

## CHAPTER 20

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# THE SECURITY COUNCIL AND THE AFGHAN CONFLICT

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THE conflict in Afghanistan has persisted in various forms since 1979, making it one of the longest conflicts since 1945. Twice, foreign powers intervened militarily (the USSR from 1979 to 1989; and the US from 2001 to the present), while neighbouring countries – notably Pakistan, Uzbekistan, and Russia – have continuously supported different armed Afghan military movements. The Afghan conflict is a good case study by which to analyse the role of the UN Security Council, with the conflict spanning a pivotal period of evolution in the international system. At the beginning of the conflict in 1979, the Security Council was paralysed by the stand-off between the Soviet Union and the Western bloc. Following the breakdown of the Soviet Union, it was widely believed that the Security Council would start to function as envisaged in the Charter. The debate surrounding UN Secretary-General Boutros Boutros-Ghali's report *An Agenda for Peace*<sup>1</sup> reflects a concentrated attempt to create a stronger security system led by the Council. However, the attacks of September 11 challenged the central role of the Security Council,

<sup>1</sup> UN doc. A/47/277 S/24111 of 17 Jun. 1992. The report aimed at reinforcing the decision making processes for preventive diplomacy, peace making, and peacekeeping.

confronting the UN with a hegemonic superpower willing to bypass the Council, threatening to marginalize it.

The key question explored by this chapter by reference to the Afghan conflict is whether the Security Council is an institution capable of managing an international security regime. An international security regime is a group of implicit or explicit norms, rules, and procedures, around which the expectations of the various actors converge in decisions regarding international security.<sup>2</sup> Has the Council contributed, if only marginally, to the definition of behavioural norms for the various actors in the case of Afghanistan? Has the post-Cold War era been favourable to developments in the collective security framework? Has the Security Council been able to establish a system of collective security that serves more than the specific national interests of its Permanent Members?

The chapter will proceed in three sections. The first section will examine who has determined the Council's policy with regard to Afghanistan, and the specific interests that have shaped the Council's approach. As the chapter shows, the level of Security Council involvement in Afghanistan has been determined by the national interests of its Permanent Members, with phases of lack of interest alternating with strong mobilization around issues where little is at stake. The Security Council's approach has generally been limited and short-term, and has failed to manifest an overarching strategy. This has meant that the Council's approach has at times been in conflict with that of other UN agencies involved in Afghanistan, such as ad hoc groups or the Secretariat. These dynamics may change over time, but the Council has never appeared to be in a position to provide the impetus for a global policy representative of the interests of the 'international community'.

The second section will examine the two different forms of involvement by the Security Council in the Afghan conflict, namely, establishment of the sanctions regime from 1999–2001,<sup>3</sup> and development of the framework for the reconstruction of Afghanistan following the 2001 US intervention. This section will explore the purpose behind the sanctions taken against the Taliban regime, and the rationale of the Council's political decisions in rebuilding Afghanistan.

The final section will examine the role the Security Council played in upholding the *jus ad bellum* (the law governing the use of force) and the *jus in bello* (the law of armed conflict) in the course of the Afghan conflict. The American intervention of 2001 was an exceptional case in that the preceding attack had been committed by a non-state actor. In the wake of the terrorist attacks on the US on 11 September 2001, the Council recognized the right to self-defence against such attacks by non-state actors<sup>4</sup>. In the year following the attacks, the US consistently argued for a broadening of the concept

<sup>2</sup> This follows Stephen Krasner's definition of a regime, in Stephen D. Krasner, *International Regimes* (Ithaca: Cornell University Press, 1983), 2.

<sup>3</sup> A targeted sanctions regime against the Taliban and al Qaeda has continued after 2001. See Appendix 4.

<sup>4</sup> SC Res. 1368 of 12 Sep. 2001; SC Res. 1373 of 28 Sep. 2001.

of self-defence, to include the notion of pre-emptive self-defence, marking a possible shift in the legal regime governing the use of force. In addition, the conflict in Afghanistan and the linked US-led global 'war on terror' has raised a range of challenges to the law of armed conflict, such as torture of terrorist suspects and their indefinite detention in Guantanamo Bay, issues on which the Security Council has been largely silent.

