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*Major Scott E. Dunn*

**When Close Doesn't Count: An Analysis of Israel's *Jus Ad Bellum* and *Jus In Bello* in the 2006  
Israel-Lebanon War**  
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## Claims Report

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**Claims Training on JAG University**  
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# The Military Selective Service Act's Exemption of Women: It is Time to End It

Major Scott E. Dunn\*

*The Congress shall have the Power to . . . provide for the common Defence . . . . To raise and support Armies . . . [and t]o provide and maintain a Navy . . . .*<sup>1</sup>

*If a deeply-rooted military tradition of male-only draft registration is to be ended, it should be accomplished by that branch of government which has the constitutional power to do so and which best represents the "consent of the governed"—the Congress of the United States, the elected representatives of the people.*<sup>2</sup>

## I. Introduction

The Military Selective Service Act (MSSA)<sup>3</sup> requires male citizens and legal residents between the ages of eighteen and twenty-six to register for possible conscription in the event of a draft.<sup>4</sup> Women are exempt from this requirement.<sup>5</sup> The MSSA exempts women primarily because the draft has been viewed as a mechanism for rapidly inducting troops into combat positions from which women have traditionally been excluded.<sup>6</sup>

Although the exclusion of women from ground combat roles continues, a large majority of military occupational specialties (MOSs) and duty positions are open to women in today's all-volunteer force.<sup>7</sup> Possible shortages of military recruits are not likely to be limited to combat MOSs and duty positions from which women are excluded. On the contrary, a majority of male conscripts, though eligible for duty in ground combat, would presumably fill positions that could also be filled by women. This is so simply because most military positions are in the support branches, rather than in combat arms.<sup>8</sup>

The time has come for Congress to reconsider its narrow view of the draft as a means only of augmenting combat troop strength. Congress should broaden the intended purpose of the MSSA to include augmenting troop strength in combat support and combat service support roles in which women are eligible to serve. There is little reason to eschew half of the pool of potential recruits, nor to exempt that half of the population from its civic obligations. This proposed change does not

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<sup>1</sup> U.S. CONST. art. I, § 8.

<sup>2</sup> *Schwartz v. Brodsky*, 265 F. Supp. 2d 130, 135 (D. Mass. 2003). In this case, the U.S. District Court for the District of Massachusetts upheld the male-only registration requirement in the Military Selective Service Act (MSSA). *Id.* This case is discussed in Part V of this article.

<sup>3</sup> Military Selective Service Act, 50 U.S.C. App. §§ 451–473 (2000).

<sup>4</sup> *Id.* § 453.

[I]t shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who . . . is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

*Id.*

<sup>5</sup> *See id.*

<sup>6</sup> *Rostker v. Goldberg*, 453 U.S. 57, 76 (1981). *Rostker* is the seminal U.S. Supreme Court case addressing the constitutionality of the male-only registration requirement in the MSSA. *Id.* The plaintiffs challenged the exemption of women from registration obligations on several grounds, among them that the exemption violated equal protection because it discriminated against men. *Id.* at 62 n.2. The Court upheld the statute's exemption of women because women were excluded from combat positions at the time and Congress viewed the draft primarily as a means of obtaining combat replacements. *Id.* at 79.

<sup>7</sup> MARGARET C. HARRELL ET AL., RAND NATIONAL DEFENSE RESEARCH INSTITUTE, ASSESSING THE ASSIGNMENT POLICY FOR ARMY WOMEN 5–6 (2007) (stating that 92.3 % of Army MOSs and 70.6 % of Army positions overall are open to women).

<sup>8</sup> *See, e.g.*, JOHN J. MCGRATH, THE OTHER END OF THE SPEAR: THE TOOTH-TO-TAIL RATIO IN MODERN MILITARY OPERATIONS (THE LONG WAR SERIES, OCCASIONAL PAPER 23) (2007) (stating that the "tooth to tail" ratio of Army troops assigned to combat units compared to those assigned to units with support missions is 1 to 2.5 in Iraq). That ratio Army-wide would presumably be even greater, given the array of units and training missions that are not present in a theater of combat operations.

rely on any change in current policy regarding the assignment of women to combat positions,<sup>9</sup> but any broadening of the assignment opportunities available to women would only underline the desirability and equity of subjecting women to MSSA registration requirements.

Part II of this article briefly summarizes the use of conscription in American history. Part III explains the provisions of the MSSA and the policy considerations underlying the statutory exemption of women from its requirements. Part IV discusses the advantages and disadvantages of using draftees versus an all-volunteer force. Part V details legal and political challenges to the MSSA's exemption of women. Part VI discusses current Department of Defense (DoD) and service assignment policies for women, to include its implementation in the Global War on Terrorism (GWOT). Part VII argues that the utility of conscription for filling non-combat positions dictates that Congress should amend the MSSA to subject women to its registration requirements.

## II. Conscription in American History

### A. Overview

#### 1. Colonial Era to Civil War

The United States has a long tradition of relying on volunteers to defend it in times of conflict, beginning with colonial militias and continuing to today's all-volunteer force.<sup>10</sup> However, conscription has been used to some degree since the colonial era, when membership in the militia was at times compulsory.<sup>11</sup> Since then, conscription has been used throughout America's history to provide for collective defense in times of need.<sup>12</sup>

During the American Revolution, the Continental Congress established quotas for each state's expected troop contribution.<sup>13</sup> Both Congress and the states preferred volunteers. The states devised various incentives to obtain them, chiefly involving payment of bounties that were roughly equivalent to modern recruiting bonuses.<sup>14</sup> The payment of bounties resulted in a degree of corruption, as Soldiers were known to enlist several times, each time with a different unit, to collect multiple payments.<sup>15</sup>

Despite the reference for volunteers, the states were often forced to resort to conscription to meet their quotas.<sup>16</sup> Draftees were allowed to provide substitutes to perform their service, a practice that allowed for volunteers to be paid by private individuals rather than by state or local government.<sup>17</sup> Without a mandated federal draft, Congress passed a resolution in 1778 recommending conscription by the states to meet their troop requirements, if necessary.<sup>18</sup> In a letter to a Congressional committee concerned with military affairs, George Washington wrote:

Voluntary inlistments [sic] seem to be totally out of the question; all the allurements of the most exorbitant bounties and every other inducement, that could be thought of, have been tried in vain, . . . some

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<sup>9</sup> Policies excluding women from combat positions have come under increasing scrutiny due to the growing role of women in recent conflicts. See, e.g., Anna Quindlen, *Not Semi-Soldiers*, NEWSWEEK, Nov. 3, 2007, available at <http://www.newsweek.com/id/67917>; Kathryn Jean Lopez, *An Army of Janes: Democrats and Women at War*, NAT'L REV. ONLINE, Oct. 11, 2007, available at <http://article.nationalreview.com>.

<sup>10</sup> See HEIDI GOLDING & ADEBAYO ADEDEJI, CONGRESSIONAL BUDGET OFFICE, THE ALL-VOLUNTEER MILITARY: ISSUES AND PERFORMANCE 2 (2007) [hereinafter CBO REPORT].

<sup>11</sup> See BERNARD ROSTKER, I WANT YOU! THE EVOLUTION OF THE ALL-VOLUNTEER FORCE 19 (2006). Rostker previously served as the Director of Selective Service and is named in the seminal Supreme Court case *Rostker v. Goldberg* regarding the constitutionality of the all-male Selective Service system. See 453 U.S. 57 (1981).

<sup>12</sup> RICHARD V. L. COOPER, MILITARY MANPOWER AND THE ALL-VOLUNTEER FORCE 47-56 (1977).

<sup>13</sup> ROSTKER, *supra* note 11, at 19.

<sup>14</sup> *Id.* at 20.

<sup>15</sup> *Id.* at 19.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 20.

other mode must be concerted, and no other presents itself, that of filling Regiments by drafts from the Militia. This is a disagreeable alternative, but it is an unavoidable one.<sup>19</sup>

Following the Revolution, compulsory membership in state militias continued for a short period.<sup>20</sup> President Madison proposed national conscription during the War of 1812, but his proposal was defeated in Congress.<sup>21</sup> Daniel Webster was a prominent foe of national conscription at the time, arguing in response to the proposed conscription bill:

The Constitution is libelled, foully libelled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their own treasure & blood a Magna Carta to be slaves. Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents, & parents from their children, & compel them to fight the battles of any war, in which the folly or wickedness of Government may engage it? . . . I almost disdain to go to quotations & references to prove that such an abominable doctrine has no foundation in the Constitution of the country.<sup>22</sup>

By the time of the Mexican War from 1846–1848, mandatory militia service had been replaced by “voluntary membership in local military companies, which Congress allowed to be organized under the militia clause of the Constitution.”<sup>23</sup> During the period between the Revolutionary War and the Civil War, the needs of a small standing army were met with volunteers.<sup>24</sup> Indeed, the practice of involuntary service had eroded to such an extent by the 1830s that Alexis de Tocqueville observed: “In America conscription is unknown and men are induced to enlist by bounties. The notions and habits of the people of the United States are so opposed to compulsory recruiting that I do not think it can ever be sanctioned by the laws.”<sup>25</sup> De Tocqueville’s assessment may have appeared accurate for several decades, but it was sharply contradicted in the 1860s.

The first large scale use of the draft occurred in what could be viewed as the first American war of the modern industrial age—the Civil War.<sup>26</sup> Both sides in the conflict were required to raise armies of a size unimaginable to earlier generations. Whereas American armies participating in earlier conflicts numbered in the thousands,<sup>27</sup> the total number of Union and Confederate troops fielded in the Civil War numbered in the millions.<sup>28</sup> While the large majority of troops raised by the North and South consisted of volunteers,<sup>29</sup> conscription was needed to supplement the forces of both sides.

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<sup>19</sup> *Id.* at 19–20 (quoting George Washington, Letter to the Committee of Congress with the Army: Headquarters (Jan. 29, 1778), in *THE WRITING OF GEORGE WASHINGTON FOR THE ORIGINAL MANUSCRIPT SOURCES* 366 (John C. Fitzpatrick ed., 1931–1944)).

<sup>20</sup> *Id.* at 21.

<sup>21</sup> 1 *A HISTORICAL REVIEW OF THE PRINCIPLE OF CITIZEN COMPULSION IN THE RAISING OF ARMIES, BACKGROUNDS OF SELECTIVE SERVICE*, SPECIAL MONOGRAPH NO. 1, at 60–61 (1949).

<sup>22</sup> 3 *THE SELECTIVE SERVICE ACT: ITS LEGISLATIVE HISTORY, AMENDMENTS, APPROPRIATIONS, COGNATES, AND PRIOR INSTRUMENTS OF SECURITY*, SPECIAL MONOGRAPH NO. 2, Apps. A–B, at 159–60 (1954) (quoting Webster’s speech on the conscription bill made in the House of Representatives on 9 December 1814).

<sup>23</sup> ROSTKER, *supra* note 11, at 21; *see also id.* n.13 (quoting Frederick Morse Cutler, *The History of Military Conscription with Special Reference to the United States* 49 (1922) (unpublished dissertation, Clark University) (describing the rise of voluntary militia service between 1815 and 1846)).

<sup>24</sup> *See id.* at 21 n.14.

The Army was disbanded after the Revolution . . . with the exception of one company of soldiers retained to protect the military stores of the nation at West Point and Fort Pitt. By 1798, the Army totaled 2,100. At the start of the War of 1812, about 80,000 volunteers and militia augmented the regular Army of 6,744. At the start of the Mexican War, the regular Army numbered 8,349; at the start of the Civil War, it was 16,367.

*Id.* (internal citations omitted).

<sup>25</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* ch. 13 (1835), available at <http://xroads.virginia.edu/~HYPER/hypertext.html#t>.

<sup>26</sup> *See* COOPER, *supra* note 12, at 49 (noting that the North issued 250,000 draft notices, although only 46,000 draftees were actually inducted); BRUCE CATTON, *BRUCE CATTON’S CIVIL WAR* 363–66 (1984) [hereinafter *CATTON’S CIVIL WAR*] (describing the prodigious expansion of Northern industry during the war); BRUCE CATTON, *AMERICA GOES TO WAR: AN INTRODUCTION TO THE CIVIL WAR AND ITS MEANING TO AMERICANS TODAY* 14 (MJB Books 1986) (1958) (stating that “[t]he Civil War was the first of the world’s really modern wars”).

<sup>27</sup> *See* ROSTKER, *supra* note 11, at 19–21 (2006); *see also, e.g.*, BENSON BOBRICK, *ANGEL IN THE WHIRLWIND: THE TRIUMPH OF THE AMERICAN REVOLUTION* 455 (Penguin Books 1998) (1997) (stating that the American army that besieged Yorktown consisted of only 9000 soldiers, of which 3500 were militia).

<sup>28</sup> *See* CBO REPORT, *supra* note 10, at 3.

<sup>29</sup> *Id.*

The Confederacy resorted to national conscription before the Union, passing a draft law on 16 April 1862.<sup>30</sup> Bernard Rostker noted that this was “ironic”:

[I]n 1814, those [states] who now made up the Confederacy had argued that it was the right of the states to raise the militia and had blocked President Madison’s proposal for a national—federal—draft. Now, in 1862, it was the “Confederate Congress [that] threw the theory of states’ rights to the winds and enacted the first ‘Conscription Law’.”<sup>31</sup>

The Confederate draft law was far reaching, requiring every able-bodied white male between the ages of eighteen and thirty-five to serve in the Army for three years, as well as extending the enlistments of those who had previously volunteered.<sup>32</sup> Twenty-one percent of the Confederate Soldiers during the war were draftees.<sup>33</sup>

In contrast, the Union waited until almost a year after the Confederates began their draft to enact its first conscription law, entitled the Enrollment Act, on 3 March 1863.<sup>34</sup> The Union draft did not cast as wide a net as its Southern counterpart, but it still resulted in a substantial augmentation of Northern forces. The Union Army inducted roughly 50,000 draftees and another 120,000 substitutes for draftees.<sup>35</sup> This meant that the draft accounted, directly and indirectly, for approximately 170,000 of the two to three million Union troops estimated to have served during the course of the war.<sup>36</sup> Approximately 87,000 federal draftees paid a commutation fee to avoid military service.<sup>37</sup>

Payment of bounties was a common element of both Revolutionary and Civil War recruitment strategies due to the reluctance of states to resort to the coercion of a draft.<sup>38</sup> Also similar to the Revolutionary War, payment of bounties led to the practice of “bounty jumping,” whereby Soldiers seeking to cash in on those incentives would enlist repeatedly in order to collect the bounties.<sup>39</sup> Despite this unscrupulous practice, conscription was a spur to voluntary recruitment because of its effect on the financial incentives that were offered by the states.<sup>40</sup>

Following the conclusion of the Civil War, the United States did not resort to the draft for the remainder of the nineteenth century.<sup>41</sup> The Indian Wars and the Spanish-American War were fought by volunteers.<sup>42</sup>

## 2. The Twentieth Century

The United States employed conscription both in times of war and peace during the twentieth century. Draftees served in large numbers in World War I, World War II, the Korean War, and Vietnam.<sup>43</sup> They served in peacetime during periods

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<sup>30</sup> ROSTKER, *supra* note 11, at 22.

<sup>31</sup> *Id.* n.15 (2006) (quoting in part Frederick Morse Cutler, *The History of Military Conscription with Special Reference to the United States* 172 (1922) (unpublished dissertation, Clark University)).

<sup>32</sup> *Id.* at 22.

<sup>33</sup> *Id.* (attributing this information to John Whiteclay Chambers, II, *Conscription*, in *THE READER’S COMPANION TO AMERICAN HISTORY* (Eric Foner & John A. Garraty eds., 1991)).

<sup>34</sup> *Id.*

<sup>35</sup> CBO REPORT, *supra* note 10, at 3–4.

<sup>36</sup> ROSTKER, *supra* note 11, at 22.

<sup>37</sup> *Id.* at 23.

<sup>38</sup> *See id.*

<sup>39</sup> *Id.* Rostker notes that one soldier reputedly enlisted thirty-two times. *Id.* (attributed to Cutler, *supra* note 23, at 64).

<sup>40</sup> *See id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> CBO REPORT, *supra* note 10, at 3.

preceding World War II, between World War II and the Korean War, and between the Korean War and the Vietnam War.<sup>44</sup> Conscription ended in 1973 and has since not been resumed.<sup>45</sup>

During World War I, 2.8 million draftees constituted roughly 70% of the U.S. military, partly because voluntary enlistments were halted “so as not to disrupt the ‘orderly’ flow of individuals through the draft system.”<sup>46</sup> The statute that governed the draft during World War I—the Selective Service Act of 1917—differed substantially from preceding law in that it did not allow for personal substitution, though it did allow deferments for essential work.<sup>47</sup> “The term Selective Service was used to capture the idea that, while all men of a specific age group—eventually 18 to 45—might be required to register, only some would be selected for military service, an amount that was in line with the total needs of the nation.”<sup>48</sup> After the conclusion of the war in 1918, the draft was ended and the Army was downsized from almost 4 million Soldiers to a force of 200,000 volunteers by 1920.<sup>49</sup>

Authority for the draft was reinstated in 1940, as the likelihood of United States involvement in World War II increased.<sup>50</sup> This draft was similar to that of World War I, in that the registration requirement was generally applicable to men of military age—initially those between the ages of twenty-one and thirty-six, later reduced to the ages of twenty-one to twenty-eight.<sup>51</sup> Deferments were authorized for individuals in specified occupations<sup>52</sup> and for students, but only for the duration of an academic year.<sup>53</sup> Fathers and married men were not specifically exempted or deferred, but the President was authorized to defer potential draftees based on their need to support dependents.<sup>54</sup>

Draftees accounted for a similar proportion of American troops during World War II as they did during World War I.<sup>55</sup> Draftees numbering 10.1 million accounted for almost two-thirds of the American armed forces in World War II. Also similar to World War I, voluntary enlistments were curtailed. In his 1977 analysis of the All-Volunteer Force (AVF), Richard Cooper provided an overview of the history of American conscription, stating:

By 1943, in order to better control and organize crucial production needs, no volunteers were being accepted. The induction process was totally responsible for military manpower procurement as it had been during World War I, and for the rest of the war a variety of regulations and deferments were enacted to meet specific industrial and military needs.<sup>56</sup>

A relatively small number of draftees served during the interim period between the end of World War II and the beginning of the Korean War. Involuntary inductions were suspended in 1949 and legal authority for the draft was set to expire on 25 June 1950.<sup>57</sup> North Korean forces invaded South Korea on 24 June 1950, however, which led to an extension of the authority for conscription.<sup>58</sup> Compared to World Wars I and II, the number of draftees declined in the Korean War in

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<sup>44</sup> *Id.* at 2–3.

<sup>45</sup> *See id.* at 6.

<sup>46</sup> COOPER, *supra* note 12, at 51.

<sup>47</sup> *Id.*

<sup>48</sup> ROSTKER, *supra* note 11, at 24. Rostker notes that 23.9 million men were registered and classified during World War I, but only 2.8 million were drafted. *Id.*

<sup>49</sup> *Id.* at 25 n.23 (attributed to JOHN WHITECLAY CHAMBERS, II, TO RAISE AN ARMY: THE DRAFT COMES TO MODERN AMERICA 252 (1987)).

<sup>50</sup> COOPER, *supra* note 12, at 52. Cooper states that supporters of a pre-war draft felt that “conscription through selective service was the only way to prepare for our inevitable entry into war.” *Id.*

<sup>51</sup> ROSTKER, *supra* note 11, at 26.

<sup>52</sup> *Id.* For example, deferments were authorized for “government officials and for those ‘employed in industry, agriculture or other occupations or employments’ who were ‘necessary to the maintenance of public health, interest, and safety.’” *Id.* (quoting in part LEWIS B. HERSHEY, SELECTIVE SERVICE IN PEACETIME: A REPORT TO THE PRESIDENT 35 (1942)).

<sup>53</sup> ROSTKER, *supra* note 11, at 26.

<sup>54</sup> *Id.* (quoting in part HERSHEY, *supra* note 52). Regarding married men and fathers, Rostker states that “[w]hile not specifically mentioning these two classes, the law allowed the President to defer ‘those men in a status with respect to persons dependent on them for support which renders their deferment advisable.’” *Id.*

<sup>55</sup> COOPER, *supra* note 12, at 52 tbl.4-1. Draftees comprised 59% of the military in 1918 and 61% of the military in 1945. *Id.*

<sup>56</sup> *Id.* at 54.

<sup>57</sup> ROSTKER, *supra* note 11, at 27.

<sup>58</sup> *Id.*

both absolute and relative terms. Roughly 1.5 million troops were drafted during the Korean War,<sup>59</sup> satisfying about 50% of the military's accession requirements between June 1950 and July 1953.<sup>60</sup>

The U.S. maintained a peacetime draft between the end of the Korean War in 1953 and the beginning of large scale deployments of troops to Vietnam in the 1960s. The number drafted, compared to the number of those eligible, was relatively low.<sup>61</sup> National security commentator Aaron Friedberg commented:

Limited conscription—from Korea to Vietnam—aroused little opposition so long as the number of those drafted remained relatively small, the use to which they were put retained broad public approval, those who preferred to avoid service could do so with relative ease, and the inevitable inquiry of the selection process did not receive undue attention. If one of these parameters changed, support for the draft would weaken; if all of them changed at once, it would disappear altogether.<sup>62</sup>

As will be discussed in the following section, three of these four parameters changed significantly during the Vietnam War: the number of those drafted did not remain relatively small, the use to which they were put did not retain broad public approval, and the selection process received close, if not undue, attention. The parameter that arguably did not change, the ease of avoiding service, came to represent the unfairness of the draft system and thereby undermined its support.

As during the Korean War, the absolute and relative numbers of those drafted were less than those in World Wars I and II. Approximately 1.9 million were drafted during the Vietnam era between August 1964 and March 1973, but draftees accounted for slightly less than half of the enlisted recruits even during the draft's peak from 1966 to 1969.<sup>63</sup> The draft ended in 1973,<sup>64</sup> generally correlating to the withdrawal of significant combat forces from Vietnam.<sup>65</sup>

## B. Draft Opposition and Inequities

Any use of conscription is bound to arouse some opposition, whether from the general public or only from those subject to being drafted. The degree of opposition and perceived unfairness to conscription, however, has varied greatly in American history. The most significant protests to American conscription occurred during the Civil War and the Vietnam War.

### 1. Civil War

The draft inspired fierce opposition in the North during the Civil War due to the unpopularity of the war in some quarters and because of perceived inequities in the conscription system.<sup>66</sup> In the summer of 1863, the opposition peaked during draft riots in New York City which required federal troops to quell them.<sup>67</sup> The primary complaint about the conscription law was that it favored the wealthy by allowing draftees to avoid service either by finding a substitute or by paying a commutation fee of \$300.<sup>68</sup> Thus, the rich could easily avoid service while the working class and poor had no such opportunity. The unfairness of this situation was recognized by national leaders, leading to the abolition of commutation fees and substitutes in

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<sup>59</sup> CBO REPORT, *supra* note 10, at 3.

<sup>60</sup> *Id.*

<sup>61</sup> ROSTKER, *supra* note 11, at 27–28. Rostker notes that “[i]n 1961, draft calls dropped to 113,000. In 1962, only 76,000 were called, and in 1963, only 119,000 were drafted. In comparison, by January 1962, more than 430,000 draft-eligible men had educational or occupational deferments.” *Id.* at 28.

<sup>62</sup> *Id.* at 27 (quoting AARON FRIEDBERG, IN THE SHADOW OF THE GARRISON STATE: AMERICA'S ANTI-STATISM AND ITS COLD WAR STRATEGY 179 (2000)).

<sup>63</sup> CBO REPORT, *supra* note 10, at 3.

<sup>64</sup> *Id.* at 6.

<sup>65</sup> PHILLIP B. DAVIDSON, VIETNAM AT WAR: THE HISTORY: 1946–1975, at 656 (1988). Davidson notes that one of the provisions of the January 1973 Paris Agreement required the withdrawal of U.S. forces from South Vietnam. *Id.*

<sup>66</sup> See JENNIFER L. WEBER, COPPERHEADS: THE RISE AND FALL OF LINCOLN'S OPPONENTS IN THE NORTH 107–11 (2006) (discussing the opposition to conscription in the North during the Civil War and the active defiance it sometimes led to, particularly on the part of the working class and certain immigrant groups).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 88.

future drafts.<sup>69</sup> There was also significant opposition to the draft in the South, where critics believed that national conscription conflicted with the doctrine of states' rights ostensibly being defended by the Confederacy, but no protests on the scale of the New York City riots occurred.<sup>70</sup>

## 2. Vietnam

The drafts that were instituted for World War I, World War II, and the Korean War were not free of criticism, but they allowed fewer reasons for draft exemptions and did not spark the same sort of protest as that of the Civil War.<sup>71</sup> The Vietnam era draft, however, became notoriously unpopular and served as a prime motivator for protest of the war itself.<sup>72</sup> Though various grounds for exemption or deferment existed, the most apparently unfair was that which allowed for draft deferments for college and graduate students.<sup>73</sup> Because higher education was less available to minorities and the poor, this deferment appeared to favor the predominantly white middle and upper classes, leading to perceptions of favoritism based on both class and race.<sup>74</sup>

In response to such criticisms and the rise in protest against the draft and the war, the draft law was amended in 1969 to permit a draft lottery,<sup>75</sup> which assigned a prioritized number for potential draftees based upon their birth date.<sup>76</sup> Those whose birthdays were drawn first were assigned the lowest numbers, and were the most likely to be drafted. This was viewed as a political move on the part of President Nixon and Congress, because it neutralized the draft as a motivating factor for protest by the majority of military age men who were not among the early numbers drawn.<sup>77</sup> Further amendments eliminated most student deferments.<sup>78</sup>

## C. End of the Draftee Military

Pursuant to campaign promises to abolish the draft, President Nixon chartered the President's Commission on an AVF, otherwise known as the Gates Commission after its chairman, former Secretary of Defense Thomas Gates.<sup>79</sup> In 1970, the Gates Commission recommended that the United States utilize an AVF, but that it retain a conscription system that could be implemented to obtain additional military personnel if needed.<sup>80</sup> The Commission's report stated:

[Conscription] has been a costly, inequitable, and divisive procedure for recruiting men for the armed forces. It has imposed heavy burdens on a small minority of young men while easing slightly the tax burden on the rest of us. . . . These costs of conscription would have to borne if they were a necessary price

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<sup>69</sup> CBO REPORT, *supra* note 10, at 4.

