a detailed analysis of US strategies and objectives, but one would have to be blind to ignore the conclusion the US is sparing no effort or expense to extend its reach, regardless of the lives destroyed. These are dangerous times, and more than ever Canada must become a voice for peace.

There is much more that could be said about the war in Afghanistan, but we will end here. In our view, Canada's participation in this war is wrong. Two federal governments have sacrificed the lives of 90 soldiers and one diplomat to satisfy the imperial ambitions of the US Government and the greed of energy corporations. We are saddened and dismayed that you, as Premier of our province, have chosen to endorse these crimes by your support for the Yellow Ribbon and Red Friday campaigns.

We are prepared to meet with you to discuss this matter further. Whether you accept our offer or not we intend to circulate this letter widely in hopes that other Manitobans will join with us in demanding that you withdraw provincial support for this war.

Sincerely,

Glenn Michalchuk, Chair
Peace Alliance Winnipeg

⁴⁵ <http://www.globalresearch.ca/index.php?context=va&aid=9788>

Appendix A: The legality of the United States intervention in Afghanistan

-- A public international law essay by Sulman Hassan, graduate in law from Liverpool John Moores University

July 15, 2005

Sulman Hassan assesses the validity of the US contention that the Article 51 'right to self-defence' is applicable in response to the September 11 atrocities in the light of the modern rules of International law. He considers the modern rule on the use of force, the applicability of UN Article 51, Role of the Security Council and the regional bodies, customary law requirements and the question of state responsibility. He concludes that the US has failed to satisfy, and instead violated the modern rules of International Law regarding the right to self-defence and instead relied on an 'expansive' interpretation given by a limited number of academics.

(Source: http://www.americansc.org.uk/Online/Forum/Afghanlegality.htm#_ednref60)

The validity of the US contention that the Article 51 'right to self-defence' is applicable in response to the September 11 atrocities needs to be assessed in light of the modern rules of International law. The US contention needs to be considered along with the principle of *jus cogens*, the obligation not to use force, which is enshrined in Article 2 (4). In order to critically assess the validity of the US contention, one must also consider the modern rules of International law which provide exceptions to Article 2 (4) [1] on the use of force. Legal issues that need to be considered include:

- First, whether the US action is justified under Article 51, both the precise scope and interpretation of Article 51 need be determined.
- Secondly, the role of the Security Council and NATO [2] in light of US evidence presented, needs to be examined.
- Thirdly, was the US and UK bombing campaign within customary international law requirements established under the Caroline Case [3].
- Fourthly, the issue of state responsibility needs to be considered, in particular whether the state of Afghanistan is responsible for actions taken by *Al Qaeda* [4].
- Fifthly, it is important to consider recent US practice and an analysis from a US perspective.
- Finally it is necessary to contemplate whether current international law is still adequate in governing the use of force and also whether the US self-defence justification is valid under modern day International law.

Modern rules on the use of force

An appropriate starting point is a brief explanation of the modern rules on the use of force. Use of force is condemned and has the status of *jus cogens*, a primary obligation for states not to go to use force [5]. In modern day international law the principle is enshrined in Article 2 (4) [6]. Article 2 (4) stipulates a general prohibition of the unilateral use of force [7]. In addition to the Article 2 (4), the

International Court of Justice (ICJ) has clarified that a general ban on the use of force exists even in customary law running parallel to the charter [8]. However as mentioned there remain three exceptions to Article 2 (4): Article 51, the Charter right to self defence [9]; action authorised by the Security Council; [10] and action by regional bodies with security council authorisation [11].

Before addressing the legal issues on self-defence it is useful briefly to explain that there is lack of evidence made public linking *Al Qaeda* or the Afghan Government to the September 11 atrocities. If the US had such ‘clear and compelling evidence’, as it claims [12], then it should have been properly disclosed to the Security Council. The US claims that disclosure would have amounted to the revelation of sensitive information. On the other hand if one takes *Charney’s* view, disclosure of evidence should be required even if the state claims that classified information is disclosed [13]. In brief *Charney’s* view seems more satisfying and that failure of the US to disclose credible evidence has thus not convinced the International Community.