## THE DEVELOPMENT OF SECURITY COUNCIL POLICY

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Two factors have shaped the nature of the Security Council's involvement in the Afghan conflict. First, the Council only got involved when its Permanent Members had a direct interest in developments in Afghanistan, and when there was consensus among them. In theory, the Security Council is a relatively broad authority consisting of fifteen states, while other members of the UN can chime in on debates though they lack voting rights. In practice, however, only the Permanent Members played a role in the resolutions regarding Afghanistan. Moreover, the decisions of the Council, at least in the case of Afghanistan, do not reflect a larger evolutionary process in institutional design on matters of law or a collective security. Rather they are the result of specific negotiations between the powers based on a traditional diplomatic model. There has been no long-term strategy for dealing with the Afghan conflict in the Council, and it was not involved at key moments in the evolution of the conflict. This is most likely attributable to the way in which resolutions were negotiated in the Council. Secondly, in certain cases, the Council's policy was either in direct opposition or ran parallel to that of the Secretariat or of ad hoc institutions involved in trying to resolve the conflict in Afghanistan, and was thus implemented without any regard to the impact of its policies on wider efforts to address the conflict.

### The interests of the Permanent Members

The Security Council's failure to address the Afghan conflict following the 1979 Soviet intervention did not indicate a lack of interest in the conflict among its member states. Rather, the involvement of several of the Permanent Members in the conflict made the crisis part of the broader confrontation between the USSR and the West. The Soviet intervention on 27 December 1979, and its consequences, highlighted the Cold War paralysis of the Council. First, by intervening in another state, a member of the

Council had violated one of the central principles, if not *the* central principle, on which the post-Second World War international security system was founded – that of sovereignty and non-intervention. The Soviet Union's attempts to legitimize the intervention by appealing to an invitation by the government of Afghanistan, in circumstances where Soviet commandoes had assassinated President Amin, convinced no one save the closest of Soviet allies. On the other side of the conflict, the Western countries armed, trained, and diplomatically supported the Mujahideen in their fight against Soviet occupation.<sup>5</sup> Secondly, the Council found itself marginalized because of its inability to condemn the intervention due to the USSR's exercise of the veto. Resolution 462 of 9 January 1980 noted the Council's inability to perform its principal responsibility – the maintenance of international peace and security – and transferred the issue to the General Assembly via the mechanism of the Uniting for Peace Resolution. The General Assembly's call for the immediate, unconditional, and total withdrawal of the foreign troops from Afghanistan was ignored by the USSR.<sup>6</sup>

The Soviet occupation of Afghanistan can be divided into two periods. Until 1985, the Soviets directed their efforts towards military victory and attempted to stabilize the country. After 1986, the USSR decided to withdraw its troops and sought to internationalize the crisis, and to establish a government of 'national reconciliation' that would include representatives of the Mujahideen, proposals that the US did not take seriously until the end of 1987. When the Geneva Accords were negotiated in 1988 under the auspices of the UN Secretary-General, the Security Council did not take part in the negotiations. Instead, the US and the USSR were the guarantors of the Accord's provisions.

To support the implementation of the Accords, the Secretary-General deployed the UN Good Offices Mission in Afghanistan and Pakistan (UNGOMAP).<sup>7</sup> The presence of UNGOMAP (from May 1988 to March 1990) could have strengthened the Soviet-supported regime in Kabul, as it aimed to limit further conflict and establish local ceasefires between the government and the US-supported Mujahideen. The effective implementation of the peace agreement, most notably the 'non-intervention' clauses, however, was difficult because of UNGOMAP's insufficient resources, compounded by a lack of political will among some members of the Security Council to implement the Accords fully. When the US withdrew its support for the Mujahideen after the failed siege of Jalalabad in 1989, the Mujahideen alliance quickly disintegrated and collapsed into civil war.

Between 1989 and 1991, the Security Council was, for a number of reasons, largely absent from the crisis in Afghanistan. The Council's Permanent Members did not feel

<sup>5</sup> According to Charles Cogan, the United States gave Afghan guerrillas two billion US dollars in aid. The Gulf States gave their side an equivalent amount. See Charles Cogan, 'Partners in Time: the CIA and Afghanistan since 1979', *World Policy Journal* 10, no. 2 (1993), 73–82. France and Britain also trained and financed certain groups, notably that of Ahmed Shah Masud.

<sup>6</sup> GA Res. ES 6/2 of 14 Jan. 1980.