<sup>70</sup> ROSTKER, *supra* note 11, at 22 (“The draft was extremely unpopular in the South” but it “fared far better than in the North”); CATTON’S CIVIL WAR, *supra* note 26, at 304. The Governor of Georgia, Joseph E. Brown, stated to Jefferson Davis that “your doctrine [regarding conscription] carried out not only makes Congress supreme over the states at any time when it chooses to exercise the full measure of its power to raise armies, but it places the very existence of state governments subject to the will of Congress.” *Id.*

<sup>71</sup> See ROSTKER, *supra* note 11, at 24–27.

<sup>72</sup> See generally MYRA MACPHERSON, LONG TIME PASSING: VIETNAM & THE HAUNTED GENERATION 99–112 (1984). MacPherson conducted numerous interviews with men who admitted that their opposition to the Vietnam War was based largely on their own desire to avoid serving in it. *Id.*; see also NORMAN PODHORETZ, WHY WE WERE IN VIETNAM 79 (Touchstone 1983) (1982). Podhoretz does not explore this subject, but notes President Johnson’s reluctance to expand conscription because of the political resistance he expected as a result. PODHORETZ, *supra*.

<sup>73</sup> CBO REPORT, *supra* note 10, at 5.

<sup>74</sup> *Id.*

<sup>75</sup> Selective Service Amendment Act of 1969, Pub. L. No. 91-124, 83 Stat. 220.

<sup>76</sup> President Nixon implemented a draft lottery by presidential proclamation. Proclamation No. 3945, 34 Fed. Reg. 19,017 (Nov. 26, 1969).

<sup>77</sup> See MACPHERSON, *supra* note 72. MacPherson estimated that of the lottery numbers, “the first third drawn were virtually certain to be called, those in the middle had a fifty-fifty chance, and those in the last third . . . were home free.” *Id.* at 148. She noted further that members of the antiwar movement were concerned about a loss of activism among those with high lottery numbers. *Id.* at 149. In the words of one lottery participant, “[p]eople who are free [of the risk of being drafted] seem self-satisfied.” *Id.*

<sup>78</sup> Pub. L. No. 92-129, tit. I, § 101(a)(1), 85 Stat. 348 (1971).

<sup>79</sup> THOMAS GATES ET AL., PRESIDENT’S COMMISSION ON AN ALL-VOLUNTEER FORCE (1970).

<sup>80</sup> *Id.* at iii.

for defending our peace and security. They are intolerable when there is an alternative consistent with our basic national values.<sup>81</sup>

Congressional authorization of the draft expired in 1973<sup>82</sup> and the Selective Service registration requirement was suspended by President Ford in 1975.<sup>83</sup> In 1980, President Carter exercised his authority under the MSSA to reinstate the Selective Service registration requirement.<sup>84</sup> When he did so, he also requested that Congress amend the MSSA to allow for registration and conscription of women.<sup>85</sup> Congress ultimately elected not to amend the MSSA in that manner, for reasons that will be addressed in Part III.

### III. The Military Selective Service Act

#### A. The MSSA Prior to 1979

The MSSA was initially passed in 1948 in response to the growing threat of communism following World War II.<sup>86</sup> At the time, the idea of a peacetime draft met with some opposition,<sup>87</sup> but the need for military preparedness won out, and Congress passed the MSSA.<sup>88</sup> The draft was in effect from 1948 until the Korean War started in 1950, and was then amended in 1951.<sup>89</sup> Further amendments were passed in 1967,<sup>90</sup> 1969,<sup>91</sup> and 1971,<sup>92</sup> all during the Vietnam War. As mentioned previously, draftees composed approximately half of the enlisted accessions into the military during the Korean conflict from 1950 to 1953, and almost as much during the height of the Vietnam War from 1966 to 1969.<sup>93</sup>

The draft was subject to relatively little protest during the Korean War and the decade that followed, but this period of calm gave way to division and controversy surrounding the war in Vietnam. As mentioned in the previous section, inequities in the conscript law came under great scrutiny and criticism during the Vietnam War. The relative ease of getting a deferment for middle or upper class men came under fire as the Vietnam War progressed.<sup>94</sup> Critics assailed the system as being unfair, often while availing themselves of its deferments.<sup>95</sup> Regardless of the sincerity of the critics, however, there can be no doubt that the availability of various deferments led to abuses.<sup>96</sup> Draft avoiders sought any and every means at their disposal to avoid the draft.<sup>97</sup>

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<sup>81</sup> *Id.* at 9–10.

<sup>82</sup> Pub. L. No. 92-129, tit. I, § 101(a)(1).

<sup>83</sup> Proclamation No. 4360, 40 Fed. Reg. 14,567 (Mar. 29, 1975).

<sup>84</sup> Bernard Rostker was the Director of Selective Service at the time and he provides a detailed insider's view of the Carter Administration's actions during this period. ROSTKER, *supra* note 11, at 437–41. President Carter announced his intention to renew draft registration in his State of the Union address on 23 January 1980, and subsequently obtained congressional approval of funding for its implementation. *Id.*

<sup>85</sup> President Carter's recommendation to subject women to the MSSA's requirements was transmitted to Congress in a report on Selective Service required by the Department of Defense Authorization Act of 1980. Pub. L. No. 96-107, 93 Stat. 803. ROSTKER, *supra* note 11, at 441.

<sup>86</sup> ROSTKER, *supra* note 11, at 27.

<sup>87</sup> Senator Robert Taft, for example, stated his opinion of conscription in the spring of 1945, while World War II was still raging in the Pacific: "Military conscription is essentially totalitarian . . . because it is the most extreme form of compulsion, military conscription will be more the test of our whole philosophy than any other policy . . . It is against the fundamental policy of America . . . and if adopted, will color our whole future." COOPER, *supra* note 12, at 56.

<sup>88</sup> "The Military Selective Service Act" was the short title of the act passed on 24 June 1948, ch. 625, tit. I, § 1, 62 Stat. 604. See DAVIDSON, *supra* note 65 (noting President Johnson's participation in the congressional debate over the MSSA while he was a congressman).

<sup>89</sup> Act passed on June 19, 1951, ch. 144, tit. I, § 1(a), 65 Stat. 75.

<sup>90</sup> Military Selective Service Act of 1967, Pub. L. No. 90-40, § 1(1), 81 Stat. 100.

<sup>91</sup> Selective Service Amendment Act of 1969, Pub. L. No. 91-124, 83 Stat. 220 (authorizing a modified selection process).

<sup>92</sup> Pub. L. No. 92-129, tit. I, § 101(a)(1), 85 Stat. 348 (1971).

<sup>93</sup> See *supra* notes 57–63 and accompanying text.

<sup>94</sup> See MACPHERSON, *supra* note 72, at 30 (stating with regard to various deferments and draft evasion measures that "[d]raft dodging was mainly for the privileged").

<sup>95</sup> See *id.* at 28–30.

<sup>96</sup> *Id.* at 36–38.

<sup>97</sup> *Id.*

From a purely pragmatic standpoint, the essential purpose of a draft is, of course, to provide military manpower in a manner that is administratively manageable. But the overall fairness of the system, or at least public perception of fairness, is crucial to inspiring public confidence and maintaining public support, both for the system itself and for any war fought by a conscripted force.<sup>98</sup> As a means of fairly distributing the civic obligations of military service across the social spectrum, many viewed the draft as a failure.<sup>99</sup> The system worked fairly well, however, as a means of providing large numbers of conscripts in an orderly manner.<sup>100</sup> So, while the draft system during the Vietnam War cannot be termed an outright failure, it did fail in the social and political realms, and served as a source of division during the war.<sup>101</sup>

For reasons discussed earlier, the draft was ended in 1973 and President Ford suspended the registration requirement in 1975.<sup>102</sup> President Carter pardoned Vietnam era violators of the MSSA upon assuming office in January 1977.<sup>103</sup> Despite various amendments to the MSSA during the 1960s and 1970s,<sup>104</sup> the statute still did not allow for the registration and possible conscription of women.<sup>105</sup>

## B. Current MSSA

### 1. 1980 Resumption of Registration

In 1980, President Carter ordered resumption of Selective Service registration in response to the Soviet invasion of Afghanistan<sup>106</sup> and requested that Congress amend the MSSA to authorize the registration of women.<sup>107</sup> The DoD made contingency plans for the inclusion of women in the MSSA, which appeared to some to be a “foregone conclusion.”<sup>108</sup> While Congress agreed to authorize funding of renewed registration, it did not agree to amend the MSSA in the manner requested.<sup>109</sup>

Congressional opposition to drafting women centered on the exclusion of women from combat roles.<sup>110</sup> Although the purpose of the draft was not limited to providing Soldiers for the combat arms, opponents of including women in the draft perceived that to be its primary purpose.<sup>111</sup> Other critics simply believed that a majority of women were not suited for

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<sup>98</sup> See CBO REPORT, *supra* note 10, at 5.

<sup>99</sup> *Id.* Golding and Adedeji wrote:

As the Vietnam War escalated in the mid- and late 1960s, the number of young men who were drafted grew, and opposition to the war and the draft intensified. Concerns about who was called to serve and about the fairness of deferments and exemptions increased. In a 1966 poll, for instance, fewer than half of respondents said the draft was handled fairly in their community.

*Id.*

<sup>100</sup> See *id.* at 3 (noting that roughly 1.9 million draftees were inducted into the military between 1964 and 1973).

<sup>101</sup> GATES ET AL., *supra* note 79, at 9 (noting that after World War II, the draft had been “costly, inequitable, and divisive”). In context, there is no doubt that this conclusion was primarily attributable to the Vietnam era.

<sup>102</sup> See *supra* notes 79–83 and accompanying text.

<sup>103</sup> Proclamation No. 4483, 3 C.F.R. 4 (1977); Exec. Order No. 11,967, 3 C.F.R. 91 (1977).

<sup>104</sup> See *supra* notes 90–92 and accompanying text.

<sup>105</sup> See *infra* notes 107–113 and accompanying text.

<sup>106</sup> ROSTKER, *supra* note 11, at 438 (describing the desire of the Carter Administration to enhance military readiness as a signal of resolve to the Soviet Union).

<sup>107</sup> See *supra* note 85 and accompanying text.

<sup>108</sup> ROSTKER, *supra* note 11, at 438; see Note, *Women and the Draft: The Constitutionality of All-Male Registration*, 94 HARV. L. REV. 406 (1980–1981) (arguing prior to the Supreme Court’s opinion in *Rostker v. Goldberg*, 453 U.S. 57 (1981), that all-male registration should be struck down as unconstitutional).

<sup>109</sup> Pub. L. No. 96-282, 94 Stat. 552 (1980).

<sup>110</sup> *Rostker*, 453 U.S. at 76. The Court noted

Congress determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops. The Senate Report explained, in a specific finding later adopted by both Houses, that “[i]f mobilization were to be ordered in a wartime scenario, the primary manpower need would be for combat replacements”

*Id.* (quoting S. REP. NO. 96-826, at 160 (1980)).

<sup>111</sup> See, e.g., *id.* at 76. The Court quoted Senator Jepsen, who stated that “the shortage would be in the combat arms. That is why you have drafts.” *Id.*

military service and that those who were already had the opportunity to serve voluntarily.<sup>112</sup> Regardless of the reasons, Congress declined to authorize the registration and possible conscription of women.<sup>113</sup>

## 2. *The MSSA since 1980*

President Reagan gave serious consideration to rescinding the Selective Service registration requirement in the early 1980s.<sup>114</sup> President Reagan opposed draft registration as a presidential candidate in 1980, stating in a letter to Senator Mark Hatfield:

[P]erhaps the most fundamental objection to draft registration is moral. Only in the most severe national emergency does the government have a claim to the mandatory service of its young people. In any other time, a draft or draft registration destroys the very values that our society is committed to defending.<sup>115</sup>

Upon assumption of the Presidency, however, President Reagan backed away from that view in deference to strong congressional, public, and military support for continued registration.<sup>116</sup> The Joint Chiefs of Staff, for example, opined that,

the act of registration has tended to remind [young men] . . . of the obligation of citizenship and helps to rekindle pride in service and country. Thus, peacetime registration is an important element in terms of civic responsibility—an element that does not run against the grain of the American public.<sup>117</sup>

Conversely, the Military Manpower Task Force appointed to review various issues related to manning of the AVF came to a different conclusion. The task force recommended against peacetime registration, concluding that the infringement on individual liberty was not justified by peacetime needs.<sup>118</sup> Ultimately, President Reagan disagreed with the task force recommendation and chose to continue peacetime registration.<sup>119</sup> The registration requirement has been in effect continuously to the present day,<sup>120</sup> and the MSSA has not been amended in any substantive manner.<sup>121</sup>

## IV. Draftees Versus the All-Volunteer Force

### A. Overview

Whether women should be subject to the MSSA raises the overarching philosophical, political, and pragmatic issues of whether any American should be subject to a draft in the first place. America has always preferred to man its forces with volunteers, but has, throughout history resorted to conscription as necessary depending on circumstances. The decision of whether to staff forces with volunteers, draftees, or a combination thereof has profound implications for the structure,

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<sup>112</sup> See ROSTKER, *supra* note 11, at 443 (quoting Congresswoman Marjorie Holt, who stated that “the majority of the American women want to stay out of the military”).

<sup>113</sup> *Id.*; see also JEANNE HOLM, *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION* 347–62 (1982). Major General Holm, a retired Air Force officer, wrote that “Congress could not bring itself to shatter 204 years of tradition by including women.” *Id.* at 348.

<sup>114</sup> President’s Announcement of the Establishment of the Military Manpower Task Force, July 8, 1981, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=44059>.

<sup>115</sup> ROSTKER, *supra* note 11, at 506.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 507 (quoting Memorandum from General David C. Jones, Chairman of the Joint Chiefs of Staff, to the Secretary of Defense (Dec. 4, 1981)).

<sup>118</sup> *Id.*

<sup>119</sup> President’s Statement About Continuation of the Registration Program Under the Military Selective Service Act, Jan. 7, 1982, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=43019>.

<sup>120</sup> Military Selective Service Act, 50 U.S.C. App. § 451 (statutory history).

<sup>121</sup> *But see* U.S. SELECTIVE SERVICE AGENCY, *FISCAL YEAR 2007 ANNUAL REPORT TO THE CONGRESS OF THE UNITED STATES* 9 (providing a summary of legislation proposed in 2007 that would have affected the MSSA. Two of the proposed bills are particularly noteworthy). Representative Ron Paul (R-TX.) introduced House Resolution (H.R.) 424 to repeal the MSSA and terminate the Selective Service system altogether. *Id.* Conversely, Representative Charles Rangel (D-NY) introduced The Universal National Service Act of 2007, H.R. 393, requiring all individuals between the ages of eighteen and forty-two, including women, to perform a period of either military or civilian service in support of national defense and homeland security. *Id.* Though these proposed bills were not enacted into law, their respective congressional sponsors continue to support them. See Susan Crabtree, *Rangel to Reintroduce Military Draft Measure*, THE HILL, Jan. 14, 2009; Ron Paul, *On Reinstating the Draft*, TEXAS STRAIGHT TALK, Feb. 16, 2009, [http://www.house.gov/htbin/blog\\_inc?BLOG,tx14\\_paul,blog,999,All,Item%20not%20found,ID=090216\\_2679,TEMPLATE=postingdetail.shtml](http://www.house.gov/htbin/blog_inc?BLOG,tx14_paul,blog,999,All,Item%20not%20found,ID=090216_2679,TEMPLATE=postingdetail.shtml).

training, and effectiveness of those forces. Additionally, the decision raises fundamental philosophical and political issues for the nation itself.

To some, conscription offers a cheap and reliable source of manpower to meet the nation's needs.<sup>122</sup> Moreover, if administered fairly, conscription spreads the burden of defending the nation in an egalitarian manner. To others, however, conscription represents an enormous infringement on personal freedom, and unfairly places the burden of national defense on a relatively few individuals.<sup>123</sup> It may also offer a less effective defense than a force of volunteers because draftees may be less motivated and serve for shorter periods of time, thus providing less time for these personnel to master military skills.<sup>124</sup> This section will briefly describe the relative advantages and disadvantages of both volunteer and draftee forces.

## B. Advantages of a Draftee Force

Proponents of a draft generally advocate conscription based on at least one of the following perceived advantages: military effectiveness and cost, fairness, and civic responsibility.<sup>125</sup>

### 1. Military Effectiveness and Cost

Draftees enhance military effectiveness in two respects. First, conscription essentially guarantees maintenance of force levels required to address national defense needs.<sup>126</sup>

Proponents of the draft have claimed that in the event of another major national crisis, the all-volunteer force would not be able to meet a large, sudden need for additional troops. More basically, draft supporters have questioned whether young people will continue to join the military given the likelihood that they may be required to deploy and fight.<sup>127</sup>

Second, conscription enhances the quality of the overall force by bringing talented individuals into the military who would not otherwise serve.<sup>128</sup> Some proponents of the draft argue that "individuals of relatively high ability, education, and social status do not normally volunteer for military service . . . [d]rafting those individuals would allow the military to benefit from their talents."<sup>129</sup> After all, draftees historically have made significant contributions in all of the conflicts in which they have been employed.

Use of draftees may have advantages relative to cost as well. Draftees are cheaper to employ for the obvious reason that financial incentives are not required to induce their enlistment.<sup>130</sup> "Supporters of the draft have argued that an all-volunteer force would cost more than a draft force because the military would have to pay significantly higher wages to attract and retain volunteers."<sup>131</sup> Lowering personnel costs enables the military to field a larger force, spend more on non-personnel items such as weapons systems, or both.<sup>132</sup>

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<sup>122</sup> CBO REPORT, *supra* note 10, at 7.

<sup>123</sup> See JOHN KEEGAN, A HISTORY OF WARFARE 228 (Vintage Books 1994) (1993) ("Conscription is a tax levied upon a male resident's time at a certain age of life, though to citizens payment of such a tax is also usually presented as a civic duty").

<sup>124</sup> See ROSTKER, *supra* note 11, at 8 (commenting on the increased professionalism and experience of the AVF).

<sup>125</sup> CBO REPORT, *supra* note 10, at 7.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> See *id.* at 8.

<sup>131</sup> *Id.*; see also COOPER, *supra* note 12, at 37–38 (noting that two commissions assigned in the 1960s to study the feasibility of an all-volunteer force concluded that it would be too costly to do away with the draft).

<sup>132</sup> CBO REPORT, *supra* note 10, at 8.

## 2. Fairness and Social Impact

Proponents of a draft often argue that conscription would spread the burden of national defense more equitably than the current system, which tends to attract the economically disadvantaged to military service.<sup>133</sup>

[S]ome supporters of the draft argue that an all-volunteer force creates . . . inequities. They maintain that the current AVF was designed to free the middle and upper classes from even the risk of military service and that lower-income groups or minorities bear a disproportionate share of service and combat. . . . [T]he military is particularly appealing to groups who have relatively poor civilian opportunities . . .<sup>134</sup>

Provided that it is administered fairly, a draft could evenly distribute the risks of military service throughout the population.

Under the current volunteer system, many have argued that a comparatively small part of the population has borne the brunt of fighting the GWOT.<sup>135</sup> Sociologist David Segal commented that “[t]he military is at war, but the country is not. And the military resents that.”<sup>136</sup> If this is true, the current conflict may have exacerbated a civilian/military rift that was noted over a decade ago by military correspondent Thomas Ricks, who wrote that “U.S. military personnel of all ranks are feeling increasingly isolated from their own country.”<sup>137</sup> According to Ricks, the end of the draft in 1973 is a key reason for this “widening gap.”<sup>138</sup>

Moreover, isolation of the military from civilian society can undermine the trust and confidence needed to maintain its proper role in national defense. An article in Washington Post Magazine commented:

[L]ess than half of the civilian population believes military leaders can be relied on to respect civilian control of the military. . . . And while nearly two-thirds of military leaders believe they share the same values as the American people, only about one-third of their civilian counter-parts agree. The vast majority of civilians believe service members are intolerant, stingy, rigid and lacking in creativity.<sup>139</sup>

A draft, if properly administered, would bring a broader cross section of society into the military. Perhaps more importantly, it would create a deeper reservoir of knowledge of and familiarity with the military in the civilian population.<sup>140</sup> This familiarity would presumably breed trust.

## 3. Civic Responsibility

Military service is a means of inculcating a sense of civic obligation in American citizens.<sup>141</sup> “Proponents of the draft [have] argued that each (male) citizen has a *moral responsibility*, or duty, to serve his country and that the draft provided a

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<sup>133</sup> See, e.g., Drew Brown, *Do We Need to Revive the Draft?*, SEATTLE TIMES, Feb. 4, 2007 (discussing the belief of some that the higher economic classes are underrepresented in the military). See generally KATHY ROTH-DOUQUET & FRANK SCHAEFFER, AWOL: THE UNEXCUSED ABSENCE OF AMERICA’S UPPER CLASSES FROM THE MILITARY—AND HOW IT HURTS OUR COUNTRY (2006) (explaining the absence of the upper classes from the military).

<sup>134</sup> CBO REPORT, *supra* note 10, at 10.

<sup>135</sup> Brown, *supra* note 133.

I don’t think it’s necessary that every eligible young man and woman serve . . . . But the idea that 300 million Americans send the same 140,000 people again and again and again into combat is absolutely immoral. We’re an enormous and wealthy country, but essentially we’ve taken a small group of people and we expect them to do everything.

*Id.* (quoting author Frank Schaeffer).

<sup>136</sup> Kristin Henderson, *Their War*, WASH. POST MAG., July 22, 2007. Henderson’s perspective may be influenced by the fact that her husband is a Navy chaplain. *Id.*

<sup>137</sup> Thomas E. Ricks, *The Widening Gap Between the Military and Society*, ATLANTIC MONTHLY, July 1997, at 66.

<sup>138</sup> *Id.*

<sup>139</sup> Henderson, *supra* note 136.

<sup>140</sup> *Id.*

<sup>141</sup> CBO REPORT, *supra* note 10, at 10.

vehicle for institutionalizing this responsibility.”<sup>142</sup> Opponents, meanwhile, argue that conscription contradicts the core American value of individual freedom.<sup>143</sup>

Reliance on a draft also helps foster a close relationship between the military and civilian society at large.<sup>144</sup> When the end of conscription was being debated in the 1960s and 1970s, “[s]ome felt that ending the draft would lead to a professional military ‘elite’ with a separate military ethos, which could pose a threat to civilian authority, individual freedoms, and the nation’s democratic institutions.”<sup>145</sup> Indeed, after the advent of the all-volunteer force, some commentators believed that a rift did develop between the military and society, though not necessarily to the extent of endangering civilian control of the military.<sup>146</sup> A draft would help reinforce the ties between the military and civilian society.

### C. Advantages of a Volunteer Force

The advantages offered by a volunteer force are, to a degree, a mirror image of those ostensibly offered by a force of draftees. Advocates of the all-volunteer force believe that reliance on volunteers maximizes military effectiveness, reduces costs, and is in accord with American values.

#### 1. *Military Effectiveness and Cost*

Volunteer forces offer two apparent advantages over draftees with regard to military effectiveness. First, volunteers are presumably more motivated to learn their craft and perform well.<sup>147</sup> This translates into better personal performance and better performance by the military in the aggregate. Second, volunteers typically serve longer initial tours than conscripts and are more likely to reenlist for subsequent tours of duty.<sup>148</sup> This instills greater proficiency as the force overall will be more experienced and have higher morale.

According to Doug Bandow, a longtime commentator and authority on military manpower affairs:

[t]he AVF by definition brings in people who want to be there, which creates a dramatically more positive dynamic. It is free to discharge soldiers who abuse drugs, perform poorly, or otherwise are ill suited to service life. Draftees, by contrast, must be retained at almost all costs lest indiscipline become a means of escape. . . . Before the advent of the AVF, only 10 percent of first-termers stayed on, compared to about 50 percent today [in 2000]. Moreover, with a draft, the increased difficulties in working with recalcitrant soldiers mean that even experienced noncommissioned officers are less likely to re-up. Thus, a return to conscription would undoubtedly result in a military that lacks experience, stability, and efficiency.<sup>149</sup>

The performance of the all-volunteer force in the current conflict supports Bandow’s view. While the hypothetical performance of a conscripted force cannot be known with certainty, most commentators agree that our volunteer military has

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<sup>142</sup> COOPER, *supra* note 12, at 35 (describing the debate within the U.S. over eliminating the draft and transitioning to an all-volunteer force in the 1970s).