The applicability of Article 51 to the US argument

Now that the modern rules on use of force are outlined and the fact there is insufficient disclosed evidence explained, it is useful to consider the applicability of Article 51 to the US argument. Article 51 stipulates nothing ‘shall impair the inherent right of individual or collective self defence if an armed attack occurs against a member of the United Nations’ [14]. Whether the US action is justified under Article 51 depends on how Article 51 is interpreted. A restrictive interpretation is that the UN Charter has displaced pre 1945 customary law on the issue of self-defence, while a permissive interpretation provides that pre 1945 customary law goes beyond rights guaranteed by the UN Charter [15] and thus even if Article 51 is not satisfied, use of force may be justified.

Using a restrictive interpretation it is difficult to see how Article 51 applies in relation to the September 11 atrocities. Article 51 gives a state the right to repel an attack that is ongoing or imminent as a temporary measure until the UN Security Council can take steps necessary for international peace and security [16]. So on a restrictive view the right of self-defence does not include the right to retaliate once an attack has stopped [17].

In order to trigger Article 51 it is necessary that there be an ‘armed attack’ within the meaning of the Charter. The definition of ‘armed attack’ is broad, as established in the *Nicaragua case* [18], where the *ICJ* held that the concept covers ‘the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries’ and a state’s ‘substantial involvement therein’ [19]. So could the attacks on the US by *Al Qaeda* satisfy the *Nicaragua* definition of ‘armed attack?’ [20]

While the terrorist attacks on September 11 appear to be clearly within the definition of ‘armed attack’ committed by ‘armed bands’ [21], it is difficult to see how action by the *Al Qaeda* terrorist group links the state of Afghanistan [22]. The *ICJ* [23] famously rejected the notion that mere assistance to rebels was an ‘armed attack’. Applying the *ICJ* interpretation of ‘armed attack’ it appears improbable that the Afghan Government sent *Al Qaeda* to the US with a view to commit terrorist acts as no disclosed evidence clarifies this. It is therefore logical to suggest that the US was not a victim of ‘armed attack’ within the meaning of Article 51 and the US use of force is contrary to Article 2 (4). However, it is stressed that the US does not recognise the jurisdiction of the *ICJ* [24] and therefore from a US perspective any statements by the *ICJ* will be persuasive rather than authoritative.

Role of the Security Council and the regional bodies

Now that Article 51 has been addressed it is appropriate to move on to the role of the Security Council and the role of regional bodies. In considering the role of the Security Council, it is a requirement [\[25\]](#) that any measures taken in self-defence ‘shall be immediately reported to the Security Council’ and then the Security Council will take ‘measures necessary to maintain international peace and security’. There is no doubt the US did report its action [\[26\]](#) and in response the Security Council passed two resolutions condemning the September 11 attacks and announced a number of measures to fight terrorism [\[27\]](#). Furthermore, Resolution 1368 on the US claim of self-defence, recognised in its preamble the inherent right of individual or collective self-defence in accordance with the Charter, but the operative part of the resolution described the attacks as ‘terrorist attacks’ and not ‘armed attacks’. Thus neither resolution authorised the use of force and instead attempted to maintain peace and security by diplomatic means. This means that US use of force is in violation of the UN Charter.

As regards the role of regional bodies, which in this case means NATO, to which the US is party, there is an obligation to act in accordance with the Charter [\[28\]](#). Invoking Article 5 of the Washington Treaty (as NATO did in response to the September 11 atrocities [\[29\]](#)), that an attack on the US is an attack on all NATO members, is not authority for use of force as the NATO Treaty is subservient to the UN Charter [\[30\]](#). Therefore any NATO justifications for use of force are not authority unless it has Security Council backing.

Customary law requirements

Now it needs to be considered whether the US action was met by the customary law requirements established under the *Caroline Case*. It is well established that to be a valid use of force in terms of self-defence under international customary law [\[31\]](#), there is a need that it be immediate, proportionate and necessary [\[32\]](#).

In terms of immediacy, *Boyle* [\[33\]](#) suggests that only ‘on-the-spot’ responses to a terrorist armed attack are permissible [\[34\]](#). *Boyle* rejects *post facto* self-defence measures because in *Boyle’s* view an expansive reading of the self-defence doctrine to include retaliation and reprisal would provide states with justification for use of force. A denial of armed reprisal is consistent with prevailing scholarly opinion that reprisals are *per se* illegal [\[35\]](#). On this view it appears that US action should have been immediate for it to be legitimate under customary law as established in the *Caroline* case. However, US state practice suggests that a reasonable delayed response is acceptable [\[36\]](#), where there is a need to gather evidence of the attacker identity to strike back in a targeted manner [\[37\]](#).