<sup>7</sup> SC Res. 622 of 31 Oct. 1988; GA Res. 43/20 of 3 Nov. 1988.

that their interests were directly affected. While Russia feared an Islamist contagion in Central Asia, in particular in Uzbekistan and Tajikistan, it failed to rally the United States in support of its concerns. It was only gradually that the US became aware of the outright hostility against it from the various radical groups based in Afghanistan. Afghanistan sheltered networks and hosted training camps established in the 1980s, with collaboration between the Islamist movements and the Afghan parties actively encouraged by the United States.<sup>8</sup> The majority of the Afghan groups, including those that later formed the Northern Alliance, were in contact with Islamist movements based in Peshawar in Pakistan, which had provided financial assistance and volunteers for the Afghan jihad. Their time in Afghanistan was an important, if not decisive, experience for the thousands of militants involved in conflicts in Kashmir, the Caucasus, and Central Asia. These militants became more and more radicalized and the dozens of small groups present in Peshawar at the end of the 1980s became increasingly anti-Western.<sup>9</sup> The Gulf War instigated the final rupture with the United States, in particular because of the presence of American troops in Saudi Arabia.

The United States was initially favourable to the Taliban, partly due to economic considerations. Thus, when the Taliban captured Kabul in 1996, this was relatively well received by the then Under-Secretary of State Robin Raphael.<sup>10</sup> When neighbouring states became increasingly involved in Afghanistan, they were not explicitly named and condemned by the Security Council in the few resolutions relating to Afghanistan during this period. The resolutions merely emphasized the importance of non-interference in the internal affairs of Afghanistan.<sup>11</sup> Pakistan's extensive support of the Taliban in its attempt to capture Herat in 1995, for example, was not explicitly condemned. The consolidation of the Taliban's power could have opened the way to international recognition, thus depriving the opposition of its last chances.<sup>12</sup>

It was the presence of radical groups on Afghan soil that ultimately precipitated the rupture with the United States. After the fall of Kabul at the hands of the Taliban in 1996, foreign non-Pakistani radical groups, whose presence had been diminished by the previous fall of Kabul four years earlier, returned to Afghanistan.

<sup>8</sup> See John Cooley, *Unholy Wars* (London: Pluto Press, 2002).

<sup>9</sup> The organizers of a number of anti American attacks had spent time in Afghan camps, including the perpetrator of the 1993 World Trade Centre bombings, Ramzi Yusuf (a Kuwaiti of Pakistani descent) and Mir Aimal Kansi (a Pakistani citizen) accused of firing outside CIA headquarters in January 1993. Consequently, Pakistan was nearly added to the US State Department's list of terrorist countries in 1994. This would have resulted in the cancellation of international foreign aid, which was essential to Pakistan's economic survival. In response to these criticisms, Pakistan drove out the Jihadist militants, pushing them towards Afghanistan.

<sup>10</sup> Until 1998, oil companies, in particular UNOCAL, worked towards developing relations with the Taliban with the hope that they would be able to transport oil and gas from Turkmenistan through Afghanistan. The future US ambassador to Afghanistan, Zalmay Khalilzad, initially advocated dialogue with the Taliban. However, he later changed his opinion and advocated the destabilization of the Taliban. See Zalmay Khalilzad and Daniel Byman, 'Afghanistan: The Consolidation of a Rogue State', *Washington Quarterly* 23, no. 1 (Winter 2000).

<sup>11</sup> See for example SC Res. 1076 of 22 Oct. 1996.

<sup>12</sup> As it was, only Saudi Arabia, Pakistan, and the United Arab Emirates recognized the Taliban regime.

Militants from the Uzbek Islamic Movement (an estimated 2,000 men) and Arabs from different groups (an estimated 3,000 men) installed bases with the consent of the Taliban.<sup>13</sup> The coordination of the foreign combatants was done under the direction and instigation of Osama bin Laden, whose marriage to the daughter of Taliban leader Mullah Omar would only further strengthen his ties to the Taliban. The 'fatwa' issued on 23 February 1998 and signed by various persons in charge of al-Qaeda, sheds light on al-Qaeda's vision of the world and its larger political objectives, including bringing an end to the presence of American forces in Saudi Arabia, the sanctions regime against Iraq, and the occupation of Palestine. Additionally, however, the text calls for an indiscriminate attack against Americans (military or civilian) in the name of jihad.<sup>14</sup> On 7 August 1998, eight years after the arrival of American troops in Saudi Arabia, the American embassies in Nairobi (Kenya) and Dar Es Salaam (Tanzania) were the target of two simultaneous attacks, in which 247 people, including twelve Americans, died.