<sup>143</sup> CBO REPORT, *supra* note 10, at 10.

<sup>144</sup> COOPER, *supra* note 12, at 36.

<sup>145</sup> *Id.*

<sup>146</sup> See generally Ricks, *supra* note 137, at 66 (discussing the growing insularity of military culture in the 1990s). For an interesting speculation on the possible result of a growing separation between military and civilian culture, see Charles J. Dunlap, Jr., *Origins of the American Military Coup of 2012*, PARAMETERS, Winter 1992-93, at 2–20. Lieutenant Colonel Dunlap extrapolated the expansion of military responsibilities into traditionally non-military roles—such as a law enforcement role in drug interdiction, increased involvement in domestic disaster relief, or other similar roles—along with its increasing cultural separation from civilian society to a hypothetical coup in 2012. Dunlap, *supra*. But see Captain Pete Kilner, *The Alleged “Civil-Military Values Gap”: Ideals vs. Standards* (Feb. 27, 2001) (unpublished paper presented to the Joint Services Conference on Professional Ethics), available at <http://www.usafa.edu/isme/JSCOPE01/Kilner01.html> (arguing that Ricks confuses a “culture” gap, which is not necessarily a negative thing, with a “values” gap, which would be. Kilner argues that Ricks overstates the “values” gap, partly due to the otherwise illogical fact that the civilian population commonly professes great respect and esteem for the military despite allegedly holding different “values.”).

<sup>147</sup> Doug Bandow, *Mend, Never End, the All-Volunteer Force*, ORBIS, June 22, 2000.

<sup>148</sup> See ROSTKER, *supra* note 11, at 8.

<sup>149</sup> Bandow, *supra* note 147, at 463. Mr. Bandow is a senior fellow at the Cato Institute and previously served on the Military Manpower Task Force advising President Reagan. Doug Bandow, *Fighting the War against Terrorism: Elite Forces, Yes; Conscripts, No*, Apr. 10, 2002, available at <http://www.cato.org/pubs/pas/pa-430es.html>.

performed well in the GWOT.<sup>150</sup> It is difficult to imagine that a group of unwilling draftees would have performed better, particularly in view of the increased sophistication of military equipment and tactics.<sup>151</sup>

Perhaps counter-intuitively, an AVF may also cost less than a force of draftees. While draftees can be paid lower wages than volunteers, other costs associated with conscription may make volunteerism the more economical option. Economists such as Milton Friedman, a member of the Gates Commission, have argued that conscription imposes a hidden tax on draftees to the extent that they are paid below market wages.<sup>152</sup> While this cost may not appear in the defense budget, it is still a cost to society, albeit one that is paid involuntarily by a small number for the benefit of everyone.<sup>153</sup> Additionally, an all-volunteer force saves the expenses of administering and enforcing draft laws, particularly if there is significant resistance or evasion, while also saving on training costs due to the decreased turnover of personnel in a volunteer force.<sup>154</sup>

## 2. American Values

As mentioned previously, some believe that conscription inherently conflicts with the American emphasis on personal liberty.<sup>155</sup> While the balance between personal freedom and society's need for defenders may shift in times of war, such as the present day, there is philosophical contradiction in coercing an individual to fight for freedom. That tension has lurked in the background of every major use of conscription in American history.<sup>156</sup>

### D. Arguments For and Against Instituting a Draft

There were few advocates for returning to the draft before the events of 11 September 2001, and the ensuing GWOT.<sup>157</sup> The strain on the armed forces caused by the war has led to renewed calls for conscription.<sup>158</sup> However, there does not appear to be sufficient political support for Congress to authorize a draft.<sup>159</sup>

Perhaps ironically, one of the most outspoken advocates of conscription is also an outspoken critic of the war in Iraq, Representative Charles Rangel of New York.<sup>160</sup> Some of his political opponents believe that his support for conscription is based on the supposition that a draft would spark greater protest and opposition to the war, rather than a desire to supply added manpower to win the war.<sup>161</sup> Regardless of Congressman Rangel's motivation, this ongoing debate highlights the fear some have that a President is more likely to use force when he has a volunteer force at his disposal, rather than a more representative one of draftees that may bring the cost of war home to a greater swath of the public.<sup>162</sup> In this sense, the perceived isolation of the military makes it easier politically to send it overseas to fight than a force of draftees.

The arguments in favor of a draft are both pragmatic and philosophical. The pragmatic issue is whether we have enough troops to fight and win our nation's wars. At present, there seems to be consensus on both sides of the political aisle that our military needs to get bigger,<sup>163</sup> but most believe that this can be done while maintaining an all-volunteer force.<sup>164</sup> The

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<sup>150</sup> See, e.g., Beth Asch, *Should Uncle Sam Want You? The All-Volunteer Army Is Working Well*, B. GLOBE, Feb. 9, 2003, available at <http://boston.com>.

<sup>151</sup> William A. Kamens, Comment, *Selective Disservice: The Indefensible Discrimination of Draft Registration*, 52 AM. U.L. REV. 703 (2003).

<sup>152</sup> See, e.g., GATES ET AL., *supra* note 79, at 12–13 (commenting that “[d]raftees and draft-induced volunteers are paid less than they would require to volunteer. The loss they suffer is a tax-in-kind which for budget purposes is never recorded as a receipt or expenditure”).

<sup>153</sup> *Id.* at 12–13.

<sup>154</sup> *Id.* at 13.

<sup>155</sup> COOPER, *supra* note 12, at 57.

<sup>156</sup> See *supra* notes 64–81 and accompanying text.

<sup>157</sup> See Bandow, *supra* note 147.

<sup>158</sup> See, e.g., Phillip Carter & Paul Glastis, *The Case for the Draft*, WASH. MONTHLY, Mar. 2005. This article is noteworthy for its novel recommendation to institute a draft of reservists, rather than active duty Soldiers, in order to augment the available pool of military manpower. *Id.*

<sup>159</sup> Brown, *supra* note 133.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See GATES ET AL., *supra* note 79, at 17.

<sup>163</sup> Michael O'Hanlon, *The Need to Increase the Size of the Deployable Army*, PARAMETERS, Autumn 2004, at 4.

GWOT has strained our all-volunteer military and recruiting has become more difficult.<sup>165</sup> Despite these challenges, volunteer accessions have generally been adequate to maintain necessary force structure.<sup>166</sup> While a draft might make it easier to induct sufficient numbers of service members, there does not appear to be a compelling need to do so at this time. Moreover, the prospect of training thousands of unwilling draftees might be more of a distraction and burden to the armed services than the extra manpower is worth.

Philosophically, do we, as a nation, wish to have the direct human costs of conflict (such as risk of death or injury, and time away from home and family) borne by a comparatively small segment of society? Any apparent injustice to servicemembers is mitigated (at least partially) by their volunteer status, but spreading the burden of fighting our nation's wars enhances unity through a sense of shared sacrifice. This is ultimately a very subjective issue, as it depends on unquantifiable factors such as the national attitude towards the military and the conflicts in which we are engaged. Our apparent military successes in the ongoing GWOT, however, make it difficult to foresee the scales being tipped in favor of a draft in the near future. While we may need a larger military, we do not seem to need one so large that it would require abandonment of current voluntary recruitment practices.

## V. Legal and Political Challenges to the Exemption of Women

The exemption of women from Selective Service requirements has not gone unchallenged. Opponents have criticized the exemption on both constitutional and policy grounds. Legally, some view the policy as a violation of constitutional equal protection doctrine. As a matter of policy, some believe that men and women should be subject to the same service obligations.

### A. Legal Challenges

#### 1. *Rostker v. Goldberg*

The most significant legal challenge to the MSSA's exemption of women made its way to the U.S. Supreme Court after the registration requirement was reinstated in 1980. In *Rostker v. Goldberg*,<sup>167</sup> the Court upheld the exemption of women from the MSSA. The plaintiffs in *Rostker* were men subject to registration and conscription during in the early 1970s, who alleged that the MSSA's application solely to men violated their due process rights under the Constitution.<sup>168</sup>

The case lay dormant for several years after the draft and registration requirements were suspended, but it had not been dismissed.<sup>169</sup> Litigation recommenced in 1979 when the defendants attempted to dismiss the claim in district court and were unsuccessful.<sup>170</sup> The U.S. District Court for the Eastern District of Pennsylvania did not initially rule on the merits of the claim because it lacked sufficient facts on the record.<sup>171</sup> After the facts were better developed, the district court ultimately ruled in favor of the plaintiffs regarding their constitutional claim and enjoined the Government from commencing registration.<sup>172</sup> The Director of Selective Service immediately appealed and the injunction was stayed pending resolution of the case by the Supreme Court.<sup>173</sup>

The Supreme Court held that men and women were not similarly situated with respect to a draft that purports to focus on filling combat positions from which women are excluded.<sup>174</sup> Because of this exclusion, the exemption of women from the

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<sup>164</sup> *Id.*

<sup>165</sup> CBO REPORT, *supra* note 10, at 1.

<sup>166</sup> Asch, *supra* note 150.

<sup>167</sup> *Rostker v. Goldberg*, 453 U.S. 57 (1981).

<sup>168</sup> *Id.* at 61–62.

<sup>169</sup> *Id.* at 61.

<sup>170</sup> *Goldberg v. Tarr*, 510 F. Supp. 292 (E.D. Pa. 1980).

<sup>171</sup> *Id.*

<sup>172</sup> *Goldberg v. Rostker*, 509 F. Supp. 586 (E.D. Pa. 1980) (holding that the male-only registration requirement violated the Equal Protection clause of the Fifth Amendment to the U.S. Constitution).

<sup>173</sup> *Rostker*, 453 U.S. at 64.

<sup>174</sup> *Id.* at 78.

reach of the MSSA was closely related to Congress' purpose in authorizing draft registration and did not violate the Due Process Clause of the Constitution.<sup>175</sup> The alleged victims of discrimination in this case were men, not women, because while the MSSA placed obligations upon men and exempted women, it did not exclude women from voluntary military service.<sup>176</sup>

The Court's majority opinion did not clearly state the controlling legal standard that should be applied to the MSSA's exemption of women. The Court emphasized its deference to Congress in the realm of military policy.<sup>177</sup> It certainly deferred to Congress' characterization of the purpose of the draft, which was to supply combat troops.<sup>178</sup> However, the Court stopped short of agreeing with the Solicitor General's argument that the gender distinction in question should be judged under the lowest form of constitutional scrutiny normally reserved for military matters, which is whether the statute in question is rationally related to a legitimate governmental purpose.<sup>179</sup> Likewise, the Court did not necessarily refuse to apply the heightened form of scrutiny articulated in *Craig v. Boren* for gender-based distinctions, which requires that gender-based discrimination be "substantially related to important governmental interest."<sup>180</sup> Instead, the Court stated:

We do not think that the substantive guarantees of due process or certainty in the law will be advanced by any further "refinement" in the applicable tests as suggested by the Government. Announced degrees of "deference" to legislative judgments, just as levels of "scrutiny" which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result. In this case the courts are called upon to decide whether Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred. Simply labeling the legislative decision "military" on the one hand or "gender-based" on the other does not automatically guide a court to the correct constitutional result.<sup>181</sup>

While the Court did not choose between these competing standards, it stated that MSSA's exemption of women nevertheless satisfied them both.<sup>182</sup> The opinion implicitly rejected any higher, "strict scrutiny" standard for the gender-based distinction.<sup>183</sup> Essentially, the opinion states that no clear standard applies, but that the MSSA would survive scrutiny under any test that could reasonably be applied.

Justices White and Marshall wrote dissenting opinions, each noting that draftees would not be exclusively used to fill combat positions.<sup>184</sup> Both noted that while the primary purpose of a draft may be to provide combat troops who had to be male, some of the men drafted would be used in non-combat roles.<sup>185</sup> Justice White pointed out an apparent absurdity in the majority opinion, which at one point seemed to argue that the military required the flexibility to move non-combat troops into combat roles as necessary, thus providing another basis for drafting men exclusively.<sup>186</sup> While this flexibility may indeed be helpful, Justice White noted that "if during mobilization for war, all non-combat military positions must be filled by combat-

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 74 n.11. The majority opinion specifically rejected the contention of the National Organization for Women's amicus curiae brief that stated that the exemption of women discriminated against them. *Id.*; see also HOLM, *supra* note 113. Holm pointed out the dilemma posed to feminists, typically political liberals, by the issue of draft registration. *Id.* at 351-53. Discussing President Carter's proposal in 1980 to apply the MSSA to women, Holm observed that the issue threw feminists into "confusion" because "the feminist movement has its roots in pacifism and many of the [then] current leaders are veterans of the antiwar, antidraft protests of the sixties and early seventies." *Id.* at 351. She wrote that "Carter's . . . decision to call for registration of men and women put feminists on the spot; they were torn between their abhorrence of war and the combat mission of the military profession, on one hand, and their desire that women enjoy the many benefits and advantages of military service . . . on the other." *Id.* Ultimately, however, Holm concluded that feminists "had no choice but to support the President—had had made them an offer they could not refuse." *Id.*

<sup>177</sup> *Rostker*, 453 U.S. at 65-66.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 69-70.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 70.

<sup>183</sup> *Id.* at 69-70.

<sup>184</sup> *Id.* at 83 (White, J. dissenting), 86 (Marshall, J., dissenting).

<sup>185</sup> *Id.* at 85 (White, J., dissenting), 96 (Marshall, J., dissenting).

<sup>186</sup> *Id.* at 83 (White, J., dissenting).

qualified personnel available to be moved into combat positions, there would be no occasion whatsoever to have any women in the Army, whether as volunteers or inductees.”<sup>187</sup> Justice White argued that the government had not shown that female draftees could not be usefully employed in non-combat roles, rather that it had merely relied on the administrative convenience of limiting the draft to individuals who could fill either combat or non-combat positions.<sup>188</sup> In his view, this was not sufficient to justify the exemption of women.

Justice Marshall focused on the legislative history that revealed that the military services appeared to disagree with Congress, and in fact desired the registration of women.<sup>189</sup> According to his review of the record, “[t]estimony about personnel requirements in the event of a draft established that women could fill at least 80,000 of the 650,000 positions for which conscripts would be inducted.”<sup>190</sup> He agreed that there would be no reason to register women if “it could be guaranteed in advance” that any future draft would only be used to fill positions from which women were excluded.<sup>191</sup> That not being the case, however, he believed that the government had failed to demonstrate that the exemption of women was substantially related to the achievement of an important government interest.<sup>192</sup>

The Court’s opinion in *Rostker* appeared to settle the constitutional question involved. Moreover, the unlikely prospects for institution of the draft throughout the 1980s and 1990s probably muted opposition to Selective Service policies. Consequently, there appears to have been little active legal opposition to the exemption of women in the two decades following *Rostker*. That changed following the events of 11 September 2001.

## 2. *Schwartz v. Brodsky*

The most recent legal challenge of any significance occurred when the MSSA’s exemption of women was challenged in *Schwartz v. Brodsky* in 2003.<sup>193</sup> The plaintiffs brought suit in U.S. District Court for the District of Massachusetts. They challenged both the constitutionality of the MSSA and provisions of Massachusetts state law that penalized individuals who failed to comply with the MSSA regarding eligibility for state student financial aid.<sup>194</sup>

The plaintiffs contended that military assignment policies for women had evolved to such a degree since *Rostker v. Goldberg* was decided in 1981 that the factual underpinning of *Rostker* had eroded.<sup>195</sup> They argued that the expansion of military positions available to women had fundamentally changed the circumstances under which a future draft would be conducted. The district court granted summary judgment to the defendants, however, because the plaintiffs conceded that two essential facts had not changed: first, that the legislative purpose of the MSSA was still to provide for a draft of primarily combat troops; and second, that women were still excluded from combat positions.<sup>196</sup> The court asserted that at least one of these essential facts would have to change in order to call *Rostker*’s holding into question.<sup>197</sup> In granting the defendant’s motion for summary judgment, the court wrote:

[T]he Constitution expressly grants the power “to raise and support Armies,” “to provide and maintain a Navy,” and “to make Rules for the Government and Regulation of the land and naval Forces,” . . . to Congress and not to the Judiciary. The Judiciary has neither the power nor the competence to undertake these awesome responsibilities . . . . If a deeply rooted military tradition of male-only draft registration is to be ended, it should be accomplished by that branch of government which has the constitutional power to do

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 85–86.

<sup>189</sup> *Id.* at 90–91 (Marshall, J., dissenting).

<sup>190</sup> *Id.* at 101.

<sup>191</sup> *Id.* at 112.

<sup>192</sup> *Id.* (explicitly adopting the test articulated in *Craig v. Boren*, 429 U.S. 190 (1976)).

<sup>193</sup> 265 F. Supp. 2d 130 (D. Mass. 2003).

<sup>194</sup> *Id.* at 131.

<sup>195</sup> *Id.* at 132; see also Ellen Goodman, *Women in the Draft?*, B. GLOBE, Jan. 16, 2003 (discussing the changed circumstances that had led the plaintiffs to file suit in *Schwartz v. Brodsky*, primarily including the increased exposure of women to combat conditions).

<sup>196</sup> *Schwartz*, 265 F. Supp. 2d at 133.

<sup>197</sup> *Id.*

so and which best represents the “consent of the governed”—the Congress of the United States, the elected representatives of the people.<sup>198</sup>

### 3. Future Legal Challenges

Legal challenges similar to *Schwartz v. Brodsky* can be expected to continue. For example, Harvey Schwartz, the plaintiff’s attorney in *Schwartz*, is currently representing an Internal Revenue Service employee who was fired due to his failure to comply with registration requirements under the MSSA.<sup>199</sup> Regarding *Rostker*, Mr. Schwartz stated, “that decision was based on the status of women in the military at the time, and it’s a whole new world now.”<sup>200</sup>

It is doubtful that the changes in this “new world” will warrant a reversal of *Rostker*,<sup>201</sup> though they may invite further litigation.<sup>202</sup> As the *Schwartz* court noted, *Rostker* is likely to remain valid case law so long as women are prohibited from combat positions, however those positions are defined by DoD policy, and as long as Congress views the draft as primarily a means of providing combat troops. Any change in the MSSA registration requirements, therefore, is more likely to come from legislative action than a judicial decision.

### B. Political Challenges

As mentioned previously, President Carter requested an amendment of the MSSA to authorize the registration and possible conscription of women, and Congress denied this request. However, public attitudes towards women’s participation in the military and in combat have changed markedly since Congress debated amending the MSSA in 1980.<sup>203</sup> Given that public opposition to women in combat may have declined, political reconsideration of the draft’s exemption of women is bound to occur.<sup>204</sup>

## VI. Assignment Policies for Women

### A. DOD Policy

As a matter of DOD policy promulgated by Secretary of Defense Les Aspin in 1994, women are currently restricted “from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground.”<sup>205</sup> Direct ground combat is defined as

engaging the enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force’s personnel. Direct ground

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<sup>198</sup> *Id.* at 135.

<sup>199</sup> Anna Badkhen, *Man Who Didn’t Register for Draft Sues IRS Over Firing*, B. GLOBE, Jan. 5, 2008, available at [http://www.boston.com/news/local/articles/2008/01/05/man\\_who\\_didnt\\_register\\_for\\_draft\\_sues\\_irs\\_for\\_firing](http://www.boston.com/news/local/articles/2008/01/05/man_who_didnt_register_for_draft_sues_irs_for_firing). Mr. Schwartz does not share the name of the lead plaintiff in *Schwartz* by accident, as it was his son. *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *But see* Dale A. Riedel, *By Way of the Dodo: The Unconstitutionality of the Selective Service Act Male-Only Registration Requirement Under Modern Gender-Based Equal Protection*, 29 DAYTON L. REV. 135 (2003) (arguing that the combination of gender-based equal protection jurisprudence and changes in the utilization of women in the armed forces have made the male-only registration requirement unconstitutional).

<sup>202</sup> *See, e.g.*, Kamens, *supra* note 151. Kamens argues that the MSSA should no longer discriminate against men by exempting women for several reasons, among them the increased utilization of women in the armed forces since *Rostker* was decided. *Id.* at 758–59. Though Kamens makes interesting and thoughtful points, he argues somewhat perversely that part of the reason that women should no longer be exempted from registration is that pre-draft registration itself serves no useful purpose and therefore does not warrant the judicial deference normally afforded to legislative decisions in military matters. *Id.* at 737–38.

<sup>203</sup> *See, e.g., id.* *See generally* KIRSTEN HOLMSTEDT, BAND OF SISTERS: AMERICAN WOMEN AT WAR IN IRAQ (2007) (describing numerous instances of women being involved in combat operations in Iraq).

<sup>204</sup> *But see* Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. OF GENDER L. & POL’Y 815 (2007). Donnelly comments negatively on the increased exposure of female service members to combat conditions. *Id.* Though Selective Service is not the primary focus of the article, Donnelly argues that subjecting women to the draft would be politically unpopular. *Id.* at 850.

<sup>205</sup> Memorandum from Sec’y of Defense to Sec’y of the Army, et al., subject: Direct Ground Combat Definition and Assignment Rule (Jan. 13, 1994).

combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.<sup>206</sup>

The DOD policy authorized, but did not require, additional restrictions at the discretion of the services provided that such restrictions were justified by specified criteria. Restrictions were authorized in the following instances: (1) where the Service Secretary attests that the costs of the appropriate berthing and privacy arrangements are prohibitive; (2) where units and positions are doctrinally required to physically collocate and remain with direct ground combat units that are closed to women; (3) where units are engaged in long range reconnaissance operations and Special Operations Forces missions; and, (4) where job related physical requirements would necessarily exclude the vast majority of women Service members.<sup>207</sup>

Secretary Aspin promulgated this policy partially in response to Congress's repeal of statutory prohibitions on the assignment of women to combat ships<sup>208</sup> and aircraft.<sup>209</sup> Ground combat restrictions have always been a matter of policy, rather than statutory.<sup>210</sup> The Aspin policy broadened the array of assignments available to women relative to the previous policy, which was governed by the so-called "risk rule."<sup>211</sup> The risk rule prohibited the assignment of women to "occupations or units characterized by the risk of exposure to direct combat, hostile fire, or capture."<sup>212</sup> Experiences during the Persian Gulf War in 1990–1991, however, provided evidence that the risk rule was not practical and led to revision of the policy.<sup>213</sup>

As a result of the 1994 policy, "women are now eligible to serve in more than [90] percent of all job categories in all branches of the armed forces."<sup>214</sup> In the Army, 92.3% of MOSs and 70.6% of positions overall are open to women.<sup>215</sup> In short, a large majority of occupational specialties and duty assignments are open to women even in the Army—the service that is presumably most affected, along with the Marine Corps—by the DoD restrictions.

When Congress repealed the prohibitions on women serving in combat aircraft and on combat ships, it anticipated that DOD would revise its assignment policy for women.<sup>216</sup> Congress foresaw that changes in assignment policy could have implications for the constitutionality of the exemption of women from Selective Service obligations.<sup>217</sup> Consequently, section 542(b) of the National Defense Authorization Act for 1994 obligated the Secretary to notify Congress of any changes regarding the assignment policy for ground combat and to prepare a report assessing their implications for Selective Service's exemption of women.<sup>218</sup> Secretary Aspin did not believe that his revision of policy required such a report, however, because it did not lift the prohibition against assigning women to ground combat positions.<sup>219</sup>

## B. Army Policy

Army policy regarding the assignment of women is contained in AR 600-13,<sup>220</sup> which states:

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1659, § 541 (1993) [hereinafter NDAA 1994] (repealing 10 U.S.C. § 6015).

<sup>209</sup> National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, 105 Stat. 1365, § 531 (1991) (repealing 10 U.S.C. § 8549).

<sup>210</sup> HARRELL ET AL., *supra* note 7.

<sup>211</sup> *Id.* at 1.

<sup>212</sup> *Id.*

<sup>213</sup> Kamens, *supra* note 151, at 736.

<sup>214</sup> *Id.*

<sup>215</sup> HARRELL ET AL., *supra* note 7, at 5–6.

<sup>216</sup> *Id.*

<sup>217</sup> CTR. FOR MILITARY READINESS, WOMEN IN LAND COMBAT: WHY AMERICAN SERVICEWOMEN ARE SERVING AT GREATER RISK, CMR REPORT NO. 16 (2003) [hereinafter WOMEN IN LAND COMBAT].

<sup>218</sup> *Id.*; see NDAA 1994, *supra* note 208, § 542(b).

<sup>219</sup> WOMEN IN LAND COMBAT, *supra* note 217.

<sup>220</sup> U.S. DEP'T OF ARMY, REG. 600-13, ARMY POLICY FOR THE ASSIGNMENT OF FEMALE SOLDIERS (27 Mar. 1992).