On the issue of necessity, the test is that there be “a necessity of self defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation” [\[38\]](#). US diplomatic means with the *Taliban* proved to be ineffective, as the *Taliban* refused to comply with US authorities [\[39\]](#). In reality necessity in relation to the September 11 atrocities seems to have, long since passed [\[40\]](#) before the bombing of Afghanistan [\[41\]](#). A claim of self defence would therefore only relate to future, anticipated attacks by *Al Qaeda*, hence *Negroponte’s* [\[42\]](#) reference to an ‘ongoing threat’. Legality of anticipatory self-defence is controversial in International law [\[43\]](#).

Academic arguments have rejected the standard of necessity set in *The Caroline Case*, for instance, *Coll* [\[44\]](#) emphasises that the *Caroline* test exaggerates necessity in a time when war was a permissible option for states that had actually been attacked. [\[45\]](#). If one is to accept *Coll’s* view it appears that the

US need not satisfy the customary law requirement of necessity in order to act in self-defence. However it is stressed that *Coll's* view is just academic with no *opinio juris* and therefore not as authoritative as the customary standard under *The Caroline case*.

Whether the US action was proportionate to the September 11 atrocities is also questionable against the argument that the *Taliban* did not represent a direct threat to the US. It was agreed in *The Caroline case* that a State exercising the right to self-defence must not do anything 'unreasonable or excessive'. However, jurists have advanced different interpretations of proportionality. On a 'deterrent' approach *Coll* explains that self-defence measures 'should be the minimum necessary to persuade him not to undertake aggression in the future' [46]. *Schachter* [47] extends the point by saying that in order to be a reasonable relation of means to ends, it is not disproportionate if in some cases the retaliatory force exceeds the original attack in order to serve a deterrent aim. Thus on this reasoning US action may be seen as proportional as there is a deterrent aim to prevent future 'terrorist' attacks. In sharp contrast to the deterrent approach is 'tit for tat' proportionality [48] which according to *Intoccia* is 'any response to an act of aggression which employs a level of violence which is greater than is necessary to counter any continuing immediate threat must be viewed as impermissible' [49]. Thus the US action would not be permissible if one was to rely on *Intoccia's* view as bombing the whole of Afghanistan would not be justified. In contrast to both of the above approaches is 'cumulative proportionality' [50]. According to this approach an accumulation of small events, such as minor terrorist attacks, can justify a single longer retaliatory response in certain instances' [51]. This approach would suit previous US claims that *Al Qaeda* has been responsible for a number of terrorist attacks against the US [52] thus justifying US use of force.

In addition to the above some have argued that, although the September 11 atrocities are serious, a full-scale invasion of Afghanistan cannot be considered a proportionate response [53]. This means the objective of replacing the *Taliban* regime was in itself is probably not proportionate and of dubious legality [54]. No international legal instrument permits intervention to maintain or impose a democratic form of government in another state [55]. Perhaps US actions find resonance if one applies *Reisman's* [56] suggestion that a contextual interpretation of Article 2 (4) should be undertaken in light of the failings of the collective security system envisaged under the UN Charter [57]. Applying *Reismans* standards, the US intervention might be considered permissible [58] since it removed the oppressive *Taliban* regime from Afghanistan. However, a utilisation of an expansive interpretation of Art 2 (4) to 'topple a repressive regime' [59] is clear violation of the plain language of the Charter [60]. Further, Military Support given to the Northern Alliance by the US can only be justified if it is the Afghan Government who had committed an armed attack against the US. Otherwise the US arming and support for the Northern Alliance is as illegal as its arming and support for the Contras was back in the 1980s [61].

In summary, the customary law requirements of immediacy, necessity and proportionality appear not to have been satisfied. Maybe the US sees itself as having leeway in respect to proportionality and necessity to its initial reaction to the September 11 atrocities because of the gravity of the attack and the flexibility of the norms in the Charter regarding self-defence [62].