As a result of these attacks, the US approached the Security Council to apply sanctions against the Taliban. This marked the beginning of a new phase of direct Security Council involvement, starting with a rapprochement on the issue between the United States and Russia, the latter of which had been arming the Taliban's opponents for many years. The Council did not propose a general plan for resolving the Afghan civil war, but focused on the link between the Taliban and al-Qaeda. The only condition to lift the sanctions was the extradition of bin Laden under the provision specifying the 'closing of terrorist facilities', a provision also included to satisfy Russian concerns over Chechen and Uzbek groups located within Afghanistan.<sup>15</sup> The other dimensions of the conflict were clearly peripheral to the Council, exemplified by the fact that the Taliban's efforts at opium production did not elicit any repercussions, though it undermined their social base in the east of the country which was to prove advantageous to the United States in 2001. Thus, it was not the Afghan conflict per se which elicited greater involvement by the UN Security Council, but rather the conjectural alliance between two Permanent Members – Russia and the US – and the association increasingly made by the US between Afghanistan and terrorism.

## Did the Security Council advance a coherent policy?

In the case of Afghanistan, Cold War paralysis and lack of interest of the Council in the early 1990s led, in various forms dependent on the period, to the involvement of

<sup>13</sup> Anthony Davies, 'Foreign Fighters Step Up Activity in Afghan Civil War', *Jane's Intelligence Review* 13, no. 8, (Aug. 2001).

<sup>14</sup> For a translation and commentary on the text see Magnus Ranstorp, 'Interpreting the Broader Context and Meaning of Bin Laden's Fatwa', *Studies in Conflict & Terrorism* 21, no. 4, (1998), 321–30.

<sup>15</sup> SC Res. 1193 of 28 Aug. 1998.

other UN actors. In particular, the repeated criticisms by the General Assembly, starting with the emergency special session on 14 January 1980, weighed heavily on the policy of the USSR. Capitalizing on the paralysis of the Council, the Secretary-General positioned himself as the lead mediator in the long negotiations which led to the Geneva Accords.<sup>16</sup> The Security Council was not involved in the Geneva talks, largely due to a desire on the part of both the USSR and the US to underline their status as superpowers.

Following the Soviet withdrawal from Afghanistan, the lack of interest of the majority of the Permanent Members and the absence of any agreement opened the door to greater involvement by regional powers, and the handling of the Afghan crisis passed to actors other than the Security Council, notably the Secretariat and the 'Six-plus-Two' group.<sup>17</sup> The UN's involvement had been foreseen in the Geneva Accords, in particular with the formation of the UN Office for the Coordination of Humanitarian and Economic Assistance Programmes in Afghanistan (UNOCA), which was initially placed under the direction of Benon Sevan. The collapse of the Najibullah regime and the Mujahideen's takeover of Kabul in 1992 marked the lowest point in the United Nations' involvement, leading to the termination of all peace processes in relation to Afghanistan. In 1994, the UN Secretary-General restarted the diplomatic process by appointing Mahmoud Mestiri as his Special Representative to Afghanistan,<sup>18</sup> in charge of a new UN Special Mission to Afghanistan (UNSMA). This mission would later be directed by Lakhdar Brahimi, followed by Francesc Vendrell in 2000–1. However, it was not the Security Council but the General Assembly that authorized the establishment of UNSMA.<sup>19</sup> UNSMA's mandate was to resume negotiations between the Taliban and the Northern Alliance in an attempt to broker a ceasefire and, if possible, to support the creation of a broad-based government. UNSMA was thus, first and foremost, a diplomatic mission, and supposed to be neutral between the various parties to the conflict.

There was an inherent contradiction between the General Assembly's resolutions, which called for a halt to the delivery of weapons to both warring parties and

<sup>16</sup> Diego Cordovez and Selig Harrison, *Out of Afghanistan. The Inside Story of the Soviet Withdrawal* (Oxford: Oxford University Press, 1995); Barnett Rubin, *The Search for Peace in Afghanistan: From Buffer State to Failed State* (New Haven: Yale University Press, 1995), 39.

<sup>17</sup> Established in 1997, the 'Six plus Two' group is comprised of Afghanistan's neighbours (Pakistan, Iran, Turkmenistan, Uzbekistan, Tajikistan, China), as well as the United States and Russia. Its official objective is to build consensus on policy pertaining to the crisis in Afghanistan. For example, in Jul. 1999, the group published a declaration denouncing their support of the armed combatant groups in Afghanistan. In practice, however, this declaration was not followed and had little effect. Pakistan continued to arm the Taliban, and Russia continued to arm the Northern Alliance. Following a meeting in New York on 15 Sep. 2000, the group restated its principal objective: 'no military solution to the Afghan conflict', and encouraged the parties to the conflict to 'enter in negotiations aimed at bringing about a political solution'.