The Army's assignment policy for female soldiers allows women to serve in any officer or enlisted specialty or position except in those specialties, positions, or units (battalion size or smaller) which are assigned routine missions to engage in direct Combat, or which collocate routinely with units assigned a direct combat mission.<sup>221</sup>

The regulation further defines direct combat in the following manner:

Engaging an enemy with individual or crew served weapons while being exposed to direct enemy fire, a high probability of direct physical contact with the enemy's personnel and a substantial risk of capture. Direct combat takes place while closing with the enemy by fire, maneuver, and shock effect in order to destroy or capture the enemy, or while repelling the enemy's assault by fire, close combat, or counterattack.<sup>222</sup>

The Rand Institute performed a study in 2007 assessing the Army's assignment policies for women.<sup>223</sup> The authors of the study summarized the differences between the DOD and Army policies as follows:

There are several important differences between the Army and the DoD policies. First, the DoD policy restricts the assignment of women to units whose *primary* mission is direct ground combat, whereas the Army restricts assignment to units that have a *routine* mission of direct combat. Second, the Army also restricts assignment to units that collocate with direct combat units. Third, the Army and DoD policies define *combat* differently: The Army's definition of *direct combat* includes a requirement that there be a risk of capture, but also includes "repelling the enemy's assault." These differences are significant, and it is notable that the Army did not update its policy when Congress repealed the legal restrictions against women serving in combat aircraft positions and on combatant ships nor when Aspin revised the DoD policy in 1994.<sup>224</sup>

The increase in the number of positions open to women and the non-linear battlefields encountered in the war in Iraq have combined to expose women to ground combat on a scale not seen in earlier conflicts.<sup>225</sup> Many support units that frequently collocate with combat units contain significant numbers of female Soldiers.<sup>226</sup> Further, the Army's inclusion of "repelling an assault" in the definition of direct ground combat would appear to exclude the assignment of women to units that are likely to be attacked, which includes many of those units performing combat support and combat service support functions in Iraq and Afghanistan.<sup>227</sup> Ironically, the RAND study concluded that the Army's practices in the current conflict generally comply with DoD policy, but violate its own more restrictive internal policies.<sup>228</sup>

### C. The GWOT

The restrictions on assignments for women have come into conflict with the realities of the non-linear battlespace so often experienced by our service members in the GWOT. The Rand Institute's report on Army assignment policies noted particular problems regarding the assignment of women to forward support elements that were often collocated with combat units.<sup>229</sup> Logistics units in which women are thoroughly integrated have come into frequent contact with the enemy.<sup>230</sup>

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<sup>221</sup> *Id.* para. 1-12(a).

<sup>222</sup> *Id.* glossary.

<sup>223</sup> HARRELL ET AL., *supra* note 7.

<sup>224</sup> *Id.* at 3.

<sup>225</sup> See HOLMSTEDT, *supra* note 203.

<sup>226</sup> HARRELL ET AL., *supra* note 7.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

There are abundant examples of women being drawn into ground combat. Sergeant Leigh Ann Hester, for example, won a Silver Star for her heroic action in a small arms engagement with insurgents in Iraq.<sup>231</sup> A total of 1,763 women had qualified for the Army's Combat Action Badge (CAB) in either Iraq or Afghanistan as of August 2006.<sup>232</sup> Enlisted CAB recipients as of that date were most likely to serve as military police, truck drivers, and logistics specialists,<sup>233</sup> all of which are MOSs generally open to women. Though the DOD and Army policies reduce the likelihood of women being involved in ground combat, they certainly do not eliminate the possibility and in practice it seems to happen frequently.<sup>234</sup>

## VII. Resolution

Selective Service's emphasis on providing combat replacements is outdated and contrary to the nation's best interest for five primary reasons. First, the draft has never been limited to the sole purpose of providing combat troops. Second, although combat troops sustain higher casualty rates, casualty rates sustained by support troops are not low enough to obviate the need for support replacements in the event of any large scale conflict. Third, though male conscripts may provide more assignment flexibility, the inclusion of female draftees is only a minimal administrative burden. This is particularly true given that the large majority of assignments are open to women under current policies. Fourth, fairness and equity dictate spreading the burden of national defense across as wide a cross-section of society as is reasonably possible. It is not fair to men to place the exclusive burden of involuntary military service on them if women are qualified and eligible to perform most of the same duties. Last, if part of the purpose of Selective Service is to inculcate a sense of civic obligation in the population, then including women would only enhance that objective.

Congress should jettison the view that the primary goal of a draft is to provide combat troops. The goal of a draft should be to provide military manpower in whatever occupational specialties are needed at the time. This may include combat support and combat service support specialties currently open to women.

A proposal to amend the MSSA to include women would undoubtedly be considered in the context of the debate over allowing women into combat positions. While related, these issues should not be confused. Changing draft eligibility is a separate issue from differing utilization of male and female conscripts upon their accession into the armed forces. Subjecting women to the registration requirements of the MSSA does not logically depend on any changes to current assignment policies. Women can fill most of the positions for which male draftees would be eligible. The exemption of women from the draft is a byproduct of an era when the role of women in the military was much more limited than it is today.

## VIII. Conclusion

Congress should change the law to reflect that in a time of need, America may draw upon the talents and abilities of all of its citizens who are otherwise eligible for military service. The American ethic is essentially egalitarian, and so too should be our system of conscription. The evolution of our conscription laws towards greater inclusion and the fairest possible allocation of duties and responsibilities demands the inclusion of women. This change, however, does not appear to be required by the Constitution and therefore cannot and should not be mandated by the judiciary.<sup>235</sup> As the court wisely noted

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<sup>231</sup> HOLMSTEDT, *supra* note 203, at 309.

<sup>232</sup> HARRELL ET AL., *supra* note 7, App. H.

<sup>233</sup> *Id.* App. H, tbl.2.

<sup>234</sup> See generally HOLMSTEDT, *supra* note 203. But see Kingsley R. Browne, *Women at War: An Evolutionary Perspective*, 49 BUFF. L. REV. 51, 246 (2001). The apparent success of female Soldiers engaged in combat operations is an interesting counterpoint to the skepticism expressed by one critic in a thought-provoking, but undoubtedly controversial, law review article published before the GWOT had started. Kingsley R. Brown, a law professor and opponent of utilizing women in combat roles, perceived a trend towards allowing greater exposure of women to combat operations and wrote the following:

But what happens if we keep moving in the same direction [towards allowing women in combat] and a few years from now find ourselves engaged in a major conflict with large numbers of women in combat positions? If it turns out that it really does not work, will the people find out about it? If the "great experiment" is acknowledged to be a failure, the nation's military and civilian leaders will have to acknowledge the sacrifice of the lives of the nation's sons and daughters in a misguided pursuit of "gender justice." There is little in the history of this nation or any nation that makes such an admission a likely prospect. Instead, regardless of actual performance, the experiment would almost certainly be labeled a success.

*Id.* at 246. Professor Browne's cynicism notwithstanding, it appears that women are too tightly woven into the fabric of the American military to easily shield them from the risks of combat, regardless of how anyone feels about it.

<sup>235</sup> See *supra* notes 167–202 and accompanying text.

in *Schwartz v. Brodsky*, the tradition of male-only conscription is best changed if that reflects the will of the people as expressed through Congress.

# When Close Doesn't Count: An Analysis of Israel's *Jus Ad Bellum* and *Jus In Bello* in The 2006 Israel-Lebanon War

Major Jennifer B. Bottoms\*

## I. Introduction

On 12 July 2006, Israel launched missiles and deployed armed troops into Lebanon, its neighbor to the north.<sup>1</sup> Israel's acts were in response to Hezbollah guerillas operating out of Lebanon, who earlier that day had killed five Israeli soldiers and kidnapped two more from an Israeli outpost near the Lebanese border.<sup>2</sup> The international community initially responded by condemning Hezbollah for its attack on Israel, and by voicing support for Israel's right to respond with force in self-defense.<sup>3</sup> However, the world community expressed concern at Israel's attack on Lebanon, a state actor, in response to actions by Hezbollah, a non-state actor.<sup>4</sup> Even more pundits voiced distress over Israel's decision to target areas in Lebanon with significant civilian populations.<sup>5</sup> Israel's actions raise a number of questions under international law: Did Hezbollah's attacks justify Israel's use of force in self-defense? Was Israel justified in using force against Lebanon, a sovereign state? Did Israel's methods of warfare comply with norms of international law?

This article analyzes Israel's claim to self-defense and the actions it took in light of the just war theory, customary international law, and the U.N. Charter. First, this article reviews the Israel-Lebanon War of 2006, including Israel's stated reasons for attacking Lebanon.<sup>6</sup> Then, this article examines the definitions of "lawful war" under the just war theory,<sup>7</sup> customary international law,<sup>8</sup> and the U.N. Charter.<sup>9</sup>

After exploring the foundational definitions of lawful war, this article analyzes Israel's actions under these three paradigms, paying particular attention to Israel's decision to hold a state responsible for a non-state actor's behavior.<sup>10</sup> This article shows that under both the just war theory<sup>11</sup> and the U.N. Charter,<sup>12</sup> Israel was justified using force in self-defense against the state of Lebanon for the actions of Hezbollah. However, Israel's *methods* of warfare were not in compliance with customary international law.<sup>13</sup> Therefore, Israel failed to prosecute a just and lawful war.

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<sup>1</sup> Greg Myre & Steven Erlanger, *Israelis Enter Lebanon after Attack*, N.Y. TIMES, July 13, 2006, available at <http://www.nytimes.com/2006/07/13/world/middleeast/13mideast.html>.

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., U.N. Doc. S/PV.5488 (July 13, 2006); U.N. Doc S/PV.5493 (July 21, 2006).

<sup>4</sup> Tom Ruys, *Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-Defense Against Hezbollah*, 43 STAN. J. INT'L L. 265, 270 (2007).

<sup>5</sup> *Id.*

<sup>6</sup> See *infra* Part II (discussing the lead up to and facts of the Israel-Lebanon War).

<sup>7</sup> See *infra* Part III (examining the just war tradition).

<sup>8</sup> See *infra* Part IV (examining the use of force under customary international law).

<sup>9</sup> See *infra* Part V (exploring lawful war under the U.N. Charter and subsequent documents).

<sup>10</sup> See *infra* Part V.B.2 (analyzing the lawfulness of Israel's decision to hold Lebanon responsible for Hezbollah's attack).

<sup>11</sup> See *infra* Part V.A.

<sup>12</sup> See *infra* Part V.B.

<sup>13</sup> See *infra* Part V.C.

## II. The 2006 Israel-Lebanon War

The political situation present along the Israel-Lebanon border on 12 July 2006 did not appear overnight. Israel and Hezbollah's contentious and often bloody relationship began the moment that Hezbollah announced itself to the world. Thus, a brief history of the two-decade Israeli/Hezbollah struggle is in order.

In 1982, Israeli forces invaded and occupied southern Lebanon in an attempt to halt continuing Palestine Liberation Organization (PLO) raids across Israel's northern border and in retaliation against the PLO for its recent assassination attempt on Israel's ambassador in London.<sup>14</sup> Angered by this incursion into its land, a group of Islamic clerics in Lebanon responded by founding Hezbollah.<sup>15</sup>

Hezbollah was disorganized in its first few years, but by 1985 it had become a coherent organization with an efficient chain of command that enjoyed considerable support from Iran.<sup>16</sup> In 1985, Hezbollah published its manifesto to the world via an "open letter"<sup>17</sup> which revealed its expanded goal to destroy Israel: "Israel's final departure from Lebanon is a prelude to its final obliteration from existence and the liberation of venerable Jerusalem from the talons of occupation."<sup>18</sup> Lest any doubt remain regarding its intentions to carry out such a threat, Hezbollah proclaimed, "Our struggle will end only when this entity is obliterated. We recognize no treaty with it, no cease fire, and no peace agreements."<sup>19</sup> This nihilistic goal has not changed throughout the past twenty years, and Hezbollah has continued to assert its intent to destroy the state of Israel.<sup>20</sup>

Were Hezbollah merely a terrorist group that happened to be located within the territory of Lebanon which the government of Lebanon opposed, the situation today might be different. Yet Hezbollah is not simply an outlying "terrorist" organization. Rather, it is a recognized political party within the Lebanese system, its members holding twenty-three of the 128 seats in Lebanon's Parliament.<sup>21</sup> In southern Lebanon, wherein lies its greatest support, social welfare is an integral part of its efforts: Hezbollah has founded hospitals, schools, clinics, and agricultural centers in this part of the country.<sup>22</sup> Notably, it is the only faction within Lebanon that the government permits to carry weapons.<sup>23</sup>

Hezbollah considers itself a legitimate resistance group, initially asserting that it existed to fight Israel's occupation of the southern part of Lebanon.<sup>24</sup> When Israel withdrew from southern Lebanon in 2000, however, Hezbollah's attacks did not cease. Instead, Hezbollah claimed that Israel also unlawfully occupies the Shebaa Farms region, a small area located on the border between Lebanon and Syria.<sup>25</sup> As long as Israeli forces remain at Shebaa Farms, warns Hezbollah, Israel and her citizens can expect continued attacks.<sup>26</sup>

Throughout the years, Hezbollah has lived up to its threats. From 2000 to 2006, while little violence occurred along the northern Israel/southern Lebanon border, Israel and Hezbollah continuously traded attacks at other locations. Several times,

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<sup>14</sup> Wilson Lam, *Hezbollah, Israel, and the Lessons of 1982*, ANGUS REID GLOBAL MONITOR, July 26, 2006, available at [http://www.angus-reid.com/analysis/view/hezbollah\\_israel\\_and\\_the\\_lessons\\_of\\_1982/](http://www.angus-reid.com/analysis/view/hezbollah_israel_and_the_lessons_of_1982/).

<sup>15</sup> Kathryn Westcott, *Who Are Hezbollah?*, BBC NEWS ONLINE, Apr. 4, 2002, [http://news.bbc.co.uk/2/hi/middle\\_east/1908671.stm](http://news.bbc.co.uk/2/hi/middle_east/1908671.stm).

<sup>16</sup> AUGUSTUS RICHARD NORTON, *HEZBOLLAH: A SHORT HISTORY* 34–35 (Princeton Univ. Press 2007).

<sup>17</sup> *Id.* at 39 (citing Open Letter from Hezbollah, *Downtrodden in Lebanon and in the World* (Augustus Richard Norton trans. 1987), in AUGUSTUS RICHARD NORTON, *AMAL AND THE SHI'A: STRUGGLE FOR THE SOUL OF LEBANON* 167–87 (Univ. of Texas Press 1987)).

<sup>18</sup> *Id.*

<sup>19</sup> Nass al-Risala al-Maftuha allati wajahaha Hizballah ila-l-Mustad'afin fi Lubnan wa-l-Alam, *AL-SAFIR* (Beirut), Feb. 16, 1985, reprinted in An Open Letter: The Hizbollah Program, 48 *JERUSALEM Q.* (trans. Fall 1988), available at [http://www.standwithus.com/pdfs/flyers/hezbollah\\_program.pdf](http://www.standwithus.com/pdfs/flyers/hezbollah_program.pdf).

<sup>20</sup> See *id.*; Andrea Levin, *Death and Destruction are Hezbollah's Goals*, B. *GLOBE*, Aug. 8, 2006, available at [http://www.boston.com/news/world/middleeast/articles/2006/08/08/death\\_and\\_destruction\\_are\\_hezbollahs\\_goals](http://www.boston.com/news/world/middleeast/articles/2006/08/08/death_and_destruction_are_hezbollahs_goals).

<sup>21</sup> IRIN Middle East, *Lebanon: The Many Hands and Faces of Hezbollah* (Mar. 29, 2006) [hereinafter IRIN], available at <http://www.irinnews.org/report.aspx?reportid=26242>.

<sup>22</sup> *Id.*

<sup>23</sup> Kevin Sites, *Positioning for Politics: Hezbollah Denies Terrorist Ties, Increases Role in Government*, *SCRIPPS HOWARD NEWS SERVS.*, Jan. 14, 2006, available at [http://www.redding.com/redd/nw\\_columnists/article/0,2232,REDD\\_17528\\_4389698,00.html](http://www.redding.com/redd/nw_columnists/article/0,2232,REDD_17528_4389698,00.html) (stating ostensibly that the government allows Hezbollah to carry weapons to protect itself against Israel).

<sup>24</sup> IRIN, *supra* note 21.

<sup>25</sup> *Focus: Shebaa Farms*, BBC NEWS, May 25, 2000, available at [http://news.bbc.co.uk/2/hi/middle\\_east/763504.stm](http://news.bbc.co.uk/2/hi/middle_east/763504.stm).

<sup>26</sup> *Id.*

Israeli warplanes flew into Lebanon's airspace. Hezbollah, not Lebanon, routinely responded by shelling both Israeli army and civilian areas.<sup>27</sup> In 2002, Hezbollah shot and killed seven Israeli civilians near the Matsuba kibbutz in Israel.<sup>28</sup> In May 2003, Israeli soldiers on foot patrol allegedly crossed the "Blue Line," the boundary between Israel and Lebanon. Hezbollah responded by attacking Israeli positions at Shebaa farms with rockets, mortars, and small arms fire.<sup>29</sup> Hezbollah periodically fired rockets and small arms on Israeli Defense Force positions in northern Israel, though rarely causing significant damage.<sup>30</sup> Both Israeli soldiers and Hezbollah forces often kidnapped each other's members to be used in subsequent prisoner exchanges.<sup>31</sup> Tensions remained high. Attacks were scattered but consistent. Yet in southern Lebanon itself, no major problems had arisen since Israel's 2000 departure. The situation at the border of Lebanon had been calm.<sup>32</sup> Israel patrolled the Israeli side, Hezbollah the Lebanese side, while the United Nations Interim Force in Lebanon (UNIFIL) observed.<sup>33</sup>

The calm broke on 12 July 2006, when Hezbollah attacked a small Israeli military post near the Israeli/Lebanese border, killing five Israeli soldiers and capturing two more as prisoners.<sup>34</sup> Meanwhile, Hezbollah's forces fired diversionary rockets into northern Israel, injuring three people.<sup>35</sup> Hezbollah's intent in these attacks, its leaders later asserted, was to seize Israeli soldiers to use as leverage in a subsequent prisoner exchange.<sup>36</sup>

However, this plan quickly spun out of control. To the surprise of Hezbollah's leadership, Israel responded by sending armored forces into Lebanon for the first time since 2000.<sup>37</sup> Israeli forces fired rockets at the Beirut airport runways, shutting down all transportation, and into southern Lebanon, where civilian casualty numbers grew uncomfortably high.<sup>38</sup> Israeli Prime Minister Ehud Olmert promptly and publicly stated, "Lebanon is responsible and Lebanon will bear the consequences of its actions."<sup>39</sup> He added, "The Lebanese government, of which [Hezbollah] is a member, is trying to undermine regional stability."<sup>40</sup> Meanwhile, Israeli Ambassador Dan Gillerman notified the Security Council that Israel was asserting its right to self-defense under Article 51 of the U.N. Charter, and that Israel held Lebanon responsible for Hezbollah's actions.<sup>41</sup>

While most of the fifteen Security Council members generally supported Israel's invocation of self-defense, many also expressed concern at Israel attacking Lebanon, particularly given that Israel appeared to be targeting civilians and civilian property.<sup>42</sup> Indeed, Israel inflicted substantial damage to the Lebanese civilian infrastructure and population in the thirty-three day conflict. By the time that Israel and Lebanon reached a ceasefire agreement on August 14, 2006,<sup>43</sup> 116 Israeli

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<sup>27</sup> Mitchell Bard, *Hezbollah Attacks Since May 2000*, AIJAC, July 24, 2006, available at [http://www.ajiac.org.au/resources/hezb\\_00-06.html](http://www.ajiac.org.au/resources/hezb_00-06.html). (AIJAC is the Australia/Israel & Jewish Affairs Council).

<sup>28</sup> Sarah Honig, *In Love with Barricades*, JERUSALEM POST, July 26, 2006, at 10.

<sup>29</sup> Bard, *supra* note 27.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Hezbollah Not to Blame for War, Report Shows*, MALAYSIA SUN, Aug. 4, 2006, available at <http://story.malaysiasun.com/index.php/ct/9/cid/b8de8e630faf3631/id/189088/cs/1/>.

<sup>33</sup> *Id.*

<sup>34</sup> Myre & Erlanger, *supra* note 1.

<sup>35</sup> *Id.*

<sup>36</sup> See *Hezbollah Not to Blame for War, Report Shows*, *supra* note 32; *Hezbollah Seizes Israeli Soldiers*, BBC NEWS, July 12, 2006, available at [http://news.bbc.co.uk/2/hi/middle\\_east/5171616.stm](http://news.bbc.co.uk/2/hi/middle_east/5171616.stm) (referencing a Hezbollah statement that the purpose of seizing the Israeli soldiers was to trade them for Hezbollah prisoners in Israel).

<sup>37</sup> See Nicholas Blanford, *Israel Strikes May Boost Hizbullah Base: Hizbullah Support Tops 80 Percent Among Lebanese Factions*, CHRISTIAN SCI. MONITOR, July 28, 2006, available at <http://www.csmonitor.com/2006/0728/p06s01-wome.htm> (quoting Mahmoud Komati, Deputy Head of Hezbollah's politburo, "[T]he truth is—let me say this clearly—we didn't even expect [this] response . . . that [Israel] would exploit this operation for this big war against us." (alteration in original)).

<sup>38</sup> Myre & Erlanger, *supra* note 1.

<sup>39</sup> Press Release, Prime Minister Ehud Olmert, Israel, Lebanon is Responsible and Will Bear the Consequences (July 12, 2006) [hereinafter Olmert Press Release], available at <http://www.mfa.gov.il/MFA/Government/Communiques/2006/PM+Olmert+-+Lebanon+is+responsible+and+will+bear+the+consequences+12-Jul-2006.htm>.

<sup>40</sup> *Id.*

<sup>41</sup> Ambassador Dan Gillerman, *Identical Letters Dated 12 July 2006 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council*, U.N. Doc. S/2006/515 (July 12, 2006).

<sup>42</sup> Ruys, *supra* note 4, at 270.

<sup>43</sup> S.C. Res. 1701, U.N. Doc. S/RES/1701 (Aug. 11, 2006).

soldiers and forty-three Israeli civilians had lost their lives.<sup>44</sup> Yet those numbers pale in comparison to the northern casualties: In Lebanon, forty-three soldiers and 1,140 non-Hezbollah civilians perished, thirty percent of whom were children, and several of whom were U.N. peacekeepers killed in an Israeli artillery attack.<sup>45</sup> Over one million Lebanese civilians were internally displaced.<sup>46</sup>

Israel's justification for attacking Lebanon in response to Hezbollah's actions contained two elements. First, Israel argued that it had been the victim of an armed attack; therefore, under Article 51 of the U.N. Charter, Israel possessed the inherent right to act in self-defense.<sup>47</sup> Second, and more controversially, Israel asserted that Lebanon, a sovereign state, was the proper object of its use of force, because Lebanon bore the responsibility for Hezbollah's actions.<sup>48</sup>

Israel's first argument, as to its right to use military force in self-defense under Article 51, was straightforward: An armed attack had occurred against it, a member nation. "This morning," explained Ambassador Gillerman, "Hezbollah terrorists unleashed a barrage of heavy artillery and rockets into Israel, causing a number of deaths."<sup>49</sup> Simultaneously, "the terrorists infiltrated Israel and kidnapped two Israeli soldiers, taking them into Lebanon."<sup>50</sup> Presumably, Ambassador Gillerman considered both the rocket attacks and the attacks on the Israeli soldiers to qualify as "armed attacks," though it is not clear in his letter to the Security Council. Regardless, the Ambassador asserted that an armed attack had occurred, citing both incidents. As a member state, Israel possessed the inherent right to act in self-defense, he concluded.<sup>51</sup>

Israel also argued that it was justified responding with military force against Lebanon as a whole, not simply against the terrorist organization Hezbollah. Prime Minister Olmert plainly asserted, "This was an act of war [by Lebanon] without any provocation on the sovereign territory . . . of the state of Israel."<sup>52</sup> In his letter on behalf of Israel to the Security Council, Ambassador Gillerman chimed,

Responsibility for this belligerent act of war lies with the Government of Lebanon, from whose territory these acts have been launched into Israel. . . . The ineptitude and inaction of the Government of Lebanon has led to a situation in which it has not exercised jurisdiction over its own territory for many years.<sup>53</sup>

This argument was more complicated than Israel's basic assertion of its right to respond to an armed attack in self-defense. To employ force in self-defense is one thing; but when the aggressor is a non-state actor, against *whom* and *how* to respond in self-defense are entirely different matters. That Israel's position in this regard was controversial is evidenced by the Security Council's reaction to it—a much more tepid response than its philosophical agreement with Israel's right to respond in self-defense.<sup>54</sup>

Ambassador Gillerman, in an open debate at the Security Council two days after the Hezbollah attacks, elaborated upon Israel's position. Notably, he did not accuse Lebanon of explicit involvement, active participation, or even public encouragement of Hezbollah. He did not reference the fact that Hezbollah members sat in the Lebanese Parliament. Instead, he imputed culpability to Lebanon due to its "ineptitude and inaction" in properly controlling its territory in the south, and blamed Lebanon for its failure to implement Security Council Resolution 1559.<sup>55</sup>

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<sup>44</sup> Ruys, *supra* note 4, at 270.

<sup>45</sup> *Timeline of the July War 2006*, DAILY STAR: LEBANON, available at [http://www.dailystar.com.lb/July\\_War06.asp](http://www.dailystar.com.lb/July_War06.asp) (last visited Mar. 28, 2009).

<sup>46</sup> INTERNAL DISPLACEMENT MONITORING CTR., LEBANON: DISPLACED RETURN AMIDST GROWING POLITICAL TENSION (2006), available at <http://www.unhcr.org/refworld/country,,IDMC,,LBN,4562d8cf2,459e5e902,0.html>. By mid-December 2006, nearly 200,000 of these civilians remained internally displaced. *Id.*

<sup>47</sup> See, e.g., Gillerman, *supra* note 41; see *infra* Part V(B) (discussing the inherent right to self-defense under Article 51 of the U.N. Charter).