State Responsibility

The issue of state responsibility regarding the US claim that Afghanistan was 'harbouring' *Al Qaeda* terrorists need to be considered. The US claim is questionable and if one applies the *Nicaragua* case, it

would appear no state responsibility can be imputed to Afghanistan [63] as there is no disclosed evidence of Afghanistan issuing ‘specific instructions’ to *Al Qaeda* to carry out atrocities in the US.

Similarly if one applies the judgements of the *International Criminal Tribunal for the former Yugoslavia (ICTY)* in *Prosecutor v Tadic* 1999 [64], to imply state responsibility the state accused needs to exercise ‘overall control’. The *Taliban* did not exercise ‘overall control’ of *Al Qaeda* and therefore on the reasoning of the *ICTY* are not responsible for the actions of *Al Qaeda*.

In addition is the view of the *International Law Commission (ILC)*, in its draft articles on *State Responsibility of States for Internationally Wrongful Acts of 2001* [65], which regards a state as responsible only:

... ‘if the ... group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct’; if the ... group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities’; and ‘if and to the extent that the State acknowledges and adopts the conduct in question as its own’... [66]

Applying the *ILC* recommendations, as there is no evidence to suggest that *Al Qaeda* was under specific instructions of the Afghan Government, it is unlikely that an *Al Qaeda* member holds authority in the Afghan government and it is unlikely that the Afghan government acknowledged such conduct as their own law, it is therefore reasonable to suggest that state responsibility can not be imputed to Afghanistan based on the reasoning of the *ILC*

However the US claim of state responsibility may be merited by some academic opinion. For example, *Baker’s* rendition of state responsibility is that even a ‘states toleration’ of terrorism can engender a victim’s right of response to an armed attack [67]. Like *Baker*, Judge *Soafer* [68], contends that state ‘sponsorship’, ‘support’, or ‘toleration’ can engender a victim state’s right to forcible response. On this line of reasoning if ‘toleration’ was to equate to the US ‘harbouring’ claim there is academic support of the US ‘harbouring’ theory. However if ‘harbouring’ is taken to mean ‘mere sanctuary’ then according to *Cassese* the law is ‘not entirely clear’ [69].

Summing up on state responsibility it appears that the US position of self-defence is invalid as the US ‘harbouring’ theory fails to satisfy any of the tests put forward by the *ICJ*, the *ICTY*, or the *ILC*. Any support for the US ‘harbouring’ theory on state responsibility comes from limited academic opinion, which it must be remembered should be seen as persuasive rather than authoritative.

Conclusion

With little compliance to modern rules of International Law, the US appears to have relied on US and Israeli past practice. US state practice seems to support the hypothesis that an ‘armed attack’ by a non-state group is sufficient to justify use of force under Article 51 [70]. From a US perspective *Al Qaeda* leadership cannot be seen as purely as a ‘non – state’ entity as it is said there is a symbiotic relationship between the two and the fact the Afghan government seems to tolerate the presence of *Al Qaeda* [71].

In the past both the US and Israel have claimed self-defence for use of force in response to ‘terrorist attacks’. Their justifications include; self defence; the protection of nationals abroad; and deterrence. Israel’s attack on Tunis in 1985 was widely condemned and seen as a violation of the UN Charter, but Israel claimed it targeted the *PLO* [72] headquarters in response to the protection of Israeli nationals abroad. As for the US attack on Tripoli in 1986, the US argument to the UN Security Council was that

the action was self-defence under Article 51 as it was intended to protect nationals abroad and to deter future terrorist attacks. Furthermore, the US claimed to have acted in self-defence in response to embassy bombings in Kenya and Tanzania in 1998 by striking at targets in Sudan and Afghanistan. It can thus be seen that US and Israeli action can be seen as pre-emptive and retaliatory amounting to reprisals, which are per se illegal. In no way should the US rely on this past practice, as it cannot be relied on as custom [73] as there is no *opinio juris* to suggest so.

In terms of whether International law is still valid in governing the use of force and self-defence, it is clear that there is some disagreement about the precise interpretation of both Article 2 (4) and Article 51. Critics have further argued that International law on this matter is too ill defined and that there is a need for the *International Law Commission* to codify exactly what are the principles applying to self-defence and use of force [74] given the changed realities of the post war quarter century [75] with the threat of 'terrorism'.