<sup>18</sup> Rubin, *The Search for Peace in Afghanistan*, 135.

<sup>19</sup> GA Res. 48/208 of 21 Dec. 1993.

the brokering of a political settlement, and the Council's position as it developed after 1999, which called for an embargo exclusively against the Taliban.<sup>20</sup> The Council's sanctions criminalized the Taliban (even though the Taliban's ties to the US were to continue informally until 2001) and excluded the Taliban from the proceeding negotiations. Following the closure of the Taliban offices in New York as demanded by the Security Council in Resolution 1333, diplomatic contact between the UN and the Taliban virtually ceased, thus putting a de facto end to the peace negotiations organized by Francesc Vendrell.

## SANCTIONS AND RECONSTRUCTION: THE COUNCIL'S POLITICAL FAILURE

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Since 1999, Security Council involvement in Afghanistan has taken two distinct forms. First, the Security Council established sanctions against the Taliban regime between 1999 and 2001. Secondly, the Security Council helped develop the framework for the reconstruction of Afghanistan following the American military intervention in 2001.

### Sanctions against the Taliban

The American strategy, as it unfolded before the September 11 attacks, did not aim to dismantle the Taliban regime but rather to place enough pressure on the Taliban to obtain bin Laden's expulsion. Following the attacks in Africa, the US had two main policy options with regard to the Taliban and Osama bin Laden. Its first option was to support the fight against the Taliban by supporting Ahmed Shah Masud and by putting pressure on Pakistan. However, the US had a history of poor relations with Masud and did not want to risk opposing Pakistan's interests. The second option was for the US to recognize the Taliban and to speed up the reconstruction of the Afghan state, strengthening the parts of the Taliban opposing the presence of radical movements. Such a long-term strategy, however, was hard to sell politically in the US, and it was thwarted by an anti-Taliban movement in the media, which in particular emphasized their treatment of women. Thus, the US chose a third option, to apply gradual pressure to the Taliban through sanctions, despite the fact that such sanctions were an ineffective tool against this type of regime.

<sup>20</sup> These conflicting aspects are evident in SC Res. 1333 of 19 Dec. 2000, which renewed the sanctions and, at the same time, affirmed its support for the 'Six plus Two' group and UNSMA.

The sanctions against the Taliban were adopted unanimously in the Council on 15 October 1999,<sup>21</sup> and extended on 19 December 2000.<sup>22</sup> The sanctions envisaged an arms embargo, the reduction of on-site diplomatic representation, and the termination of all Taliban representation abroad. Moreover, the financial assets of the Taliban leaders were frozen and the national air carrier Ariana was no longer authorized to travel beyond the borders of Afghanistan. These sanctions were not on the same scale as those against Iraq after the 1991 Gulf war, which had severe humanitarian consequences for Iraqi society. In turn, the sanctions only had a marginal effect on the economy, as Afghanistan's physical infrastructure was largely non-existent, and as it would have been difficult for political reasons to prevent UN agencies from providing humanitarian aid to a country on the brink of famine due to a persistent drought.<sup>23</sup>

The Taliban rejected the extradition of bin Laden to the US, and was supported in this by the Government of Pakistan prior to September 11.<sup>24</sup> Having rejected the options of either trying bin Laden in Afghanistan or extraditing him directly to the US, the Taliban proposed several intermediary solutions, including the extradition of bin Laden to a Muslim country after having first been judged by Afghans, Saudis, and an additional third country *ulema*. Ahmed Muttawakil, the Taliban's foreign minister, proposed putting bin Laden under tight security watch of the Organization of the Islamic Conferences (OIC). It seems that this last option also entailed a deal whereby bin Laden would be expelled in return for diplomatic recognition of the Taliban regime. Whether due to a lack of support by Mullah Omar or the refusal of the US, these propositions were rendered moot.

Any agreement most likely failed because of inadequate understanding of and uncertainty about the ideological and military constraints on the Taliban, and the Taliban's mistrust of the American government. Rather than the US being regarded as a party seeking to enter negotiations, a perception the American government would have been delighted with, the West was perceived as an existential threat. This reflected not only the growing influence of bin Laden on the Taliban regime

<sup>21</sup> SC Res. 1267 of 15 Oct. 1999.