<sup>48</sup> See, e.g., Olmert Press Release, *supra* note 39.

<sup>49</sup> Gillerman, *supra* note 41.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Olmert Press Release, *supra* note 39.

<sup>53</sup> Gillerman, *supra* note 41.

<sup>54</sup> See Ruys, *supra* note 4, at 270.

<sup>55</sup> *Id.* at 277–78 (citing Ambassador Dan Gillerman, *Statement Before the Security Council During Open Debate on "The Situation in the Middle East,"* at 6, U.N. Doc. S/PV.5489 (July 14, 2006)). Security Council Resolution 1559 required, among other things, that Israel withdraw from southern Lebanon, and that Lebanon dismantle the Hezbollah militia. S.C. Res. 1559, U.N. Doc. S/RES/1559 (Sept. 2, 2004).

But were Israel's attacks on Lebanon justified under the U.N. Charter? Though Israel did not explicitly invoke either just war theory or customary international law (apart from the inherent right of self-defense that exists in Article 51), what role do these traditions play in determining the legality of Israel's actions? In short, under any of the recognized paradigms allowing the use of military force against another entity, were Israel's actions, both its decision to go to war and its conduct within that war, lawful? But first, an examination of the just war, customary international law, and U.N. Charter paradigms is in order.<sup>56</sup>

### III. Lawful Wars: Just War Tradition

The roots of the just war theory were laid hundreds of years before the founding of Christianity, fittingly among Greek philosophers. As these thinkers attempted to bring reason, order, and meaning to their society, they also sought to justify warfare on moral, religious, and juridical grounds.<sup>57</sup> The great philosopher Aristotle was the first to coin the phrase "just war," proclaiming that such a conflict must further "the moral ends of peace and justice." Men do not fight a just war simply for the sake of going to battle, he asserted, but for higher goals—ultimately, for peace, justice, or unity.<sup>58</sup>

The Roman statesman Cicero, who lived in the century prior to Christ, built upon the Aristotelian theory of just war, adding the concept of "just causes."<sup>59</sup> According to Cicero, war is only just when it is "declared and waged to recover lost goods."<sup>60</sup> A just cause is not a "willful exercise of violence but a just and pious endeavor occasioned by delict or injustice of the enemy."<sup>61</sup> Cicero was the first just war thinker to label the decision to go to war under the term "just cause," and to link that concept with Aristotle's definition of "just war."<sup>62</sup>

The first Christian thinker to grapple with and expand the just war concept was Ambrose of Milan, bishop and mentor to Saint Augustine of Hippo. According to Ambrose, courage alone is not enough; the cause itself must be just, and acts within the war (*jus in bello*) must be ethical.<sup>63</sup>

#### A. Saint Augustine of Hippo (c. 354–430 AD)

The first Western thinker systematically to expand upon these ideas was Saint Augustine of Hippo, who, due to his enormous contributions to the subject, is known as "the father of the Western theory of just war."<sup>64</sup> Augustine penned his thoughts over a period of several decades,<sup>65</sup> as Rome slowly was coming apart at the seams, battle victims of barbarians such as the Visigoths and the Vandals.<sup>66</sup> Indeed, it is believed that Augustine himself perished, either from starvation or exposure, as the Vandals were tearing down the walls of his hometown.<sup>67</sup>

Within this framework, well aware of the alarming enemies that Rome faced and the continuing decline of the Roman army, Augustine provided his just war theory. He proposed that wars are just only when they promote or preserve the peace,

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<sup>56</sup> To explore "lawfulness" under the U.N. Charter requires examining subsequent International Court of Justice opinions, as well as U.N. Security Council Resolutions (as Israel referenced in its justification for attacking Lebanon). In analyzing Israel's actions under the U.N. Charter, therefore, this article will also consider these influences.

<sup>57</sup> FREDERICK H. RUSSELL, *THE JUST WAR THEORY IN THE MIDDLE AGES 1* (Cambridge Univ. Press 1975).

<sup>58</sup> *Id.* at 4.

<sup>59</sup> *Id.* at 5.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 14–15.

<sup>64</sup> JOHN MARK MATTOX, *SAINT AUGUSTINE AND THE THEORY OF JUST WAR 1–2* (Continuum Books 2006).

<sup>65</sup> LOUIS J. SWIFT & LOUIS SWIFT, *EARLY FATHERS ON WAR AND MILITARY SERVICE 110* (Michael Glazier, Inc. 1983).

<sup>66</sup> ALEX J. BELLAMY, *JUST WARS: FROM CICERO TO IRAQ 26* (Polity Press 2006).

<sup>67</sup> *Id.*

punish the evildoers in other nations, or recover possessions wrongfully taken.<sup>68</sup> Further, the sovereign must engage in war as a last resort, as the competent authority, and with the right intention.<sup>69</sup> Each of these elements of Saint Augustine's just war theory will be considered in turn.

*Secure the peace.* To Augustine, a just war ultimately must be fought to secure the peace. War never should be an end in itself.<sup>70</sup> As Augustine advised Roman general Boniface,

Peace should be your aim; war should be a matter of necessity so that God might free you from necessity and preserve you in peace. One does not pursue peace in order to wage war; he wages war to achieve peace. And so, even in the act of waging war be careful to maintain a peaceful disposition.<sup>71</sup>

In his seminal work, *City of God*, Augustine noted, "Hence it is an established fact that peace is the desired end of war. For every man is in quest of peace, even in waging war, whereas no one is in quest of war when making peace."<sup>72</sup>

*Punish Evildoers.* Perhaps Augustine's most interesting remarks regarding just war, given our analysis of Israel's conduct in Lebanon, center upon his mandate of punishing evildoers if the evildoers' own state neglects to do so. Said Augustine, "As a rule just wars are defined as those which avenge injuries, *if some nation or state against whom one is waging war has neglected to punish a wrong committed by its own citizens*, or to return something that was wrongfully taken."<sup>73</sup> Taking this concept a bit further, Augustine even suggested a duty element to the punishment of evildoers: "It is the other side's wrongdoing that *compels* the wise man to wage just wars."<sup>74</sup>

*Last Resort.* War should be the last resort. In a letter to the Roman ambassador Darius, Augustine asserted, "Preventing war through persuasion and seeking or attaining peace through peaceful means rather than through war are more glorious things than slaying men with the sword."<sup>75</sup>

*Competent Authority.* For Augustine, no war was just unless undertaken by the state sovereign. Believing that human governments are ordained by God, he asserted that the right to wage war therefore belongs exclusively to sovereigns, not to individuals.<sup>76</sup> "It makes a difference for what reasons and under whose authority men undertake wars that are to be waged. . . . [T]he planning of it [rests] with the chief of state."<sup>77</sup>

*Right Intention.* Even if all other conditions exist to merit a just war, a wrong intention can invalidate the pursuit. A war fought with the right intention is one that is "waged by the good in order that, by bringing under the yoke the unbridled lusts of men, those vices might be abolished which ought, under a just government, to be either extirpated or suppressed."<sup>78</sup> No sovereign should delight in violence, and Augustine asserts that such will not occur for the sovereign who takes action with right intention.<sup>79</sup>

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<sup>68</sup> Joseph L. Falvey, Jr., *Our Cause Is Just: An Analysis of Operation Iraqi Freedom Under International Law and the Just War Doctrine*, 2 AVE MARIA L. REV. 65, 67 (Spring 2004). The recovery of possessions wrongfully taken does not apply as directly to the Lebanon War; thus it will not be addressed separately in this article.

<sup>69</sup> MATTOX, *supra* note 64, at 45–60.

<sup>70</sup> See LARRY MAY ET AL., *THE MORALITY OF WAR: CLASSICAL AND CONTEMPORARY READINGS 16–17* (Pearson Prentice Hall 2006) (quoting SAINT AUGUSTINE, *CITY OF GOD* bk. 12 (A.D. 412–422)) ("Peace is the Instinctive Aim of All Creatures, and is Even the Ultimate Purpose of War.").

<sup>71</sup> SWIFT & SWIFT, *supra* note 65, at 114–15 (quoting Saint Augustine, *Letter 189.6*).

<sup>72</sup> MAY ET AL., *supra* note 70, at 16–17 (quoting AUGUSTINE, *supra* note 70, bk. 12).

<sup>73</sup> SWIFT & SWIFT, *supra* note 65, at 135 (emphasis added) (quoting Saint Augustine, *Questions on the Heptateuch 6.10*); see *infra* notes 83–87 and accompanying text (describing Saint Thomas Aquinas' revision of this definition by explicitly allowing for one state to use military force against another state for the wrongs of its citizenry).

<sup>74</sup> SWIFT & SWIFT, *supra* note 65, at 116 (quoting AUGUSTINE, *supra* note 70, bk. 19.7).

<sup>75</sup> *Id.* at 115 (quoting Saint Augustine, *Letter 229.2*). However, Saint Augustine did not require that all means short of war must first be exhausted. See MATTOX, *supra* note 64, at 79.

<sup>76</sup> See MATTOX, *supra* note 64, at 56.

<sup>77</sup> SWIFT & SWIFT, *supra* note 65, at 129 (quoting Saint Augustine, *Against Faustus 22.75*).

<sup>78</sup> MATTOX, *supra* note 64, at 54 (quoting AUGUSTINE, *supra* note 70, bk. 19.7).

<sup>79</sup> *Id.* at 55. In addition to Saint Augustine's robust proposals regarding *jus ad bellum*, he also was one of the first theorists to suggest the importance of just conduct *within* war (i.e., *jus in bello*). Saint Augustine believed that for a war to be just, it must not only be entered into, but also fought, in a just manner.

## B. Saint Thomas Aquinas (c. 1225–1274 AD)

Saint Thomas Aquinas, philosopher, theologian, and Italian priest, burst upon the scene after years of relative silence regarding Augustine's just war concepts. The crusade era was at its zenith, with both popes and laity equating "just war" with "crusade."<sup>80</sup> With few original thoughts provided on the concept of just war and with Augustine now hundreds of years behind them, church and secular leaders "construct[ed] . . . a just war built on the strength of traditional and accepted notions as is witnessed by the calls of a holy war or crusade as a way to internal peace."<sup>81</sup>

Enter Thomas Aquinas. Well-versed in the philosophies of both Augustine and Aristotle, he seasoned the Western world with original and well-developed thought, not only about just war, but about a multitude of theological subjects. In his seminal work *Summa Theologica*, Aquinas revisited the just war theory.<sup>82</sup> Instead of parroting the religious and military leaders of his day, indeed without addressing crusades at all, Aquinas fused Aristotelian and Augustinian thought, added his own elaborations, and, in a brief but rich explanation, laid the theory of just war that the Western world still holds today.<sup>83</sup>

Aquinas addressed the criteria for just war (*jus ad bellum*) by anticipating several objections to military violence. Most of his thoughts centered on the response to his question, "Whether it is always sinful to wage war."<sup>84</sup> Aquinas responded in the negative, but qualified that response by asserting that for a war to be just, three criteria must exist: proper authority, just cause, and rightful intention.<sup>85</sup> Each of Aquinas' elements will be discussed in turn.

*Proper Authority.* As did Augustine, Aquinas held that only the state sovereign possesses the authority to engage in warfare. A private individual cannot on his own initiative declare war. It is the authority that "beareth the sword" that is divinely appointed to declare and wage war.<sup>86</sup>

*Just Cause.* Those being attacked must "deserve it on account of some fault."<sup>87</sup> Relevant to our later discussion, Aquinas reinforced Augustine's earlier position<sup>88</sup> regarding what "faults" create a just cause for going to war: "A just war is wont to be described as one that avenges wrongs, *when a nation or state has to be punished for refusing to make amends for the wrongs inflicted by its subjects*, or to restore what has been seized unjustly."<sup>89</sup>

The acute eye will notice that differences emerge here between Aquinas and Augustine. First, while Augustine held that the *negligence* of a state is enough to rise to a level meriting punishment by military force, Aquinas raised the bar, espousing that only the *refusal* of a state to punish its own wrongdoers justifies another nation's use of force.<sup>90</sup> Apparently, to Aquinas, only another nation's *willfulness*, not its negligence, would make it the lawful object of military force. On the other hand,

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*Id.* at 60. His words suggest a belief that "just manner" is the fruition of right intention; it includes abiding by the doctrine of military necessity and minimizing the taking of lives to the greatest possible extent.

For he whose aim is to kill is not careful how he wounds, but he whose aim it is to cure is cautious with his lancet; for the one seeks to destroy what is sound, the other that which is decaying. . . . [W]hat is important to attend to but this: who were on the side of truth, and who were on the side of iniquity; who acted from a desire to injure, and who from a desire to correct what was amiss?

*Id.* at 61 (quoting Saint Augustine, *Letter 93.8*).

<sup>80</sup> RUSSELL, *supra* note 57, at 39.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 25.

<sup>83</sup> *See id.* at 258–59.

<sup>84</sup> SAINT THOMAS AQUINAS, *SUMMA THEOLOGICA*, II.2.40, *quoted in* ST. THOMAS AQUINAS ON POLITICS AND ETHICS 64 (Paul E. Sigmund, ed. & trans., W.W. Norton & Co. 1988), *available at* <http://www.ccel.org/a/aquinas/summa/SS/SS040.html>.

<sup>85</sup> *Id.* at 64–65.

<sup>86</sup> *Id.* at 64.

<sup>87</sup> *Id.*

<sup>88</sup> *See supra* note 71 and accompanying text.

<sup>89</sup> ST. THOMAS AQUINAS ON POLITICS AND ETHICS, *supra* note 84, at 64–65.

<sup>90</sup> *See* SWIFT & SWIFT, *supra* note 65, at 135 (quoting Saint Augustine, *Questions on the Heptateuch 6.10*). However, Augustine's quote also simply may have been a translation issue. If so, it is a critical word that can make the difference as to whether or not a war is perceived as just under Augustine's just war theory.

Aquinas asserted what Augustine did not explicitly address: Once that state reaches the “willfulness” threshold, the *state itself*—not merely the “evildoers” within that state—is a lawful object of military attack.<sup>91</sup>

*Rightful Intention.* The sovereign must possess a “rightful intention, so that they intend the advancement of good, or the avoidance of evil.”<sup>92</sup> Again quoting Augustine, Aquinas explained that wars fought with the right intention are those waged “for the sake of peace, to restraint the evildoers and assist the good.”<sup>93</sup> Indeed, a war may be declared by the proper authority, with a just cause, but still be unlawful if the intentions are not right.<sup>94</sup> Securing the peace, in particular, is essential to rightful intention. As did Augustine, Aquinas asserted that the goal of all wars is peace. Indeed, drawing upon Augustine’s “duty” language, Aquinas similarly linked defense of the common good to a moral imperative,<sup>95</sup> indicating that *inaction* in the face of attack is as sinful as *action* by attack when unwarranted. Duty compels the just sovereign to act justly; when attacked, the sovereign must defend his community.

Yet Aquinas did not stop here. Instead, he introduced the concept now commonly known as “double-effect.”<sup>96</sup> Namely, an action taken can produce two consequences, “only one of which is intended and the other outside our intention.”<sup>97</sup> Explained Aquinas, “Moral acts are classified on the basis of what is intended, not of what happens outside of our intention since that is incidental to it.”<sup>98</sup> For example, a sovereign may choose to attack another nation’s enemies, knowing that innocent bystanders may also be killed in the process. The “double effect,” then, is the hastening of the war’s end through the killing of enemy soldiers (a “good”), and the death of innocent bystanders, perhaps even children (an “evil”). Whether the decision to attack is good or evil depends upon the intent of the sovereign.<sup>99</sup> If the sovereign’s goal is to end the war by killing soldiers, he possesses a rightful intention.<sup>100</sup> If his goal is to cause suffering to the civilian population, he does not possess a rightful intention, and thus the war is not just.<sup>101</sup> The question then becomes: Is the sovereign’s purpose in going to war to promote the good by bringing peace to the state, or is it to make the enemy, particularly noncombatants, suffer? The answer to this question bears on a determination of rightful intention.<sup>102</sup>

#### IV. Lawful Wars: Customary International Law

While just war theory is a more philosophical approach to studying the lawfulness of using military force, customary international law looks to past *practice* that states have deemed legally acceptable. Customary international law is commonly

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<sup>91</sup> This argument is quite similar to that now espoused by international law scholars who opine that state actors may be held responsible for the actions of their non-state actor citizenry. See, e.g., *infra* notes 163–70 and accompanying text.

<sup>92</sup> ST. THOMAS AQUINAS ON POLITICS AND ETHICS, *supra* note 84, at 64.

<sup>93</sup> *Id.* at 65.

<sup>94</sup> *Id.* Saint Aquinas, albeit indirectly, also provided critical tenets for the *methods* of waging war in his “rightful intention” prong. To Aquinas, even if the sovereign enters a war with the rightful intention—for example, to defend his nation—should that intention become evil, then just war no longer exists. R.J. Araujo, *Anti-Personnel Mines and Peremptory Norms of International Law: Argument and Catalyst*, 30 VAND. J. TRANSNAT’L L. 1, 8 (1997). Intending evil rather than good reasonably includes killing noncombatants; Aquinas echoes this thought in his statement on the “evil” of “slaying the innocent.” AQUINAS, *supra* note 84, at II.2.64.6, available at <http://www.ccel.org/a/aquinas/summa/SS/SS064.html#SSQ64OUTP1>. Or a rightful intention could be sullied by destroying more than what military necessity requires, perhaps out of rage or a desire for revenge. *Id.* Quoting Augustine regarding “rightful intention,” Aquinas reminds his readers, “True religion looks upon as peaceful those wars that are waged *not for motives of aggrandizement*, or cruelty . . . . The passion for inflicting harm, the cruel thirst for vengeance, . . . and suchlike things, all these are rightly condemned in war.” *Id.* at II.2.40.1 (emphasis added).

<sup>95</sup> RUSSELL, *supra* note 57, at 262.

<sup>96</sup> ST. THOMAS AQUINAS ON POLITICS AND ETHICS, *supra* note 84, at 70–71.

<sup>97</sup> *Id.* at 70.

<sup>98</sup> *Id.*

<sup>99</sup> *See id.*

<sup>100</sup> *See id.* at 70–71.

<sup>101</sup> *See id.* at 71.

<sup>102</sup> See, e.g., Paul Ramsey, *Contemporary Problems in Thomistic Ethics: War and the Christian Conscience*, in ST. THOMAS AQUINAS ON POLITICS AND ETHICS, *supra* note 84, at 226, 227. While Aquinas’ calculus does not explicitly address the issue of proportionality, this “double-effect” description suggests that such a calculus is necessary as a matter of course. See also *supra* note 94 (discussing Aquinas’ prohibition against destroying more than military necessity requires). The most helpful modern definition of proportionality is found in Protocol I of the Geneva Conventions. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 52(5)(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; see *infra* note 308 and accompanying text.

defined as “a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>103</sup> The Statute of the International Court of Justice (ICJ) echoes that it is “evidence of a general practice accepted as law.”<sup>104</sup> Thus customary international law forms, or ripens,<sup>105</sup> when the elements of general practice and acceptance as law exist.<sup>106</sup>

These elements, however well-recognized in theory, have proven elusive; particularly challenging has been creating a consensus for comprehensive definitions of “general” and “practice.”<sup>107</sup> For “practice,” the primary debate centers upon what evidence should be considered as legitimate.<sup>108</sup> For “general,” the primary focus is upon how consistent or widespread such practice must be—both across the 194 states in the world, and over time.<sup>109</sup> Some scholars hold that “general practice must be general, but it need not be universal”;<sup>110</sup> others insist that “the number of states involved in the custom-forming process” does not matter in determining whether a general practice exists.<sup>111</sup> The Third Restatement of Foreign Relations’ view on this question is that:

[t]he practice necessary to create customary law may be of comparatively short duration, but . . . it must be “general and consistent.” A practice can be general even if it is not universally followed . . . but it should reflect wide acceptance among the states particularly involved in the relevant activity. Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary international law though it might become “particular customary law” for the participating states.<sup>112</sup>

Despite its definitional challenges, customary international law is not as elusive as it may seem. One letter from 1841 has proven the sturdiest base for consensus on customary international law norms. Known as the *Caroline* incident, many scholars and historians view its doctrine as providing for nearly two centuries the essential guidelines of customary international law on the use of force.<sup>113</sup> The *Encyclopedic Dictionary of International Law* notes, “Under customary international law, it is generally understood that the correspondence between the USA and UK of 24 April 1841, arising out

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<sup>103</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS]; see also JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 21, 23 (2005).

<sup>104</sup> Statute of the International Court of Justice art. 38, June 26, 1945, available at [http://www.icj-cij.org/documents/index.php?p=4&p2=2&p3=0#CHAPTER\\_II](http://www.icj-cij.org/documents/index.php?p=4&p2=2&p3=0#CHAPTER_II).

<sup>105</sup> Custom is said to ripen, crystallize or harden into customary international law. See, e.g., Major Nicholas F. Lancaster, *Occupation Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Fourth Geneva Convention Still be Considered Customary International Law?*, 189 MIL. L. REV. 51, 68 n.127 (2006) (ripens); Vincy Fon & Francesco Parisi, *International Customary Law and Articulation Theories: An Economic Analysis*, 2 B.Y.U. INT’L L. & MGMT. REV. 201, 206 n.5 (2006) (same); Leah M. Nicholls, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and Its 161 Rules of Customary International Humanitarian Law*, 17 DUKE J. COMP. & INT’L L. 223, 240 (2006) (crystallizes); Robert Cryer, *Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 239, 243 (2006) (same); Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT’L L. 119, 148–49 (2007) (hardens); Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 784 (2001) (same).

<sup>106</sup> RESTATEMENT OF FOREIGN RELATIONS, *supra* note 103, § 102(2); see also YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 5 (2004); Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817, 817 (2005) (“[T]hat, at least in the field of humanitarian law, customary law continues to thrive and to depend in significant measure on the traditional assessment of both state practice and *opinio juris*.”). But see GOLDSMITH & POSNER, *supra* note 103, at 14–15, 84–106, 185–203, 225 (rejecting the traditional assumption that States comply with international law out of good faith instead of self-interest).

<sup>107</sup> See Michelle M. Kundmueller, *The Application of Customary International Law in U.S. Courts: Custom, Convention, or Pseudolegislation?*, 28 J. LEGIS. 359, 360–65 (2002).

<sup>108</sup> See, e.g., GOLDSMITH & POSNER, *supra* note 103, at 23 (“There is little agreement about what type of state action counts as state practice.”); Kundmueller, *supra* note 107, at 363.

<sup>109</sup> See, e.g., GOLDSMITH & POSNER, *supra* note 103, at 24.

<sup>110</sup> Kundmueller, *supra* note 107, at 362.

<sup>111</sup> *Id.* (quoting KAROL WOLFKE, *CUSTOM PRESENT IN INTERNATIONAL LAW* 53 (2d. rev. ed. 1993)); see also GOLDSMITH & POSNER, *supra* note 103, at 24.

It is practically impossible to determine whether 190 or so states in the world engage in a particular practice. Thus, customary international law is usually based on a highly selective survey of state practice that includes only major powers and interested states. . . . Increasingly, courts and scholars ignore the state practice requirement altogether.

*Id.*

<sup>112</sup> RESTATEMENT OF FOREIGN RELATIONS, *supra* note 103, at 21.

<sup>113</sup> Timothy Kearley, *Raising the Caroline*, 17 WIS. INT’L L. J. 325, 325 (1999).

of the *Caroline Incident* expresses the rules on self-defense.”<sup>114</sup> Before examining the contents of that correspondence, a historical overview is in order.

During the 1837 Canadian Rebellion against Great Britain, many U.S. citizens sympathized with Canada.<sup>115</sup> In December 1837, a group of armed men, including several U.S. citizens, seized Navy Island, located on Canada’s side of the Niagara River and began to use the island as a base from which to attack British forces.<sup>116</sup>

On 29 December 1837, the *Caroline*, a seized Navy Island ship, made several trips between New York and Canada, carrying arms and fighting men.<sup>117</sup> The commander of the local British forces, Colonel Alan McNab, determined that he would attack the ship once it reached Canadian territory.<sup>118</sup> However, by nightfall the *Caroline* had managed to return again to the United States.<sup>119</sup> Despite this turn of events, Colonel McNab decided to continue with his plan to attack the ship, deeming it a threat to his forces.<sup>120</sup> The attack met no resistance from those on board,<sup>121</sup> which included twenty-three American citizens who had requested permission to sleep on the ship due to their inability to find lodging at a nearby tavern.<sup>122</sup> Two men on board were killed, and the British burned the ship and sent it over Niagara Falls.<sup>123</sup>

Then-Secretary of State Daniel Webster responded to the incident by sending a series of letters to his British counterpart, Lord Ashburton.<sup>124</sup> Webster’s letters form the *Caroline* doctrine—the basis for customary international law governing the use of force in self-defense.<sup>125</sup>

To Britain’s claims of self-defense,<sup>126</sup> Webster responded that the use of force against another nation is permissible only when the attacking state can “show a necessity of self-defense, *instant, overwhelming*, leaving *no choice of means*, and *no moment for deliberation*.”<sup>127</sup> Even if such necessity exists, Webster argued that the principle of *proportionality* still applies. The attacking state also must show how,

even supposing the necessity of the moment authorized them to enter the territories of the United States at all, [that they] did nothing *unreasonable* or *excessive*; since the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the “*Caroline*” was impracticable, or would have been unavailing; it must be shown that daylight could not be waited for; that there could be no attempt at discrimination, between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her, in the darkness of night, while moored to the shore, and while unarmed men were asleep on board, killing some, and wounding others . . . .<sup>128</sup>

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<sup>114</sup> *Id.* at 329 (quoting ENCYCLOPEDIA OF INTERNATIONAL LAW 361 (Clive Parry et. al. eds., 1988)).