In conclusion it appears the US has failed to satisfy and instead violated the modern rules of International Law regarding the right to self-defence and instead relied on an 'expansive' interpretation given by a limited number of academics. Further any claim of a new emergence of customary international law, based on a broader definition of 'armed attack', in response to terrorism [76] is a weak argument as only two states, those being Israel and the US, rely on such practice. There is therefore no *opinio juris* amongst the international community as the action had been widely condemned, silence of the UN can by no means be taken as acceptance of US action.

References

[1] three exceptions to Article 2 (4) those being; Article 51 right to self-defence, action authorised by the Security Council and action authorised by regional bodies [1] with Security Council approval

[2] NATO is a regional body

[3] *The Caroline Case* 1837, 29 Brit & For St Papers 1137

[4] Al Qaeda is interpreted as either a paramilitary group and/or terrorist group

[5] see Dixon, M, 'Textbook on International Law', 4th edn, Blackstone p 293

[6] ratified after the failed attempt of the Kellogg-Briand Pact 1928 which condemned 'recourse to war'

[7] see Dixon, M, 'Textbook on International Law', 4th edn, Blackstone p 296

[8] see *Nicaragua v USA* 1986 ICJ Rep

[9] Article 51 UN Charter

[10] Chapter vii UN Charter

[11] (Chapter viii)

[12] see UN Security Council Document s/2001/946 <http://un.int/usa/s-2001-946.htm> Negroponte's letter to the UN Security Council

[13] see Charney, J 'The Use of Force Against Terrorism and International Law' [2001] 95 AJIL 835

[14] see Article 51 UN Charter

- [15] ie see see Reisman, 'Coercion and Self-Determination: Contruing Charter Article 2 (4)', 78 AJIL 642, 643 (1984)
- [16] Mandel, M, 'Say What You Want, But This War is Illegal' <http://geocities.com/notowars/views/illegal.html>
- [17] Mandel, M, 'Say What You Want, But This War is Illegal' <http://geocities.com/notowars/views/illegal.html>
- [18] see *Nicaragua v USA* 1986 ICJ Rep
- [19] see O' Sullivan, D, 'The bombing of Afghanistan' [2001] New Law Journal
- [20] see Kurta, A, 'Dubious legality of Afghan bombing' <http://dawn.com/2001/11/13/op.htm>
- [21] see Kacczorowska, A, 'Public International Law', (2002) p 404
- [22] see Kurta, A, 'Dubious legality of Afghan bombing' <http://dawn.com/2001/11/13/op.htm>
- [23] see *Nicaragua v USA* 1986 ICJ Rep
- [24] see footnote 24
- [25] see Bowett's view in Greig, WG, 'Self defence and the Security Council; what does Article 51 require?' [1991] Volume 40 International and Comparitive Law Quarterly p366
- [26] see UN Security Council Document s/2001/946 <http://un.int/usa/s-2001-946.htm> Negroponte's letter to the UN Security Council
- [27] see Grierson, G, 'War' Shorts', [2001] <http://peak.sfu.ca/the-peak/2001-3/issue10/ne-bs.html>
- [28] see Article 52
- [29] see Ravindran, P, 'US-led military initiative in Afghanistan – Ironing out the legal wrinkles' [2002] <http://blonnet.com/2002/01/28/stories/2002012800100900.htm>
- [30] see Grierson, G, 'War' Shorts', [2001] <http://peak.sfu.ca/the-peak/2001-3/issue10/ne-bs.html>
- [31] see Martyn A, *The Right of Self-Defence under International Law-the Response to the Terrorist Attacks of 11 September* <http://aph.gov.au/library/pubs/CIB/2001-02/02cib08.htm>
- [32] as set down by the classic formulation by the US in the 1837 *Caroline* incident.
- [33] see Arend, A C and Beck, RJ, 'International Law and the Use of Force', Routledge p 163
- [34] see footnote 34
- [35] see footnote 34
- [36] discussed later in essay
- [37] see Martyn A, *The Right of Self-Defence under International Law-the Response to the Terrorist Attacks of 11 September* <http://aph.gov.au/library/pubs/CIB/2001-02/02cib08.htm>
- [38] see O' Sullivan, D, 'The bombing of Afghanistan' [2001] New Law Journal and *Caroline Case* 1837
- [39] see Martyn A, *The Right of Self-Defence under International Law-the Response to the Terrorist Attacks of 11 September* <http://aph.gov.au/library/pubs/CIB/2001-02/02cib08.htm>