<sup>22</sup> SC Res. 1333 of 19 Dec. 2000. There seems to be an escalation in the terminology used by the Council in the resolutions leading up to SC Res. 1333: 'expressing its grave concern at the continued Afghan conflict which has recently sharply escalated due to the Taliban forces' offensive in the northern part of the country' (SC Res. 1193 of 28 Aug. 1998); 'deeply disturbed by the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and the planning of terrorist acts' (SC Res. 1214 of 8 Dec. 1998); and '[s]trongly condemning the continuing use of the areas of Afghanistan under the control of the Afghan faction known as Taliban, which also calls itself the Islamic Emirate of Afghanistan (hereinafter known as the Taliban), for the sheltering and training of terrorists and planning of terrorist acts, and reaffirming its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security' (SC Res. 1333 of 19 Dec. 2000).

<sup>23</sup> See also the wider discussion of the impact of sanctions by David Cortright, George Lopez, and Linda Gerber Stellingwerf, in Chapter 8.

<sup>24</sup> See the interview with President Musharraf in the *Washington Times*, 21 Mar. 2001.

but also an ardent nationalist reaction following the US bombings of alleged terrorist training camps in Afghanistan on 20 August 1998, following the terrorist attacks on US embassies,<sup>25</sup> as well as the importance of transnational solidarity for the Taliban among a range of Islamic societies. The sanctions regime failed because the Taliban, isolated diplomatically, was radicalized without having its capacity for fighting diminished due to continued backing by Pakistan. Indeed, without pressure on Pakistan the sanctions had no real impact. Additionally, the Taliban benefited, particularly with respect to their large offensives, from the support of Pakistani fundamentalists. The Taliban regarded itself as untouchable – previously because they believed an American intervention was unlikely and now because they were convinced that they would be able to deal with the American invasion as the Afghans had dealt with the Soviet invasion in the 1980s.

The extension of sanctions in December 2000 was followed by further radicalization of the regime in 2001. In this light, the destruction of the monumental Buddhas of Bamiyan marked a definitive rupture with the international community. This decision was essentially political, as Mullah Omar had previously issued a decree in July 1999 calling for the protection of pieces of art, and specifically the Buddhas. A new decree issued on 26 February 2001 led to their destruction with dynamite in March, despite numerous attempts to dissuade the Taliban from this course of action.<sup>26</sup>

## The post-2001 reconstruction

The reconstruction of Afghanistan has presented a series of challenges that are entirely unique in the history of the UN's state-building efforts. Since the end of the Cold War, the Security Council has been involved on several occasions in setting up interim or transitional governments.<sup>27</sup> What differentiates this particular case is that the UN's state-building efforts occurred in parallel with ongoing US military operations against the Taliban and al-Qaeda in Afghanistan, and thus often appeared to be part of the US operation.

For example, while the Bonn Agreement was officially negotiated and signed under the auspices of the UN, and was endorsed by the Council in Resolution 1386,<sup>28</sup> the Afghan negotiators who were present in Bonn were selected by the US. Rather than creating a transitional authority marked by ethnic and political

<sup>25</sup> The US bombings may have contributed to general opposition by the Taliban to the mission of Prince Turki (the head of the Saudi secret service) to Kandahar in the late summer of 1998, after he had received a relatively encouraging reception at an earlier mission to Kandahar in Jun. 1998 to obtain the expulsion of bin Laden.

<sup>26</sup> See Pierre Centlivres, *Les Bouddhas d'Afghanistan* (Lausanne: Favre, 2001).

<sup>27</sup> See also Richard Caplan's discussion of UN international administrations in Chapter 25.

<sup>28</sup> SC Res. 1386 of 20 Dec. 2001.

diversity, and including all parties to the conflict in Afghanistan, the Bonn negotiations led to a government dominated by the Northern Alliance and those closest to the US. A few months later, the choice of Hamid Karzai for President and the marginalization of the ancient king, Zâher Shah, limited the scope of the *Loya Jirga* (Constituting Assembly) which was summoned in March 2002.