<sup>115</sup> *Id.* at 328.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Louis-Phillipe Rouillard, *The Caroline Case: Anticipatory Self-Defense in Contemporary International Law*, 1 MISKOLC J. INT’L L. No. 2, 104 (2004), available at <http://www.uni-miskolc.hu/~wwwdrint/20042rouillard1.htm>.

<sup>123</sup> Kearley, *supra* note 113, at 328.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 328–29.

<sup>126</sup> *Id.* at 325. It is interesting to note the many parallels between the United Kingdom claims to the United States in 1837–1841, and the Israel claims to Lebanon in 2006.

<sup>127</sup> Letter from Sec’y of State Daniel Webster to Lord Ashburton (Apr. 24, 1841) [hereinafter Webster Letter] (emphasis added), available at [http://avalon.law.yale.edu/19th\\_century/br-1842d.asp](http://avalon.law.yale.edu/19th_century/br-1842d.asp).

<sup>128</sup> *Id.* (emphasis added).

Hence, the *Caroline* incident introduced the customary international law requirements of weighing *necessity* and *proportionality*.<sup>129</sup> For the use of force to pass the “necessity” test, articulated Webster, an immediate and overwhelming threat unequivocally must exist, with no other option but force available in response. The mere possibility, even the *strong* possibility, of a threat is not enough to create the right.<sup>130</sup>

That Webster did not stop with the necessity test is important to recognize, particularly when we subsequently analyze the 2006 Israel-Lebanon War.<sup>131</sup> The existence of necessity alone is not enough to justify using whatever methods a state has at its disposal to defend itself. Instead, the *actions* of the state in its use of military force matter, and must be tempered to ensure no needless loss of innocent life. The principle of proportionality applies. Unreasonable or excessive force, or force used prematurely without considering other options, delegitimizes a state’s actions, even when necessity is present. In the *Caroline* incident, innocent men lost their lives. Other options were available to the British government. Britain violated the proportionality principle through its conduct *within* its decision to attack, and thus violated international law.

The principles espoused in the *Caroline* incident have continued for nearly two centuries to be the “universally accepted standard for lawful self-defense.”<sup>132</sup> As with the just war theory, many scholars view the principle of proportionality as overlapping the distinction between *jus ad bellum* and *jus in bello*, because it includes both the initial decision to resort to arms, and the conduct of hostilities once that decision is made:<sup>133</sup>

“Proportionality” in the self-defense context could mean either that the intensity of force used in self-defense must be about the same as the intensity defended against, or it could mean that the force, even if it is more intensive than that, is permissible so long as it is not designed to do anything more than protect the territorial integrity or other vital interests of the defending party.<sup>134</sup>

## V. United Nations Charter

Article 2(4) of the U.N. Charter provides, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>135</sup> Since 1945, this provision has been the core guiding principle for states’ use of military force.<sup>136</sup> The drafters’ choice of the term “use of force” instead of “war” was deliberate.<sup>137</sup> It reflected their broad intent to outlaw *any* type of military action against another state, not simply to outlaw *declared war*.<sup>138</sup> The negotiating history of the U.N. Charter further reveals that “Article 2(4) was intended to be a comprehensive prohibition on the use of force by one state against the other.”<sup>139</sup>

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<sup>129</sup> Even for those scholars who have argued for limiting the *Caroline* doctrine to similar circumstances, certainly the crises between Israel and Lebanon, and Israel’s decision to attack Lebanon under the self-defense argument, is such a “similar circumstance,” meriting the application of the *Caroline* doctrine. See Kearley, *supra* note 113, at 325 (advocating a more limited view of the applicability of the *Caroline* doctrine).

<sup>130</sup> Webster Letter, *supra* note 127 (emphasis added).

<sup>131</sup> See *infra* Part VI.C (analyzing whether Israel violated the *jus in bello* customary international law principles of necessity and proportionality).

<sup>132</sup> Ryan Schildkraut, *Where There are Good Arms, There Must Be Good Laws: An Empirical Assessment of Customary International Law Regarding Preemptive Force*, 16 MINN. J. INT’L L. 193, 199 (2007). Presumably, the men killed were U.S. citizens and perhaps innocent of any wrongdoing on their part; either way, Webster seems particularly concerned with the fact that at the time of the attack, they were unarmed.

<sup>133</sup> Frederic L. Kirgis, *Some Proportionality Issues Raised by Israel’s Use of Armed Force in Lebanon*, 10 ASIL INSIGHT, No. 20, Aug. 17, 2006, available at <http://www.asil.org/insights/2006/08/insights060817.html>.

<sup>134</sup> *Id.*

<sup>135</sup> U.N. Charter art. 2, para. 4.

<sup>136</sup> Stephanie Bellier, *Unilateral and Multilateral Preventive Self-Defense*, 58 ME. L. REV. 507, 508 (2006). Some scholars have asserted that Article 2(4) was “revolutionary” because in outlawing the use of force, it prohibited what people always had assumed was a natural part of life, namely conflict and war. See *id.* However, that position is somewhat untenable, as evidenced by the two exceptions to Article 2(4) within the Charter itself. Furthermore, that war was to be accepted as a normal part of life is not found in the just war theory, as evidenced by Aquinas’ question as to whether it “is . . . *always* sinful” to wage war, indicating that war is an abnormality to be avoided in most cases.

<sup>137</sup> Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L. J. 41, 42 (2002); see Albrecht Randelzhofer, *Article 51*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 788, 790 (Bruno Simma et al. eds., 2d ed. 2002). The Briand-Kellogg Pact in 1928 had outlawed war in Article I; however, Article 2(4) expanded the prohibitions on the use of force to include all types of conflicts. *Id.* at 789.

<sup>138</sup> Murphy, *supra* note 137, at 42.

<sup>139</sup> *Id.* at 42–43 (citations omitted).

The Charter provides two exceptions to this general prohibition against the use of force. The first exception is U.N. Security Council authorized action pursuant to Chapter VII; the second is the inherent right to self-defense under Article 51.

#### A. U.N. Security Council Authorized Action Pursuant to Chapter VII

Regarding the first exception, the Security Council may authorize a state to use military force under Chapter VII in order to “maintain or restore international peace and security.”<sup>140</sup> Such authorization, from the state’s perspective, is unassailable, as the Security Council explicitly approves the use of military force, and as member states have agreed to support the Security Council’s decisions.<sup>141</sup>

#### B. Inherent Right to Self-Defense Under Article 51

Because U.N. Security Council authorizations to use military force are relatively rare,<sup>142</sup> Article 51, the second exception, has “become the pivotal point upon which disputes concerning the lawfulness of the use of force in inter-state relations usually concentrate.”<sup>143</sup> Article 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council . . . .<sup>144</sup>

Article 51, therefore, allows for the “inherent right” of self-defense if “an armed attack occurs.” A strict textual reading of the article places three conditions on the use of force by an individual state.<sup>145</sup> First, an individual state’s use of force is permitted only when an “armed attack” on its territory has occurred.<sup>146</sup> Second, the Security Council is to supervise any state’s use of force, evidenced by the requirement for states to “immediately report” their use of force to the Security Council.<sup>147</sup> Third, the right to use force is temporary; it terminates when the Security Council becomes involved by taking “measures necessary to maintain international peace and security.”<sup>148</sup>

The continuing challenge of Article 51, particularly in the post 9/11 world, lies in determining what constitutes an armed attack,<sup>149</sup> and whether the article applies to attacks by non-state actors (as opposed to applying exclusively to attacks by other

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<sup>140</sup> U.N. Charter art. 42.

<sup>141</sup> *See id.* arts. 25, 48(1), 49.

<sup>142</sup> The U.N. Security Council has authorized the use of broad military force only twice in its history. *See* Jutta Brunnee, *The Use of Force Against Iraq: A Legal Assessment*, 59 BEHIND THE HEADLINES, No. 4 (2002); S.C.Res. 83, U.N. Doc. S/RES/83 (June 27, 1950) (authorizing military force in Korea); S.C. Res. 678, U.N. Doc. S/RES/0678 (Nov. 29, 1990) (authorizing military force to eject Iraq from Kuwait). The U.N. Security Council has also authorized force in a few peacekeeping missions in the 1990s (e.g., Somalia, Haiti, Rwanda, and Bosnia). However, as peacekeeping missions, they differ significantly from the nature of the conflicts that we are examining here. *See* Lawyers’ Comm. on Nuclear Policy, Inc., *The United Nations Charter and the Use of Force Against Iraq* (Oct. 2, 2002), available at <http://lcnp.org/global/Iraqstatemt.3.pdf>.

<sup>143</sup> Randelzhofer, *supra* note 137, at 790; *see infra* Part V.B.1 (discussing Judge Simma’s Commentary to the U.N. Charter).

<sup>144</sup> U.N. Charter art. 51.

<sup>145</sup> Bellier, *supra* note 136, at 513. Judge Simma interprets a fourth requirement in Article 51, that “the State acting in self-defense must observe the principle of ‘proportionality.’” Randelzhofer, *supra* note 137, at 790. While it is true that a state must observe this principle, it is the view of the present author that this principle is not found in Article 51, but rather in the just war theory and customary international law.

<sup>146</sup> U.N. Charter art. 51.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* *But see* Randelzhofer, *supra* note 137, at 804. Claiming that

Since the [Security Council] has, for a long time, been far from performing its intended function, self-defence has become the regular course of action. Therefore, the restriction envisaged by the reporting duty, as well as the related duty to discontinue defensive measures, has so far been almost devoid of practical significance.

*Id.*

<sup>149</sup> Ironically, or perhaps sagely, the U.N Charter provides no definition of “armed attack.” While the Charter uses the term “attack” or “aggression” in articles 1, 39, 51, and 53, it never defines either term’s meaning. *See id.* at 794. *But see* G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (Dec. 14, 1974); *infra* note 155 and accompanying text (U.N. General Assembly Resolution defining *aggression*).

states).<sup>150</sup> Put another way, can the actions of a non-state actor trigger responding in self-defense against another sovereign state, and if so, under what circumstances? Several sources assist us in addressing these issues, and to these sources we now turn.

### 1. Commentary on the United Nations Charter and Nicaragua

Judge Bruno Simma's Commentary is widely cited as the preeminent interpretive authority for the U.N. Charter.<sup>151</sup> In his work, Judge Simma's examination of Article 51 includes exploring the meaning of armed attack, and the level of responsibility and culpability that a state bears for the actions of non-state actors within its borders.<sup>152</sup> Much of his analysis centers upon the ICJ's decision in *Nicaragua v. United States*.<sup>153</sup> In this section, we will examine Judge Simma's Commentary, particularly in light of his interpretation of the *Nicaragua* case.

The *Nicaragua* court provided no definition of armed attack, and no source prior to *Nicaragua* had done so. However, the ICJ noted in its opinion, "There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks."<sup>154</sup> The ICJ then provided several examples of activities that would constitute armed attacks, stipulating that such attacks include not only cross-border actions by regular forces, but also a state's participation in the use of force by "military organized unofficial groups," as reinforced by U.N. General Assembly Declaration 3314 (1974), *Definition of Aggression*.<sup>155</sup> Explained the *Nicaragua* court:

[I]t may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of

<sup>150</sup> Ruys, *supra* note 4, at 274.

<sup>151</sup> See Andreas L. Paulus, *Professor Bruno Simma to be Judge at the International Court of Justice in the Hague*, 4 GERMAN L.J. 2 (Feb. 1, 2003); *The Court: All Members*, INT'L COURT OF JUSTICE, available at <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2> (last visited Mar. 29, 2009).

<sup>152</sup> Randelzhofer, *supra* note 137, at 788–806.

<sup>153</sup> In the *Nicaragua* case, the Court addressed the issue of the United States providing assistance to Nicaraguan "contras" (fighting to overthrow the established Nicaraguan government) and the United States' position that it was lawfully acting in collective self-defense. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. LEXIS 4, at \*18, \*33–34 (June 27). Nicaragua brought suit against the United States at the International Court of Justice, alleging that throughout the early 1980s, the United States had assisted the contras by providing military equipment and tactical information to assist them in their struggle. *Id.* at \*4, \*18. The crowning frustration, according to Nicaragua, was that in early 1984, the United States had assisted the contras in laying mines in several Nicaraguan harbors, resulting in two lives lost, fourteen people injured, and twelve fishing vessels destroyed, all without prior warning. *Id.* at \*82–83. The United States, though asserting that the Court had no jurisdiction to hear the case, submitted a written justification for its actions: that it was acting in collective self-defense of neighboring El Salvador because Nicaragua was aiding guerrillas in that country. *Id.* at \*8, \*21. The Court determined that the United States' use of force was both out of scale to the threat, and continued after any perceived threat had been neutralized. *Id.* at \*262. Thus the court ruled that the United States had violated the customary international law principle of proportionality. *Id.*

<sup>154</sup> *Id.* at \*215.

<sup>155</sup> *Id.*; see G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (Dec. 14, 1974).

Article 1. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition. . . .

Article 3. Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State . . . ;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

. . . .

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State . . . ;

. . . .

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

*Id.* arts. 1, 3. Regarding the ICJ's decision to refer to a definition of "aggression" when providing an example of "armed attack": "Even though the GA's Definition of Aggression does not as such define the notion of 'armed attack,' its Art. 3 does in fact give some useful indications on how to interpret this term." Randelzhofer, *supra* note 137, at 796.

such gravity as to amount to” . . . an actual armed attack conducted by regular forces, “or its substantial involvement therein.”<sup>156</sup>

Judge Simma notes, “The ICJ strongly hints that it does not see any difference in content between the term ‘armed attack’ under customary international law and that used in Art. 51 of the U.N. Charter.”<sup>157</sup> The key for determining whether an activity qualifies as an armed attack is whether “such an operation, because of its *scale and effects*, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.”<sup>158</sup>

The concept of scale and effects is critical. The Court in *Nicaragua* was not suggesting that should an attack happen on a frontier, it is *ipso facto* not an armed attack.<sup>159</sup> Instead, in determining whether an armed attack has occurred, the issue is the level of force used and the result of that force (i.e., its “scale and effects”), not the location of the incident itself.<sup>160</sup> “An armed attack must involve at least the use of force producing (or liable to produce) serious consequences, epitomized by territorial intrusions, human casualties or considerable destruction of property.”<sup>161</sup>

Using this scale and effects test to determine the level of force does not permit a non-state actor to stay below the threshold of an armed attack simply by launching a series of smaller attacks over an extended period of time, none of which individually might qualify as an armed attack. Instead, a series of incidents may be accumulated over time to determine whether the threshold of armed attack has been reached.<sup>162</sup> This theory is known as the *Nadelstichtaktik* (Needle Prick) Doctrine or the “accumulation of events theory.”<sup>163</sup> According to this doctrine, “each specific act of terrorism, or needle prick, though it may not independently qualify as an armed attack, could, taking into consideration the totality of incidents, amount to an armed attack entitling the victim state to respond with armed force.”<sup>164</sup>

To determine whether to hold a *state* liable for the activities of a non-state entity, whether those activities consisted of one large-scale attack or a series of smaller incidents, the attacked state must also show “substantial involvement” on the part of the sending state.<sup>165</sup> The Court in *Nicaragua* indicated that substantial involvement must be interpreted restrictively.<sup>166</sup> “[I]t did not consider assistance for rebels in the form of the provision of weapons or logistical support to suffice for the assumption of an ‘armed attack.’”<sup>167</sup> Thus, under the ICJ’s rationale in *Nicaragua*, most demonstrations of aggression by non-state actors do not rise to the level of an armed attack; instead, the scale and effects of the act of aggression must be restrictively weighed in determining whether to respond with force.

Judge Simma’s Commentary then takes an interesting turn, under the lens of a post 9/11 world. While acknowledging that, prior to 9/11, he supported the view of the ICJ in *Nicaragua*, that an attacked state must demonstrate substantial involvement in a non-state actor’s aggression, he since has changed his position. Judge Simma now asserts that due to the

<sup>156</sup> *Nicar. v. U.S.*, at \*215 (quoting G.A. Res. 3314, art 3, para. (g), U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974)).

<sup>157</sup> Randelzhofer, *supra* note 137, at 800.

<sup>158</sup> *Id.* (emphasis added). A “mere frontier incident” is the paradigm of an unlawful use of force violative of Article 2(4), but not rising to the level of an armed attack justifying actions in self-defense. See MICHAEL N. SCHMITT, COUNTER-TERRORISM AND THE USE OF FORCE IN INTERNATIONAL LAW 18 (2002).

<sup>159</sup> Ruys, *supra* note 4, at 273.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 272 (citing YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 193 (4th ed. 2005)).

<sup>162</sup> See *id.* (citing D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 898 (5th ed., Sweet & Maxwell, 1998)); Michael Kelly, *Forum: Israel v. Lebanon: Article 51, Self-Defense, and Preemptive Strikes*, JURIST, July 29, 2007, available at <http://jurist.law.pitt.edu/forumy/2006/07/israel-v-hezbollah-article-51-self.php>.

<sup>163</sup> Victor Kattan, *Israel, Hezbollah, and the Conflict in Lebanon: An Act of Aggression or Self-Defense?*, 14 HUM. RTS. BR. 26, 27 (2006). German international lawyers coined the term “Nadelstichtaktik” for this doctrine at least thirty-five years ago. See Yehuda Z. Blum, *Operation Kadesh: A Legal Perspective*, in THE SUEZ-SINAI CRISIS, 1956: RETROSPECTIVE AND REAPPRAISAL 230, 233 (Moshe Shemesh & Selwyn Ilan Troen eds., 2007) (citing P. Wittig, in *Der Aggressionsbegriff im Internationalen Sprachgebrauch*, in VÖLKERRECHTLICHES GEWALTVERBOT UND FRIEDENSSICHERUNG 33, 55 (W. Schaumann ed., 1971)).

<sup>164</sup> Kattan, *supra* note 163, at 27 (citing Norman Menachem Feder, *Reading the UN Charter Connotatively: Toward a New Definition of Armed Attack*, 19 N.Y.U. J. INT’L L. & POL. 415 (1986–1987)).

<sup>165</sup> “Sending state” is usually a term of art used in international agreements regarding liability for the actions of government officials, such as military servicemembers. However, as used in this context, it refers to the state from which the attacks emanate, or from which the attackers operate.

<sup>166</sup> Randelzhofer, *supra* note 137, at 801.

<sup>167</sup> *Id.*

advent and spread of terrorism, the ICJ's statement in *Nicaragua* is far "too sweeping" and requires "further clarification."<sup>168</sup> Otherwise, a loophole exists in Article 51, allowing state actors to provide indirect support to terrorists, perhaps just below the substantial involvement level, threatening another state's safety and "eroding the very purpose of this rule."<sup>169</sup> Incorporating both the notion of armed attack and of state culpability for a non-state actor's activities, Judge Simma concludes:

Acts of terrorism committed by private groups or organizations as such are not armed attacks in the meaning of Art. 51 of the UN Charter. But if large scale acts of terrorism of private groups are attributable to a State, they are an armed attack in the sense of Art. 51. But they are also attributable to a State if they have been committed by private persons and the State has encouraged these acts, has given its direct support to them, planned or prepared them at least partly within its territory, *or was reluctant to impede these acts.*<sup>170</sup>

Judge Simma is not alone in his position. Some scholars assert that to prohibit the use of force against non-state actors unduly restricts Article 51's meaning.<sup>171</sup> These advocates point to the prohibition against the use of force in Article 2(4), noting that its language explicitly refers to military action by one state against another *state*. Article 51's self-defense language contains no such restrictive language requiring both parties to be state actors. Had the drafters wished the right of self-defense to apply only to state actors, the argument goes, they would have put that language in Article 51, as they did in Article 2(4).<sup>172</sup>

A team of international law scholars has concluded similarly, asserting that "Article 51 is not confined to self-defence in response to attacks by states. The right of self-defence applies also to attacks by non-state actors."<sup>173</sup> In such cases, however, the attack by the non-state actor must be "large scale,"<sup>174</sup> if the attacked state intends to enter the territorial space of another state, "it must be evident that that state is unable or unwilling to deal with the non-state actors itself," and this force must be both necessary and proportional.<sup>175</sup>

## 2. Security Council Resolutions 1368 and 1373

We have examined the strict view of the *Nicaragua* Court on state responsibility, as well as Judge Simma's newly-revised and more expansive theory. We now will categorize the three primary theories within the spectrum of belief as to when a non-state actor's aggression may be imputed to a state.<sup>176</sup> To do so, we first must consider the significant effect of U.N. Security Council Resolutions 1368 and 1373.

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<sup>168</sup> *Id.* at 800. In his separate opinion in *Democratic Republic of Congo v. Uganda*, Judge Simma notes, "From the *Nicaragua* case onwards the Court has made several pronouncements on questions of use of force and self-defence which are problematic less for the things they say than for the questions they leave open, prominently among them the issue of self-defence against armed attacks by non-State actors." Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 1, 3 ¶ 9 (Dec. 19) (separate opinion of Judge Simma).

<sup>169</sup> Randalzhofer, *supra* note 137, at 801.

<sup>170</sup> *Id.* at 802 (emphasis added).

<sup>171</sup> See Josef L. Kunz, Editorial Comments, *Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947) ("The text of the Article does not explicitly restrict the scope of 'armed attacks' to acts of state agents, yet it has traditionally been interpreted this way."). But see Ruys, *supra* note 4, at 274 (citing J. Brunnee, *The Security Council and Self-Defence: Which Way to Global Security*, in THE SECURITY COUNCIL AND THE USE OF FORCE 122 (Neils Blokker & Nico Schrijver eds., 2005)).

<sup>172</sup> See Murphy, *supra* note 137, at 51; Ruys, *supra* note 4, at 274 (citing Ian Brownlie, *The Use of Force in Self-Defence*, 1961 BRIT. Y.B. INT'L L. 183, 245; Pierluigi L. Zanardi, *Indirect Military Aggression*, in THE CURRENT LEGAL REGULATION ON THE USE OF FORCE 111, 111 (Antonio Cassese ed., 1986)).

<sup>173</sup> Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* 11 (Chatham House, ILP WP 05/01, Oct. 2005), available at [http://www.chathamhouse.org.uk/files/3278\\_ilpforce.doc](http://www.chathamhouse.org.uk/files/3278_ilpforce.doc). The Chatham House is an independent think tank on international affairs and is composed of senior international law experts from a variety of fields. Participants in this statement included at least thirteen of such scholars. *Id.* at 3.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> The author has categorized and labeled these theories in an attempt to explain them in a more orderly fashion.

The U.N. Security Council passed Resolutions 1368 and 1373 within days of 9/11. Directly addressing the terrorist attacks, Resolution 1368 affirmed combating “by all means threats to international peace and security caused by terrorist acts.”<sup>177</sup> The Security Council proclaimed that it regarded “any act of international terrorism, as a threat to international peace and security,” endorsed “all necessary steps . . . to combat all forms of terrorism,” and recognized “the inherent right of individual or collective self-defense in accordance with the Charter.”<sup>178</sup> Resolution 1373 reaffirmed the rhetoric of Resolution 1368, and exhorted all states to “[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, . . . deny safe haven to those who finance, plan, support, or commit terrorist acts,” and “prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.”<sup>179</sup> While these Resolutions did not authorize the United States to use military force against terrorists,<sup>180</sup> “they both affirmed, in the context of such incidents, the inherent right of individual and collective self-defense and the need ‘to combat by all means’ the ‘threats to international peace and security caused by terrorist acts.’”<sup>181</sup>

Many scholars, and some members of the ICJ, have asserted that these resolutions taken together add a “completely new element” to self-defense, one found neither in Article 51 nor in *Nicaragua*’s examples of armed attack.<sup>182</sup> The new element is the understanding that attacks by *non-state* actors—not only attacks by states—may trigger the right to use force in self-defense.<sup>183</sup> According to Judge Kooijmans in the *Wall* opinion:<sup>184</sup>

This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defense on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defense.<sup>185</sup>

What remains, despite this potentially new element that U.N. Security Council Resolutions 1368 and 1373 introduce, is the requirement for some nexus, some level of “involvement” to exist, between the state and the non-state actors responsible

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<sup>177</sup> S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001). Since this determination by the U.N. Security Council was in the preambular paragraphs (or *chapeau*) of Resolution 1368, and since the U.N. Security Council was not taking action pursuant to Chapter VII, this language cannot be construed as specifically authorizing the use of military force either in response to the 9/11 attacks or to combat terrorism.

<sup>178</sup> *Id.*

<sup>179</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373, Sept. 28, 2001. Although acting under Chapter VII of the U.N. Charter, the U.N. Security Council was careful not to “authorize all necessary means” in combating terrorism, which would have authorized the use of military force to do so. The closest the U.N. Security Council came to authorizing military force in Resolution 1373 was in paragraph 2(b) in which it “[d]ecides also that all States shall . . . Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information.” *Id.* para. 2(b) (emphasis added).

<sup>180</sup> See *supra* notes 177–79 and accompanying text (citing specific language in U.N. Security Council Resolutions 1368 and 1373).

<sup>181</sup> Murphy, *supra* note 137, at 48 (quoting S.C. Res. 1368, *supra* note 177, pmbl.; S.C. Res. 1373, *supra* note 179, pmbl.).