- [40] see O' Sullivan, D, '*The bombing of Afghanistan*' [2001] New Law Journal
- [41] October 7 2001
- [42] see UN Security Council Document s/2001/946 <http://un.int/usa/s-2001-946.htm> Negroponte's letter to the UN Security Council
- [43] see O' Sullivan, D, '*The bombing of Afghanistan*' [2001] New Law Journal
- [44] see Arend, A C and Beck, RJ, '*International Law and the Use of Force*', Routledge p 164
- [45] see footnote 44
- [46] see Arend, A C and Beck, RJ, '*International Law and the Use of Force*', Routledge p 165
- [47] see footnote 46
- [48] see Greg Intocchia in Arend, A C and Beck, RJ, '*International Law and the Use of Force*', Routledge p 165
- [49] see Arend, A C and Beck, RJ, '*International Law and the Use of Force*', Routledge p 165
- [50] see Guy Robert's view in Arend, A C and Beck, RJ, '*International Law and the Use of Force*', Routledge p 165
- [51] see Arend, A C and Beck, RJ, '*International Law and the Use of Force*', Routledge p 165
- [52] eg embassy bombings in Kenya and Tanzania, attack on USS Cole and September 11.
- [53] See Nanda, V, 'Agora: FORCES IN PANAMA; DEFENDERS, AGGRESSORS OR HUMAN RIGHTS ACTIVISTS?' '*The Validity of United States Intervention in Panama under International Law*' [1990] 84 AJIL p 497
- [54] see O' Sullivan, D, '*The bombing of Afghanistan*' [2001] New Law Journal
- [55] see Nanda, V, 'Agora: FORCES IN PANAMA; DEFENDERS, AGGRESSORS OR HUMAN RIGHTS ACTIVISTS?' '*The validity of United States Intervention in Panama under International Law*' [1990] 84 AJIL p 489
- [56] see Reisman, '*Coercion and Self-Determination: Construing Charter Article 2 (4)*', 78 AJIL 642, 643 (1984)
- [57] see footnote 57
- [58] see footnote 57
- [59] see Scachter, '*The Legality of a Pro-Democratic Invasion*', 78 AJIL 645 (1984)
- [60] see Nanda, V, 'Agora: FORCES IN PANAMA; DEFENDERS, AGGRESSORS OR HUMAN RIGHTS ACTIVISTS?' '*The validity of United States Intervention in Panama under International Law*' [1990] 84 AJIL p 499
- [61] see Myjer, EPJ and White, ND, '*The Twin Towers Attack: An unlimited Right To Self-Defence?*' [2002] C & S Law and also *Nicaragua v USA*
- [62] see Ratner, SR, '*Jus ad Bellum and Jus in Bell After September 11*' [2002] 96 AJIL p 12
- [63] note the USA does not recognise jurisdiction of the ICJ

[64] see The Times, September 24, 2001

see The Times, September 24, 2001

[66] see The Times, October 3, 2001.

[67] see Arend, A C and Beck, RJ, '*International Law and the Use of Force*', Routledge fn 296

[68] see footnote 67

[69] see footnote 67

[70] see Martyn A, *The Right of Self-Defence under International Law-the Response to the Terrorist Attacks of 11 September* <http://aph.gov.au/library/pubs/CIB/2001-02/02cib08.htm>

[71] see Martyn A, *The Right of Self-Defence under International Law-the Response to the Terrorist Attacks of 11 September* <http://aph.gov.au/library/pubs/CIB/2001-02/02cib08.htm>

[72] Palestinian Liberation Organisation

[73] even though the US and Israel may argue it to be so

[74] see Martyn A, *The Right of Self-Defence under International Law-the Response to the Terrorist Attacks of 11 September* <http://aph.gov.au/library/pubs/CIB/2001-02/02cib08.htm>

[75] Franck, T '*Whom killed Article 2 (4) ?*' [1970] 64 AJIL 809 p 835

[76] O' Sullivan, D, '*The bombing of Afghanistan*' [2001] New Law Journal