Further, the mandate of the UN Assistance Mission in Afghanistan (UNAMA) and its 'light footprint' objective reflected the American preference for a tightly circumscribed UN presence in Afghanistan.<sup>29</sup> US policy was shaped by two priorities. On the one hand, the US wanted to avoid UN oversight and any constraint limiting the use of its armed forces in Afghanistan. This was eventually accomplished by a bilateral agreement signed by Hamid Karzai in 2005.<sup>30</sup> On the other hand, the US wanted to keep its counter-terrorism efforts distinct from the UN-mandated reconstruction and peacekeeping efforts in Afghanistan. This resulted in the formation of a UN-authorized peacekeeping mission under the name of the International Security Assistance Force (ISAF), originally a small force designed to support the government in maintaining order and security in the capital. In 2002, the Bush government, responding to the repeated demands of President Karzai; the head of UNAMA, Lakhdar Brahimi;<sup>31</sup> and members of the American Congress, appeared to be willing to extend ISAF's mission to cover other parts of Afghanistan. However, this idea was abandoned largely because of opposition by US Secretary of Defense, Donald Rumsfeld.

Faced with a deteriorating security situation, by October 2003 the US accepted the extension of ISAF's mandate to cover areas outside Kabul,<sup>32</sup> and by the end of 2006, ISAF covered the whole of Afghanistan. This extension was arguably granted too late, given that the Taliban and the local war lords regained control over significant parts of Afghanistan's territory, making reconstruction and political development difficult in areas beyond the effective control of the Afghan government. The operations of ISAF, now under NATO command, have been increasingly challenged by the resurgence of the Taliban. To enhance reconstruction, since 2003, US and NATO forces have been involved, albeit somewhat marginally, in the reconstruction of Afghanistan through their Provincial Reconstruction Teams

<sup>29</sup> SC Res. 1401 of 28 Mar. 2002. There is no evidence of any discussion on the establishment of the ISAF in the resolutions or the related statements (See UN Doc. S/PV.4443 of 20 Dec. 2001).

<sup>30</sup> The agreement, which was signed at the time of his trip to Washington in May 2005, in practice, gives the United States total autonomy in organizing military operations on Afghan territory. See *Joint Declaration of the United States Afghanistan Partnership*, Washington, DC, 23 May 2005. By the end of 2006, the US and Afghanistan had not signed a Status of Forces Agreement (SOFA), regulating the rights and responsibilities of US troops in Afghanistan.

<sup>31</sup> See Lakhdar Brahimi's report on Afghanistan, advocating the extension of the ISAF with 5,000 additional soldiers, and American ambassador Negroponte's rebuttal (UN doc. S/PV.4579 of 19 Jul. 2002). This refusal to extend ISAF was a reaffirmation of the position of his predecessor in Mar. 2002 (S/PV.4497 of 26 Mar. 2002, 9).

<sup>32</sup> SC Res. 1510 of 13 Oct. 2003.

(PRTs). While these operations respond to the wishes of many Western countries for greater strategic integration of both military and civilian efforts, such initiatives have been criticized by a large number of international NGOs in Afghanistan, who fear that the PRTs blur the line between military tasks and civilian reconstruction. None of these decisions were taken by the Security Council, which merely endorsed and arguably 'rubber-stamped' them.

## AFGHANISTAN, THE WAR ON TERROR, AND HUMANITARIAN LAW

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In response to the attacks against the American embassies in Africa on 7 August 1998, US missiles targeted several camps in Afghanistan and a pharmaceutical plant in Sudan on 20 August 1998. The military effectiveness of these targeted attacks is doubtful: twenty radical militants (none belonging to the cadres of the movement) were killed in Afghanistan, while the destruction of a pharmaceutical plant was based on false intelligence that the plant was producing chemical weapons and was associated with al-Qaeda. The bombings were a political disaster, as they increased bin Laden's popularity and power, and hardened anti-American sentiments in the region. Both of these military operations were decided unilaterally by the US and were executed without any consultation with its allies or UN authorities. While it has never been suggested that the Taliban was responsible for the attacks, following the 1998 embassy bombings, the Security Council has regularly called upon states (and explicitly on the Taliban regime) to take measures to prevent acts of terrorism, and not to acquiesce in the presence of terrorist organizations on their territory, and to take measures for the prosecution and punishment of the perpetrators.<sup>33</sup>

Following the attacks on 11 September 2001, the Security Council was faced with an unprecedented situation, as the attacks were committed by non-state actors while at the same time the gravity of them made them classifiable as an act of war.<sup>34</sup> The resolution passed by the Council essentially gave the US free rein in indicating the 'inherent right of individual and collective self-defence in accordance to the Charter', as well as specifying the need to 'bring to justice those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts', and holding them accountable.<sup>35</sup> From the very beginning the US military operation

<sup>33</sup> See for example SC Res. 1189 of 13 Aug. 1998; SC Res. 1214 of 8 Dec. 1998; SC Res. 1267 of 15 Oct. 1999; and SC Res. 1333 of 19 Dec. 2000.