<sup>182</sup> See, e.g., Iain Scobbie, *ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Words My Mother Never Taught Me—In Defense of the International Court*, 99 AM. J. INT’L L. 76, 81 (Jan. 2005); Ruys, *supra* note 4, at 279 (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9) (dissenting opinions of Judge Kooijmans and separate opinion of Judge Buergenthal));

<sup>183</sup> Michael N. Schmitt, Charles H. Stockton Prof. of Int’l Law, U.S. Naval War College, 56th Graduate Course Visiting Lecture at TJAGLCS, Charlottesville, Va. (Feb. 22, 2008) [hereinafter Schmitt Lecture].

<sup>184</sup> The *Wall* opinion determined whether Israel could erect a protective wall within the Palestinian Occupied Territory. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9). The ICJ found that because Israel was exercising control over this territory, and hence this situation did not involve a foreign invasion, Israel could not invoke Resolutions 1368 and 1373. *Id.* Interestingly, the ICJ in *Wall* further found that Article 51 recognizes a right to self-defense only in the case of armed attack by one state against another state. *Id.* In Judge Kooijmans’ dissent to this opinion, he stated that the Court’s finding was an aberration from the clear direction of international law since 9/11. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 229–30 ¶ 35 (July 9) (dissenting opinion of Judge Kooijmans); see also Wilmshurst, *supra* note 173, at 11 (asserting that it is impossible for the *Wall* opinion to limit the right of force in self-defense to attack from other states, despite the Court’s efforts to do so; Article 51 is not that restrictive). “There is nothing in the text of Article 51 to demand, or even to suggest, such a limitation.” *Id.*; see also Judge Simma’s response to the *Wall* opinion: “Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as ‘armed attacks’ within the meaning of Article 51.” Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 1, 3 ¶ 11 (Dec. 19) (separate opinion of Judge Simma).

<sup>185</sup> Scobbie, *supra* note 182, at 81 (quoting Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 229–30 ¶ 35 (July 9) (dissenting opinion of Judge Kooijmans)).

for the attack.<sup>186</sup> The significance of these Resolutions, however, should not be underestimated. Resolutions 1368 and 1373 echo Judge Simma's position that a non-state actor's attack *can* trigger a state's right to respond in self-defense, including the right to use military force against the *state* harboring, aiding, or potentially, failing to prevent, the terrorist attacks.<sup>187</sup>

### 3. Three Theories of State Responsibility

The U.N. Security Council Resolutions 1368 and 1373 expanded the spectrum of opinions regarding state responsibility. To the emerging theories of the level of involvement that potentially trigger the use of military force we now turn. While scholars in the past have not articulated these theories as they are described below, the ideas supporting these three views are well-represented on the continuum of opinion regarding when a state may be held liable for the actions of non-state actors.

#### a. View #1: Effective Control

Under the "effective control" theory, if a state can attribute the acts of non-state actors to the state from whose territory the attacks were launched, then the difficulty of using force against that state is surmounted.<sup>188</sup> The challenge, however, is "attributing" the acts to the state itself. Proponents of this position read the Draft Article 8 of the General Assembly's Responsibility of States for Internationally Wrongful Acts strictly<sup>189</sup> which asserts that the conduct of a non-state actor "'shall be considered an act of a State under international law' if the actor 'is in fact acting *on the instructions of, or under the direction and control of,* that State.'"<sup>190</sup> Under this relatively high standard, it is difficult to attribute the actions of a non-state actor to a state.<sup>191</sup> For example, says one scholar, in Afghanistan the Taliban "essentially made Afghanistan's territory available to Al Qaeda."<sup>192</sup> However, this action is not enough to demonstrate that the Taliban government had effective control over Al Qaeda, and under this standard the United States was not justified to attribute responsibility for Al Qaeda's 9/11 attacks to the Taliban government in Afghanistan.<sup>193</sup>

#### b. View #2: Harboring and Assisting

A less restrictive view than that of effective control is that of harboring and assisting. Under this view, a state can be held liable for a non-state actor's acts when the state "has a role in organizing, coordinating or planning the military actions of a military group."<sup>194</sup> Many legal scholars now accept the notion that the right of self-defense "includes military responses against bases of non-state actors located in another state, from which an attack has been launched or directed, provided that the latter state *willingly harbored* the non-state group."<sup>195</sup> Such was the United States' primary argument, for instance, for

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<sup>186</sup> See, e.g., Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills*, 59 STAN. L. REV. 415, 437 (2006). For Judge Simma, as well as under the just war theory, this nexus could be as simple as the state's "reluctance to impede" the acts of non-state actors on its territory. Randelzhofer, *supra* note 137, at 802.

<sup>187</sup> See Ruys, *supra* note 4, at 282–83 (asserting that "harboring" a non-state actor is the threshold requirement for using force against the state, and that such "harboring" is not mere acquiescence, but also assistance to the non-state actor); Weiner, *supra* note 186, at 431–32 (asserting that the threshold is much higher; not only does it include "assisting," but also the sponsoring state having "effective control" over the operations of the non-state actor); Interview with Michael N. Schmitt, Charles H. Stockton Prof. of Int'l Law, U.S. Naval War College, at TJAGLCS, in Charlottesville, Va. (Feb. 22, 2008) [hereinafter Schmitt Interview] (differentiating between a higher level of state involvement needed to justify taking actions in self-defense against the state, versus a lower threshold for taking actions in self-defense against the terrorists themselves, albeit in the other state's territory).

<sup>188</sup> See Weiner, *supra* note 186, at 431.

<sup>189</sup> Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Draft Article 8, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10(SUPP) (Dec. 12, 2001).

<sup>190</sup> Weiner, *supra* note 186, at 431 (emphasis added) (quoting G.A. Res. 56/83, *supra* note 189, draft art. 8, at 103). *Contra* Schmitt Interview, *supra* note 187 (arguing that the draft articles on state responsibility were intended to resolve the legal liability of a state in a court of law, *not* as a justification for using military force against that state).

<sup>191</sup> See *infra* notes 294–95 and accompanying text (arguing that this view of state responsibility is overly-restrictive, since if a non-state actor is effectively controlled by a state, then it is effectively, if not actually, an *instrument* of that state—this theory essentially defines away the definition of a non-state actor).

<sup>192</sup> Weiner, *supra* note 186, at 433; Schmitt Interview, *supra* note 187.

<sup>193</sup> Weiner, *supra* note 186, at 432–33.

<sup>194</sup> *Id.* at 432 (citing Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, at 131 (July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>).

<sup>195</sup> Ruys, *supra* note 4, at 282 (emphasis added) (citing MICHAEL BYERS, WAR LAW 67 (2005)); Randelzhofer, *supra* note 137, at 801. *Contra* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. LEXIS 4, at \*215 (June 27).

intervening militarily in Afghanistan. Namely, the United States claimed that the Taliban government had harbored Al Qaeda terrorists and therefore would be held liable for Al Qaeda's attacks on 9/11.<sup>196</sup>

*c. View #3: State Unwilling or Unable to Prevent*

A more liberal reading of Draft Article 9 on Responsibility of States for Internationally Wrongful Acts<sup>197</sup> presents this view.<sup>198</sup> While Draft Article 8 imputes state responsibility to those governments exercising effective control over the non-state actor, Draft Article 9, somewhat ambiguously, adds:

The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons is in fact exercising elements of governmental authority in the absence *or default* of the official authorities and in circumstances such as to call for the exercise of those elements of authority.<sup>199</sup>

Some scholars have interpreted this article to purport that if a government is unable to control the actions of its non-state actors (i.e., “defaults” on its state responsibility<sup>200</sup> because it has lost control), and less forceful measures—such as diplomacy—have been exhausted, then the victim state may attribute responsibility and liability to that state and consider the attack of the non-state actor as an attack from the state itself.<sup>201</sup>

C. Do the Just War Theory and Customary International Law Survive the U.N. Charter?

The advent of the U.N. Charter in 1945, which addresses the lawful use of force in self-defense,<sup>202</sup> trumps neither the just war theory nor customary international law. Instead, the just war theory, customary international law, and the U.N. Charter are best viewed as a triffecta, each serving a vital purpose in the grand scheme of regulating war, and each reliant on the other, to some extent, for its legitimacy. This section analyzes how, despite the existence of “black letter law” in the U.N. Charter governing the use of force, both the just war theory and customary international law still hold sway.

*1. Just War Theory*

Although some scholars claim that the U.N. Charter has eclipsed the just war theory,<sup>203</sup> the just war tradition retains its viability in the post-Charter world. Political and international leaders continue to employ just war language in their rhetoric regarding use of force.<sup>204</sup> Scholars and theorists continue to examine military actions under the just war paradigm.<sup>205</sup> The

<sup>196</sup> See, e.g., Bellier, *supra* note 136, at 510.

<sup>197</sup> This draft article is a part of the same International Law Commission report that created Draft Article 8, discussed previously. See *supra* notes 189–90 and accompanying text.

<sup>198</sup> G.A. Res. 56/83, *supra* note 189, Draft Art 9.

<sup>199</sup> *Id.* (emphasis added).

<sup>200</sup> A perhaps related concept to this notion is the “responsibility to protect.” Under this theory, a state has primary responsibility to protect its citizens. However, if a population within a state is suffering serious harm, and the state is “unwilling or unable to halt or avert it,” then the international community is responsible for stepping in and protecting those citizens, overriding the principle of nonintervention. See THE RESPONSIBILITY TO PROTECT, REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (Dec. 2001), available at <http://www.iciss.ca/report2-en.asp#synopsis>.

<sup>201</sup> See, e.g., Ruys, *supra* note 4, at 290. *Contra* Schmitt Interview, *supra* note 187 (arguing that the draft articles on state responsibility were intended to resolve the legal liability of a state in a court of law, *not* as a justification for using military force against that state).

<sup>202</sup> See U.N. Charter art. 51.

<sup>203</sup> See, e.g., Yoram Dinstein, *The Rule of Law in Conflict and Post-Conflict Situations: Comments on War*, 27 HARV J.L. & PUB. POL’Y 877, 879–80 (2004); Schmitt Interview, *supra* note 187.

<sup>204</sup> See, e.g., President George W. Bush, Remarks on the War on Terror at Fort Bragg (June 28, 2005) [hereinafter Bush Remarks at Bragg] (transcript available at <http://thinkprogress.org/2005/06/28/breaking-full-text-of-bush-speech/>); President George W. Bush, Ultimatum to Iraq (Mar. 18, 2003); see *infra* notes 207–12 and accompanying text.

<sup>205</sup> See, e.g., Michael Walzer, Presentation at Radboud Universiteit Nijmegen: War and Death: Reflecting on the Meaning of Just War Theory Today (2007). MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (Basic Books 2000) (1977); PAUL RAMSEY, WAR AND THE CHRISTIAN CONSCIENCE: HOW SHOULD MODERN WAR BE CONDUCTED JUSTLY? (Duke Univ. Press 1961); see *infra* notes 213–18 and accompanying text.

just war tradition continues to provide the moral compass by which to analyze issues critically and to make decisions regarding the use of force—or at least to explain those decisions to the civilian population.<sup>206</sup>

*a. Rhetoric from Political/International Leaders*

“Whenever we argue about aggression or military intervention or the conduct of battles, we regularly use the language of just war.”<sup>207</sup> Michael Walzer’s recent assertion has proven itself repeatedly since the advent of the U.N. Charter, particularly within the last few years. During the Kosovo conflict, British Prime Minister Tony Blair unequivocally declared, “This is a just war, based not on any territorial ambitions but on values.”<sup>208</sup> In the build-up to and aftermath of the invasion of Iraq in 2003, President George Bush and his administration regularly employed just war rhetoric, specifically that introduced by Saint Thomas Aquinas, in justifying a preemptive strike on the Iraqi Army and Saddam Hussein.<sup>209</sup> Both George Bush and John Kerry used the principle of “last resort” in their debates prior to the 2004 Presidential elections.<sup>210</sup> In 2006, then-Secretary General of the United Nations, Kofi Annan, on the U.N. General Assembly floor, justified Israel’s decision to invade Lebanon under the just war tradition, proclaiming that Israel had a right to defend itself and was fighting a just war against Lebanon.<sup>211</sup>

Thus, despite the U.N. Charter’s preeminence, politicians and other international leaders routinely employ just war language. The just war principles remain the moral imperative for the use of force. Perhaps leaders use this rhetoric because the principles of just war, with inspirational ideas of morality and justice, prove more effective for rallying citizens<sup>212</sup> and allies than do specific provisions found in an international treaty (i.e., the U.N. Charter).

*b. Continued Use of Just War Language by International Law Scholars*

Not only is just war rhetoric employed by just war theorists, but also by international law scholars, who are well aware of the relevant and obligatory articles of the U.N. Charter.<sup>213</sup> These scholars have examined the continued significance of the just war theory from several different perspectives.

Some authors have asserted that the just war tradition inserts the critical moral dimension into any analysis of a state’s decision whether to use military force.<sup>214</sup> Others have advocated analyzing the scope of noncombatant immunity by placing precedence on the “just cause” prong of just war analysis.<sup>215</sup> At least one scholar has applied the just war theory to assert that

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<sup>206</sup> Schmitt Interview, *supra* note 187.

<sup>207</sup> Walzer, *supra* note 205.

<sup>208</sup> Prime Minister Tony Blair, Address at the Economic Club, in Chicago, Ill. (Apr. 24, 1999) (transcript available at <http://www.number-10.gov.uk/output/Page1297.asp>).

<sup>209</sup> See, e.g., Bush Remarks at Bragg, *supra* note 204; President George W. Bush, Ultimatum to Iraq (Mar. 18, 2003); President George W. Bush, Address to the Nation on the Start of the Iraq War (Mar. 20, 2003) (transcript available at <http://guardian.co.uk/Iraq/Story/0,,918031,00.html>); President George W. Bush, Address to the Woodrow Wilson International Centre for Scholars (Dec. 14, 2005); Presidential Letter to the Speaker of the House and President Pro Tempore of the Senate (Mar. 21, 2003); President George W. Bush, State of the Union Address (Jan. 29, 2002); ‘Moral Case’ for Deposing Saddam, BBC NEWS (Aug. 15, 2002), available at <http://news.bbc.co.uk/1/hi/world/americas/2193426.stm>.

<sup>210</sup> Major Richard P. Dimeglio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, 186 MIL. L. REV. 116, 124 (Winter 2005).

<sup>211</sup> Walzer, *supra* note 205. Annan later qualified those remarks, as he came to believe that Israel’s conduct within the war (*jus in bello*) violated the principle of proportionality. *Id.*

<sup>212</sup> Schmitt Interview, *supra* note 187.

<sup>213</sup> See, e.g., Walzer, *supra* note 205; RAMSEY, *supra* note 205; Thomas C. Wingfield, *The Convergence of Traditional Theory and Modern Reality: Just War Doctrine and Tyrannical Regimes*, 2 AVE MARIA L. REV. 93, 121 (2004) (“Just war theory in this context is more relevant today than it has ever been, due largely to the rapidly-changing nature of war and the threats faced by civilized nations.”). *Contra* Dinstein, *supra* note 203, at 880.

The U.N. Charter has wiped out the pre-existing permissive legal norms concerning recourse to inter-State force and has introduced a whole new set of legal norms based on *jus contra bellum*. It is totally irrelevant today whether or not a war is just. The sole question is: is war legal, in accordance with the Charter?

*Id.*

<sup>214</sup> See, e.g., John F. Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT’L L. REV. 221 (Fall 2004).

<sup>215</sup> See Richard J. Arenson, *Global Justice, Peace, and Security: Just Warfare Theory and Noncombatant Immunity*, 39 CORNELL INT’L L. J. 663, 688 (2006) (“What one may permissibly do to combatants and noncombatants in the course of war depends to a very large extent on the justice or injustice of one’s case.”).

President George W. Bush possessed the authority, notwithstanding the lack of U.N. Security Council approval, to use military force in Iraq.<sup>216</sup> Professor Antonio Perez has asserted that just war theory is still relevant because the U.N. Charter is unable to properly address the prongs of legitimate authority and rightful intention.<sup>217</sup> That these scholars examine current military action through the lens of just war theory demonstrates that the tradition remains vibrant and germane.<sup>218</sup>

## 2. Customary International Law

The U.N. Charter itself recognizes the continued relevance of customary international law in Article 38(1)(b) of the Statute of the International Court of Justice:<sup>219</sup> “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international custom, as evidence of a general practice accepted as law.”<sup>220</sup> The U.N. Charter also implicitly supports the continued vitality of customary international law in Article 51’s language recognizing the “inherent right of self-defense.”<sup>221</sup>

In addition to the U.N. Charter’s recognition of its continued relevancy, customary international law remains pertinent for at least three other reasons. First, a couple of states are not members of the United Nations; thus, they are not bound by the U.N. Charter.<sup>222</sup> They continue, however, to be bound by customary international law as provided in the *Caroline* doctrine.<sup>223</sup>

Second, some states have chosen not to submit to the jurisdiction of the ICJ, the primary forum for resolving disputes over the interpretation of multilateral treaties,<sup>224</sup> while other states have chosen not to adhere to certain treaties, to include the Additional Protocols to the Geneva Conventions.<sup>225</sup> For states in either of these two categories, the ICJ must interpret the lawfulness of the use of military force under customary international law provisions, which are binding on all states.<sup>226</sup> Indeed, this scenario occurred in *Nicaragua v. United States*,<sup>227</sup> where the ICJ, due to the United States withholding

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<sup>216</sup> See Ronald J. Rychlak, *Just War Theory, International Law, and the War in Iraq*, 2 AVE MARIA L. REV. 1 (2004).

When just war theory is properly understood, one is led to the conclusion that the authority to make the final decision to go to war rests with national sovereigns. They have the obligation to protect their citizenry from outside threats. For that reason, they must determine when war is just. Alternative institutions, like the United Nations, the Church, or an international tribunal, are not necessarily superior decision-makers, and they may even be less qualified to fill this role due to political or pastoral reasons.

*Id.* at 2.

<sup>217</sup> See Antonio F. Perez, *The Modern Relevance of Legitimate Authority and Right Intention in the Just War Tradition*, 51 CATH. U. L. REV. 15 (2001).

<sup>218</sup> It is also interesting to note that the Roman Catholic Church, with one billion members worldwide, explicitly has incorporated the just war tradition into its official teaching. See U.S. CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH: SECOND EDITION 615 (Doubleday 1995).

<sup>219</sup> This statute is incorporated into the U.N. Charter via Article 92. See U.N. Charter art. 92.

<sup>220</sup> Statute of the International Court of Justice art. 38, June 26, 1945, available at [http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER\\_II](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II).

<sup>221</sup> U.N. Charter art. 51; see *supra* note 144 and accompanying text.

<sup>222</sup> As of this publication, only the Holy See and the newly independent state of Kosovo are not members of the United Nations. See generally United Nation Member States, <http://www.un.org/members/nonmembers.shtml> (last visited Apr. 7, 2009); United Nation Member States, *List of Member States*, <http://www.un.org/members/list.shtml> (last visited Apr. 7, 2009); Conor Sweeney & Christian Lowe, *Russia’s Options Limited for Kosovo’s Retaliation*, SAN DIEGO UNION TRIBUNE, Feb. 15, 2008, available at <http://www.signonsandiego.com/news/world/20080215-0733-kosovo-serbia-russia-response.html>. While technically the Cook Islands is not a member of the United Nations (yet is a signatory to the Geneva conventions), the Cook Islands fall under New Zealand for national security and U.N. purposes, and New Zealand is a member of the United Nations. See generally CIA: THE WORLD FACTBOOK: COOK ISLANDS, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/cw.html#Govt> (last visited Mar. 29, 2009); ICRC, *Cook Islands: Constitutional Structure and Position of IHL in Domestic Law*, available at <http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/baf346b55e6c3589c1256af1004575f1!OpenDocument> (last visited Mar. 29, 2009).

<sup>223</sup> Kearley, *supra* note 113, at 326.

<sup>224</sup> *Id.* at 326–27. The United States, for instance, is a state that has withheld this jurisdiction (known as the Vandenberg Reservation). See John Norton Moore, *Appraisals of the ICJ’s Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT’L L. 151, 155 (Jan. 1987); Anthony D’Amato, *The United States Should Accept, by a New Declaration, the General Compulsory Jurisdiction of the World Court*, 80 AM. J. INT’L L. 331 (1986).

<sup>225</sup> See generally ICRC, *Treaties*, available at <http://www.cicr.org/ihl.nsf> (follow “Tables showing the States party to selected treaties” hyperlink) (last visited Mar. 29, 2009).

<sup>226</sup> Kearley, *supra* note 113, at 326–27.

<sup>227</sup> *Supra* note 153.

jurisdiction on U.N. Charter interpretation, was required to rely strictly on the customary international law principles of proportionality and necessity in reaching its opinion.<sup>228</sup>

Third, many scholars believe that the inherent right to self-defense recognized in Article 51 of the Charter refers to the interpretation of that right at the time the U.N. Charter was ratified in 1945. Given that the *Caroline* doctrine was the prevailing authority on the lawfulness of self-defense at that time, it retains significant relevance in interpreting Article 51 and thereby, arguably, is incorporated into the U.N. Charter.<sup>229</sup>

In addition to these three reasons, customary international law remains relevant in the post-Charter world because it keeps the principles of necessity and proportionality central to the equation of whether the use of force is justified.<sup>230</sup> These principles are not found within the U.N. Charter. However, they “are of outstanding legal and practical importance for the right of self-defense,”<sup>231</sup> particularly in the *jus in bello* context. Explains Judge Simma:

Although Art. 51 does not expressly state that these principles [of proportionality and necessity] limit the right of self-defence, it does not follow that these principles, which are recognized for the traditional right of self-defence, have been rendered inapplicable by the Charter provision. According to the better and prevailing view, any recourse to the right of self-defence laid down in Art. 51 is likewise subject to these principles of proportionality and necessity.<sup>232</sup>

Customary international law, as established by the *Caroline* doctrine, thus remains a significant force in determining the lawfulness of a state’s actions.

## VI. Analysis

This article has examined the use of force in self-defense under the just war theory, customary international law, and the U.N. Charter. With these paradigms in sight, the remainder of this article will analyze whether Israel was justified in going to war (*jus ad bellum*).<sup>233</sup> Then, this article will shift focus to Israel’s conduct within the war (*jus in bello*).<sup>234</sup> Ultimately, this article concludes that although Israel was justified acting in self-defense against Lebanon for the actions of Hezbollah under both the just war theory and the U.N. Charter, its methods were not in compliance with customary international law.<sup>235</sup> Therefore, Israel waged an unjust war, which led to considerable approbation by the international community.<sup>236</sup>

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<sup>228</sup> Kearley, *supra* note 113, at 327.

<sup>229</sup> *Id.*; see also MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 3–4 (1999) (“[C]ustomary international law would seem to exist alongside many treaty provisions, influencing the interpretation and application of those provisions, and in some cases modifying their content.”). While Byers does not directly address the interpretation of Article 51’s inherent right under customary international law, he asserts in general that customary international law can aid in the interpretation of treaty law. *Id.*

<sup>230</sup> See, e.g., Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. LEXIS 4, at \*122 (June 27) (discussing the criteria of “necessity” as a prerequisite to the use of force); Wilmshurst, *supra* note 173, at 10.

<sup>231</sup> Randelzhofer, *supra* note 137, at 805.

<sup>232</sup> *Id.* However, Judge Simma does not believe that customary international law remains relevant in the *jus ad bellum* context: “[T]he continuing existence of the wide customary law is of practical impact merely for the few non-members of the UN. As regards UN members, it stands that Art. 51, including its restriction to armed attack, supersedes and replaces the traditional right to self-defence.” *Id.* at 806.

<sup>233</sup> See *infra* Parts VI.A.–B.

<sup>234</sup> See *infra* Part VI.C.

<sup>235</sup> See *infra* Part VII.

<sup>236</sup> See, e.g., Walzer, *supra* note 205 (discussing then-Secretary General of the United Nations Kofi Annan’s statements that Israel’s actions within war violated the principle of proportionality); Sarah E. Kreps, *The 2006 Lebanon War: Lessons Learned*, 37 PARAMETERS, NO. 1, 72, 81 (Spring 2007) (discussing Hezbollah’s use of the media to convince some international leaders that Israel had violated the principle of proportionality, and how international reaction to these images of civilian casualties, coupled with collateral damage that Israel inflicted on the Lebanese village of Qada, resulted in Israel suspending airstrikes for forty-eight hours).

## A. Was Israel's Use of Force Justified Under the Just War Theory?

Laying aside for the moment the issue of state responsibility, which will be examined subsequently,<sup>237</sup> we first approach Israel's putative action of self-defense under the just war theory. Specifically, we will consider the principles of: (a) just cause, (b) proper authority, (c) rightful intention, and (d) use of force as a last resort. When we apply these principles to Israel's action in 2006 against Lebanon, Israel appears to have met the just war criteria. Therefore, Israel was justified under the just war theory to act in self-defense.

### 1. Just Cause

#### a. Secure the Peace

In examining whether Israel's cause to secure the peace was just, we must look not only to Hezbollah's actions on July 12, 2006, but to the whole of Hezbollah's behavior and rhetoric towards Israel. The issue, then, is whether Israel used force legitimately believing that it was necessary to secure the peace based on the aggregate of its interactions and experience with Hezbollah since 1982.<sup>238</sup> The key to examining this issue is first to recall Hezbollah's goals and reasons for existence, and to couple that with its actions towards Israel.