<sup>34</sup> Anna Müller, 'Legal Issues Arising from the Armed Conflict in Afghanistan', *Non State Actors and International Law* 4, no. 3 (2004), 239–76.

<sup>35</sup> SC Res. 1368 of 12 Sep. 2001.

was not conducted under a specific UN mandate, but rather was justified by Article 51 of the UN Charter affirming the right to use force in self-defence, a right that was explicitly recognized in Resolution 1368. In the course of the year following the attacks on September 11, there was an extensive debate, in particular in the US, about a possible widening of the concept of self-defence. Notions of 'pre-emptive' and 'anticipatory' self defence were widely discussed, and the US was essentially hoping for a change in the legal doctrine authorizing military action.<sup>36</sup>

One can question the US tendency to avoid multilateral frameworks in the context of the Afghan conflict. The US justified its invasion, not by claiming that the Taliban were the perpetrators behind the attacks, but by arguing that their harbouring of terrorists such as bin Laden gave the US the right to use force. Moreover, as statements by members of the American administration until the end of September indicate,<sup>37</sup> the US was willing to leave the Taliban in place had they accepted the previous Security Council resolutions (requiring the extradition of bin Laden and the closing of all camps). However, once the military was deployed, the official goal of the US was to destroy the Taliban regime.

The war in Afghanistan marks a new phase in practices condemned by international law: the poor treatment and, in some cases, torture of prisoners; the refusal to recognize the legal status of combatants even those from recognized Taliban units; the creation of a detainment camp for prisoners without trial at Guantanamo Bay; the transfer of detainees to countries that practise torture; and the execution of military operations with little regard for the well-being of civilians.

In spite of the fact that the Security Council had, in several resolutions, indicated a specific interest in respecting the rights of civilian populations and the laws of war,<sup>38</sup> the Council's silence regarding these repeated violations of the *jus in bello* in Afghanistan has been one of the most notable aspects of the conflict since 2001. Even though, in practice, previous calls by the Security Council for respect of international humanitarian law were not always heeded, at the very least they served as a reminder of the existence of the *jus in bello*. However, the direct involvement by Permanent Members of the Security Council in a counter-insurgency war has resulted in the Council being silent on specific violations of international humanitarian law in the ongoing conflict in Afghanistan. The massacre of numerous prisoners (up to 3,000, depending on the source) by General Rashid Dostum, an ally of the US who played an important role in capturing the north of the country, for example, was not subject to any thorough and complete

<sup>36</sup> The US doctrine, as presented in the National Security Strategy issued in Sep. 2002, practically erases all distinction between prevention and pre-emption (text is available at [www.whitehouse.gov/nsc5/html/](http://www.whitehouse.gov/nsc5/html/)). See also Mark A. Drumbl, 'Self Defense and the Use of Force: Breaking the Rules, Making the Rules, or Both?' *International Studies Perspectives* 4, vol. 4 (2003), 409–31.

<sup>37</sup> See statement made by Colin Powell in *The Statesman* (Pakistan), 20 Sep. 2001.

<sup>38</sup> See also Georg Nolte's discussion of the Council's role with respect to humanitarian law in Chapter 23.

investigation and the amnesty law passed in January 2007 by the Afghan government is closing the possibility of further inquiries in the matter.<sup>39</sup>

## CONCLUSION

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In reference to the three questions posed in the introduction, we can conclude that the Council has not been able to articulate a coherent policy with regard to Afghanistan. Throughout the conflict the Council has been instrumentalized by the interests of its Permanent Members, notably the USSR/Russia and the US. When it was involved, through sanctions and post-conflict reconstruction, the effect of its policies has been limited, and in the case of the reconstruction of Afghanistan, the failure of its policy is now widely recognized. This analysis has revealed that the Council has not provided a framework through which a legitimate regime could be born, but rather has been a forum in which Permanent Members furthered their own short-term interests.

Despite the fact that proper reform of the Security Council is, in reality, very unlikely, one cannot fail to highlight the Council's inability to adapt to the current international environment. In the absence of an international hierarchy, we will continue to require a forum where the rules and practices of international security can be properly defined. However, at present, as revealed in the case of Afghanistan, the Council was not even able to act as the spokesperson for the 'international community', the existence of which is yet to be demonstrated.

<sup>39</sup> Aunohita Mojumdar, 'Doubts Grow over Afghan War Crimes Amnesty', *Financial Times*, 12 Feb. 2007.