As discussed previously, from its earliest days Hezbollah has publicly proclaimed that its goal is the complete destruction of Israel.<sup>239</sup> As recently as 2002, Hezbollah's spokesman, Hassan Ezzeddin, asserted, "Our goal is to liberate the 1948 borders of Palestine."<sup>240</sup> In other words, Hezbollah's goal is to restore the Middle Eastern map to pre-1948, when Israel came to exist as a nation.<sup>241</sup>

Based on Hezbollah's rhetoric alone, Israel had legitimate reason to believe that it was required to use force in order to secure the peace by defending itself. When we couple Hezbollah's rhetoric with its actions towards Israel, focusing specifically on its actions *after* Israel had withdrawn its troops from southern Lebanon in 2000,<sup>242</sup> we find even more evidence that Israel's use of force, examined under the lens of securing the peace, was justified.

Perhaps more disturbing than Hezbollah's past attacks was the widely-held belief, not only by Israeli intelligence officers but also by sources close to Hezbollah, that Hezbollah was in the process of accumulating over 8,000 rockets, with a range of up to forty-five miles, at the Lebanese/Israeli border.<sup>243</sup> Such rockets could reach south of Haifa, into Israel's industrial heartland.<sup>244</sup> Israelis feared, and with good cause, a large-scale Hezbollah attack aimed at destroying its country.

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<sup>237</sup> See *infra* Part VI.B.2.

<sup>238</sup> Israel's comprehensive interaction with Hezbollah, discussed here, will be revisited when discussing the definition of "armed attack." Here, however, the discussion is a bit more broad, as the just war theory does not specifically require an armed attack prior to the use of force; rather, it requires, most on point with the concept of armed attack, a just cause and use of force as a last resort.

<sup>239</sup> See *supra* notes 17–20 and accompanying text.

<sup>240</sup> Levin, *supra* note 20.

<sup>241</sup> On 14 May 1948, Israel declared its independence from Palestine. See The Declaration of the Establishment of the State of Israel (May 14, 1948), available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm>. The Arab-Israeli War started that same day; Israel's surrounding Arab neighbors invaded the new state immediately, hoping to abolish it before it fully could be established. See James Burk, *From Wars of Independence to Democratic Peace: Comparing the Cases of Israel and the United States*, in MILITARY, STATE, AND SOCIETY IN ISRAEL 81–101 (Daniel Maman et al. eds., 2001). The war ended by the year's end, with heavy casualties on both sides, but with Israel successfully defending its independence and establishing its new statehood. *Id.*

<sup>242</sup> See *supra* notes 27–32 and accompanying text. Hezbollah, since 2000, has continued to put its rhetoric into action. After Israel's May 2000 withdrawal from Lebanon, Hezbollah's aggressive action against Israel allegedly included multiple incidents of killing soldiers by firing small arms weapons, rockets, and mortars at Israeli Defense Force [IDF] positions near Sheeba farms; detonating charges near IDF vehicles; firing on IDF convoys; and launching mortars over the border into Israeli defensive positions. Bard, *supra* note 27. Further, Hezbollah has attacked and killed Israeli civilians, to include stabbing an Israeli woman to death near Haifa (April 2001), blowing up two civilian houses (August 2001), using small arms to attack and kill Israeli school children in Metzuba, Israel (March 2002), firing anti-aircraft shells into the town of Shlomi, Israel, killing one child and wounding four others (August 2003), and firing Katyusha rockets into homes in Israel (December 2005). *Id.*

<sup>243</sup> Jeffrey Goldberg, *A Reporter at Large: In the Party of God (Part I)*, N. YORKER, Oct. 14, 2002, available at [http://www.jeffreygoldberg.net/articles/tny/a\\_reporter\\_at\\_large\\_in\\_the\\_par.php](http://www.jeffreygoldberg.net/articles/tny/a_reporter_at_large_in_the_par.php).

<sup>244</sup> *Id.*

Combining all of these factors with Hezbollah's actions on 12 July 2006, presents a more comprehensive view of Israel's position when Hezbollah attacked that summer day. Given Hezbollah's rhetoric expressing its intent to destroy Israel, its attacks from May 2000 to July 2006, and Israel's belief that Hezbollah possessed thousands of sophisticated rockets with considerable range, Israel was justified under the just war theory to use force to secure the peace and to protect its citizens. We now turn to *against whom* that force could be used under the just war theory.

*b. Punish Evildoers*

Both Saints Augustine and Aquinas focused on punishing evildoers as a just cause, and thus a permissible reason to wage war.<sup>245</sup> Saint Augustine explained that a just war may be one that punishes another party for injuries "if some nation or state against whom one is waging war has neglected to punish a wrong committed by its own citizens."<sup>246</sup> Saint Aquinas, lest any doubt remain regarding *against whom* such force could be used, added that the *state itself*, in refusing to punish its citizenry, was a legitimate object in this calculus.<sup>247</sup>

Hezbollah's members are not merely "citizens" within Lebanon, but also members of a recognized political party holding eighteen percent of parliamentary seats.<sup>248</sup> Indeed, joining with Hezbollah, the state of Lebanon officially has refused to abide by U.N. Security Council Resolution 1559,<sup>249</sup> which mandated that all militia organizations within Lebanon must disband and disarm.<sup>250</sup> In the immediate aftermath of Hezbollah's actions on July 12, 2006, Lebanon proclaimed that it did not condone the acts, but took no steps to censure or punish Hezbollah.<sup>251</sup> A few days later, Lebanon's president publicly vowed to stand by Hezbollah leader Sayyed Hassan Nasrallah.<sup>252</sup>

To Israel, the very reason that it was forced to act in self-defense was because Lebanon, at best, had refused to take responsibility for its citizenry.<sup>253</sup> At worst, Lebanon itself, albeit indirectly, had assisted Hezbollah.<sup>254</sup> Yet regardless of whether Lebanon's claim of innocence or Israel's scathing indictment was more accurate, under the just war theory Israel lawfully used force to "punish evildoers." Lebanon had rejected its obligations under U.N. Security Council Resolution 1559. Further, it neither prevented nor censured Hezbollah for its attack on Israel; instead, Lebanon voiced its support within days. Both of these incidents demonstrate that Lebanon "refus[ed] to make amends for the wrongs inflicted by its subjects."<sup>255</sup> Arguably, then, not only Hezbollah, but Lebanon itself was the "evildoer." Regardless, due to Lebanon's own explicit refusal to punish Hezbollah, Israel was justified in using force against Lebanon for the actions of this non-state actor.

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<sup>245</sup> See, e.g., SWIFT & SWIFT, *supra* note 65, at 135 (quoting Saint Augustine, *Questions on the Heptateuch* 6.10); ST. THOMAS AQUINAS ON POLITICS AND ETHICS, *supra* note 84, at 64–65. It is interesting to note that, to some extent, this argument has come full circle in the argument for imputing state responsibility to a non-state actor when that state is unwilling or unable to take action itself. State responsibility will be discussed later in this analysis section, under the Article 51 justification for use of force. See *infra* Part VI.B.

<sup>246</sup> SWIFT & SWIFT, *supra* note 65, at 135 (quoting Saint Augustine, *Questions on the Heptateuch* 6.10). Today, the concept of citizenship is arguably more fluid, and perhaps the modern-day equivalent would be domiciliaries, that is persons who regularly reside in one state.

<sup>247</sup> See *supra* note 89 and accompanying text.

<sup>248</sup> IRIN, *supra* note 21.

<sup>249</sup> S.C. Res. 1559, U.N. Doc. S/RES/1559 (Sept. 4, 2004).

<sup>250</sup> See Lauren Rivera, *Hezbollah Disarmament Unclear*, CNN.COM INT'L, May 7, 2005, available at <http://edition.cnn.com/2005/WORLD/meast/05/06/lebanon.report/index.html>. Lebanon's response was that Hezbollah is a legitimate "resistance movement" against Israel, not a militia. *Id.* However, the fact that the Security Council itself disagrees with Lebanon's claim demonstrates its lack of credibility. See *id.* Indeed, Lebanon's response that Hezbollah is a resistance movement further demonstrates its unwillingness to punish Hezbollah for its various attacks against Israel.

<sup>251</sup> See, e.g., Statement by Prime Minister Fouad Siniora, DAILY STAR (Leb.), July 17, 2006 [hereinafter Siniora Statement], available at [http://www.dailystar.com.lb/article.asp?edition\\_ID=1&article\\_ID=74027&categ\\_id=2#](http://www.dailystar.com.lb/article.asp?edition_ID=1&article_ID=74027&categ_id=2#).

<sup>252</sup> *Lebanon Evacuation Gathers Pace*, BBC NEWS, July 18, 2006, available at [http://news.bbc.co.uk/2/hi/middle\\_east/5189988.stm](http://news.bbc.co.uk/2/hi/middle_east/5189988.stm).

<sup>253</sup> See *supra* notes 51, 53 and accompanying text (Ambassador Gillerman's statement).

<sup>254</sup> See *supra* notes 39–40 and accompanying text (Prime Minister Olmert's statement).

<sup>255</sup> See ST. THOMAS AQUINAS ON POLITICS AND ETHICS, *supra* note 84, at 64–65.

## 2. Proper Authority

Israel, as a sovereign state, possessed the proper authority to use force.<sup>256</sup> Thus, Israel satisfied this just war prong.

## 3. Rightful Intention

Recall Saint Aquinas' concept of "double-effect" in determining whether a sovereign possesses rightful intention.<sup>257</sup> Applied here, Israel's apparent intent in going to war was to accomplish the positive good of protecting its citizens. Its goal in making this decision was not to cause suffering to noncombatants.<sup>258</sup> Indeed, given Hezbollah's rhetoric and its many attacks in the past, Aquinas likely would assert that Israel was morally *obligated* to defend the common good.<sup>259</sup> Duty compelled the sovereign state of Israel to act. Its use of force, then, was just under the rightful intention prong—to protect its citizens from further, perhaps decimating, attack.

## 4. Last Resort

While the "last resort" prong may appear to be Israel's most challenging hurdle under the just war tradition, this concept does not require Israel first to attempt all means short of using military force. Rather, it requires the state to *consider* all means and to determine that no lesser means are available.<sup>260</sup>

Given these parameters, Israel's use of force was its last resort. The most glaring evidence supporting this position was Lebanon's refusal to abide by U.N. Security Council Resolution 1559,<sup>261</sup> even though years earlier, Israel had withdrawn from Lebanon as required.<sup>262</sup> Despite Resolution 1559, Lebanon continued to allow Hezbollah to remain an organized, armed militia, and did not prevent Hezbollah from continuing to launch rockets at both military and civilian targets within Israel.<sup>263</sup> Given Hezbollah's continued attacks, Lebanon's apparent inability to control Hezbollah, the intelligence that Israel possessed regarding Hezbollah, and Hezbollah's continued rhetoric proclaiming its intent to destroy Israel, Israel was justified under this just war prong to use force against Lebanon for Hezbollah's attacks.

Therefore, Israel was justified acting in self-defense against Lebanon for the actions of Hezbollah under the just war tradition. We will now examine the lawfulness of Israel's use of force through the lens of Article 51 of the U.N. Charter.

### B. Was Israel's Use of Force Justified Under Article 51 of the U.N. Charter?

As we have seen from our previous discussion of Article 51 of the U.N. Charter,<sup>264</sup> the critical issues are: (a) determining what constitutes an "armed attack," and (b) determining the level of state responsibility required before another state can impute to it the actions of its non-state citizenry. If an armed attack occurred, and if Israel rightfully held Lebanon responsible, then Israel was justified under Article 51 to use force against Lebanon in self-defense. Therefore, we first will examine whether Hezbollah's actions rose to the threshold of armed attack. Then, we will analyze whether Israel was correct in holding Lebanon responsible under the post-U.N. Charter theories of state responsibility.

<sup>256</sup> Some might argue that in a post-U.N. Charter world, only the Security Council possesses the proper authority to use force. Yet this argument is belied by Article 51 of the Charter, which acknowledges the "inherent right" of a sovereign state to use force in self-defense. U.N. Charter art. 51.

<sup>257</sup> See *supra* notes 96–102 and accompanying text.

<sup>258</sup> It is important to keep in mind at this point the distinction between *jus ad bellum* and *jus in bello*. Israel's targeting decisions, once *in* war, are another matter that will be fully addressed in Part C of this section. See *infra* Part VI.C.

<sup>259</sup> RUSSELL, *supra* note 57, at 262; see *supra* note 95 and accompanying text (discussing Aquinas' understanding of moral obligation and duty).

<sup>260</sup> See DAVID L. CLOUGH & BRIAN STILTNER, FAITH AND FORCE: A CHRISTIAN DEBATE ABOUT WAR 61 (Georgetown Univ. Press 2007); MATTOX, *supra* note 64, at 79.

<sup>261</sup> See Rivera, *supra* note 250.

<sup>262</sup> See *supra* notes 27–32 and accompanying text (providing examples of Hezbollah's continued attacks on Israel, despite the mandate in U.N. Security Council Resolution 1559 for Lebanon to disband Hezbollah).

<sup>263</sup> For example, Hezbollah fired Katyusha rockets at an IDF army base in Galilee (May 2006); launched a heavy attack of mortars and rockets near Rajar village in Israel, killing nine soldiers and two civilians (November 2005); and fired over twenty mortars across the Lebanon/Israel border, killing one soldier and wounding four others, to include an IDF medical officer (June 2005). See *Hezbollah Attacks Since May 2000*, *supra* note 27.

<sup>264</sup> See *supra* Part V.B.

## 1. Armed Attack

In determining whether Hezbollah's actions constituted an armed attack, we must recall the previous discussion regarding whether Israel's response was necessary to "secure the peace" under the just war theory.<sup>265</sup> Namely, we look to the aggregate actions of Hezbollah over the six-year period since Israel had withdrawn from southern Lebanon, Hezbollah's continued rhetoric regarding its intent to destroy Israel, and intelligence reports indicating that Hezbollah was storing thousands of long-range missiles at the Lebanese/Israeli border.

Further, when dealing with the definition of armed attack under Article 51, we must examine these issues under the scale and effects doctrine of *Nicaragua*,<sup>266</sup> the doctrine that some scholars label the *Nadelstichtaktik* or accumulation of events theory.<sup>267</sup> Recall from the examination of this topic earlier,<sup>268</sup> the basic doctrine holds that in determining what qualifies as an armed attack by a non-state actor, while each specific act may not rise to that level, the attacks could, "taking into consideration the totality of incidents, amount to an armed attack entitling the victim state to respond with armed force."<sup>269</sup> The caveat, asserts Judge Simma, harkening back to the scale and effects doctrine, is that such attacks as a whole must be "large scale." They cannot, in the words of *Nicaragua*, amount to "mere frontier incident[s]."<sup>270</sup>

Some scholars have argued that the nature of Hezbollah's attacks on 12 July 2006, even standing alone, rose to the threshold of armed attack. "[T]he premeditated and well-organized character of the Hezbollah ambush, the ongoing nature of the abduction, combined with the diversionary rocket attacks suggest that this was a deliberate 'armed attack' rather than a mere 'incident.'"<sup>271</sup> Yet while these factors assist in determining the nature of Hezbollah's aggressive acts (whether armed attack or mere frontier incident), we also should consider *all* of Hezbollah's activities against Israel between 2000 and 2006.<sup>272</sup> We must keep in mind that Lebanon refused to disarm Hezbollah in accordance with the provisions of U.N. Security Council Resolution 1559.<sup>273</sup> Given not only Hezbollah's attack on 12 July 2006, but also its attacks in the past on Israeli civilians, its capacity to fire rockets as far as Haifa (not only derived from intelligence reports but now proven on 12 July 2006),<sup>274</sup> and its continued expressed desire to "obliterate" Israel,<sup>275</sup> the scale and effects of Hezbollah's actions were of a magnitude to constitute, in the aggregate, a large-scale armed attack. Had Israel not responded under Article 51, it would have left itself vulnerable to another inevitable Hezbollah attack, perhaps of even greater magnitude.

Thus, due not only to the extent of the strikes on July 12, 2006, but also to the continued attacks throughout the years preceding 2006, Hezbollah's actions had reached the threshold of an "armed attack." Israel's right to respond with force in self-defense was triggered under Article 51.

## 2. State Responsibility

Recall that on the spectrum of beliefs regarding what constitutes state responsibility for terrorist attacks, we have examined three guideposts: effective control, harboring and assisting, and unwilling or unable to control non-state actors.<sup>276</sup> In the case of Lebanon and its relationship to Hezbollah, state responsibility may be imputed to Lebanon under either the harboring and assisting theory or the unwilling or unable theory. A colorable though weaker argument may be made for imputing state responsibility under the effective control notion as well. We will examine these theories from the most narrow (effective control) to the most expansive (unwilling or unable to prevent attacks).

<sup>265</sup> See *supra* notes 238–44 and accompanying text.

<sup>266</sup> See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. LEXIS 4, at \*216 (June 27).

<sup>267</sup> Kattan, *supra* note 163, at 27.

<sup>268</sup> See *supra* notes 163–64 and accompanying text.

<sup>269</sup> Kattan, *supra* note 163, at 27.

<sup>270</sup> Randelzhofer, *supra* note 137, at 802.

<sup>271</sup> Ruys, *supra* note 4, at 273.

<sup>272</sup> See *supra* notes 27–30, 259 and accompanying text.

<sup>273</sup> See Rivera, *supra* note 250.

<sup>274</sup> See Roe Nahmias, *Long-Range Rocket Lands Near Jenin*, YNETNEWS.COM, Aug. 2, 2006, available at <http://www.ynetnews.com/articles/0,7340,L-3285259,00.html>.

<sup>275</sup> See *supra* note 19 and accompanying text.

<sup>276</sup> See *supra* Part V.B.3.

*a. Effective Control*

As a recognized political party, holding over twenty of the 128 seats in Lebanon's Parliament, Hezbollah can be viewed as a participant in the Lebanese government. Thus, to some extent it is a misnomer to label Hezbollah a non-state actor.<sup>277</sup> Recall that effective control does not require that the state completely control the non-state actor. Rather, it requires that the non-state actor "is in fact acting on the instructions of, *or under the direction and control of*, that State."<sup>278</sup> Here, Hezbollah, as a putatively legitimate political party within a sovereign state's political system, is to some extent under the effective control of Lebanon. One may legitimately assert that, because Lebanon has chosen not only to recognize but also to embrace Hezbollah as part of its government, it exercises effective control over this organization. Because it has legitimized Hezbollah and made it part of the Lebanese government, it has demonstrated that it exercises control, and that Hezbollah as a political party acts under the control of the state of Lebanon.

This argument's weakness is readily apparent, however. Effective control refers to the nature of the *specific act* in question, not to the *general relationship* between the state and non-state actor.<sup>279</sup> Lebanon has never asserted that it "ordered" Hezbollah to attack Israel, or provided "directions" to that effect.<sup>280</sup> Indeed, according to Lebanese Prime Minister Siniora, "The [Lebanese] government . . . was not aware of what was to take place and does not adopt the operation carried out by Hizbullah to capture the two Israeli soldiers."<sup>281</sup> Thus, the argument that Lebanon effectively controlled Hezbollah, or that Hezbollah was acting under the control of Lebanon in this attack, meets with scant evidence. We now turn to the two stronger arguments for imputing state responsibility to Lebanon.

*b. Harboring and Assisting*

Under the harboring and assisting view, a state can be held liable for a non-state actor's acts when the state "has a role in organizing, coordinating or planning the military actions of a military group"<sup>282</sup> *or* has "willingly harbored"<sup>283</sup> the non-state group. That Lebanon has at least "harbored" Hezbollah is readily apparent. Lebanon has not only permitted Hezbollah to exist, both as a political party and as a militia, but further exclusively has allowed it to carry weapons within Lebanon.<sup>284</sup> Given that Hezbollah continues to attack Israel with mortars, rockets, and small arms fire, Lebanon's decision suggests a condoning of these attacks and an encouragement of continued attacks against Israel. By arming Hezbollah, Lebanon itself has a role in the military actions of the group. Additionally, simply by allowing Hezbollah to continue to exist, particularly in light of U.N. Security Council Resolution 1559, Lebanon continues to willingly harbor this non-state group. Thus, under the harboring and assisting theory, Israel was justified to hold Lebanon liable for the actions of Hezbollah.

*c. Unwilling or Unable to Prevent Attacks*

Lebanon itself, at least early in the Israel-Lebanon War, claimed the unwilling position.<sup>285</sup> Israeli Ambassador Gillerman seconded that notion, noting that Lebanon's "ineptitude and inaction . . . has led to a situation in which it has not exercised jurisdiction over its own territory for many years."<sup>286</sup> Lebanon's refusal or inability to dismantle the Hezbollah militia in

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<sup>277</sup> Indeed, it appears that Israel makes this very argument: that Hezbollah is not a non-state actor, but rather is a part of the Lebanese government; thus, Lebanon is responsible. *See, e.g.,* Olmert, *supra* note 39. For our purposes, however, we will examine Israel's actions not on the basis of its rhetoric, but under all possible readings of Article 51.

<sup>278</sup> Weiner, *supra* note 186, at 431 (quoting Report of the International Law Commission, U.N. GAOR Supp. No. 10, at 103, U.N. Doc. A/56/10) (emphasis added).

<sup>279</sup> *See supra* notes 188–91 and accompanying text.

<sup>280</sup> *See, e.g.,* Siniora Statement, *supra* note 251.

<sup>281</sup> *Id.*

<sup>282</sup> Weiner, *supra* note 186, at 432 (citing Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, at 131 (July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>); *see supra* note 193 and accompanying text.

<sup>283</sup> Ruys, *supra* note 4, at 282 (citing MICHAEL BYERS, WAR LAW 67 (2005)); Randelzhofer, *supra* note 137, at 801.

<sup>284</sup> Sites, *supra* note 23.

<sup>285</sup> *See, e.g.,* Siniora Statement, *supra* note 251 ("The [Lebanese] government . . . was not aware of what was to take place and does not adopt the operation carried out by Hizbullah to capture the two Israeli soldiers.").

<sup>286</sup> Gillerman, *supra* note 41.

accordance with Security Council Resolution 1559 provides stark evidence of its powerlessness—or acquiescence—in the face of this political and military faction within its borders. That Hezbollah, for six years after Israel withdrew from Lebanon, continued to barrage Israeli citizens with military attacks while the Lebanese government remained notably silent, again demonstrates Lebanon’s unwillingness or inability to prevent such attacks.

*d. Is “Harboring and Assisting” or “Unwilling or Unable” Enough?*

Judge Simma and other legal scholars correctly note that in light of U.N. Security Council Resolutions 1368 and 1373, Article 51 is not restricted to “state vs. state” conflicts.<sup>287</sup> Indeed, given the nature of modern conflict, where more and more non-state actors take center stage in large scale attacks, a state vs. state limited reading on Article 51 is anachronistic and not in keeping with the spirit of the article. According to some scholars—including at least two ICJ judges—the *Nicaragua* opinion is outdated and bad law, despite the ICJ’s refusal directly to address that issue.<sup>288</sup>

The realities of the nature of conflict, particularly post-9/11, are manifested in the explicit language of U.N. Security Council Resolutions 1368 and 1373. No longer may only state actions constitute a threat to international peace and security, but those of non-state actors may qualify as well.<sup>289</sup> The Security Council passed these resolutions in the aftermath of 9/11, knowing full well that *non-state actors* had committed these attacks.<sup>290</sup> Yet the Security Council chose to use the language that triggers Chapter VII of the U.N. Charter dealing with enforcement actions (threat to international peace and security)<sup>291</sup> to condemn the attacks.<sup>292</sup> Thus, the U.N. Security Council engaged in a major paradigm shift, one that must inform our reading of Article 51’s scope. No longer is this article interpreted as applying only to state actors, but to non-state actors as well.<sup>293</sup>

Returning, then, to whether Lebanon was responsible for the actions of the non-state actor Hezbollah<sup>294</sup> within its borders, the answer must be in the affirmative. To assert the effective control theory is to erase the border between the definitions of state and non-state actor entirely. Put another way, if a non-state actor is effectively controlled (“under the direction and control of”<sup>295</sup> the state) in its attack, then it is effectively, if not actually, an *instrument* of that state. Indeed, the definition of non-state actor does not exist under this theory. The theory is not simply overly-restrictive—it defines the term away entirely.

Harboring and assisting also can be too restrictive. Under this theory, a state is excused for acquiescing to the non-state actor by refusing to take action against it, so long as the state does not “organiz[e], coordinat[e] or plan[] the military actions” of the non-state actor,<sup>296</sup> and the victim state has no recourse. It must continue to suffer attacks by the non-state actor who enjoys safety within the borders of the acquiescent, apathetic, or anemic state. The purpose of Article 51 is thwarted, as the victim state can do nothing but continue to watch casualties mount, or to raise the issue to the U.N. Security Council as a

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<sup>287</sup> See, e.g., Randelzhofer, *supra* note 137, at 802; Schmitt Interview, *supra* note 187.

<sup>288</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, 219–34 (July 9) (separate opinion of Judge Kooijmans); Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), 2005 I.C.J. 1, 2–3 ¶¶ 9–13 (Dec. 19) (separate opinion of Judge Simma); Schmitt Lecture, *supra* note 183. *But see* Statute of the International Court of Justice art. 59 (providing that ICJ opinions in contentious cases are only binding on the states involved for that particular case, and thus do not serve as binding precedent for future ICJ decisions). Statute of the International Court of Justice art. 59, June 26, 1945, available at [http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER\\_II](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II).

<sup>289</sup> See S.C. Res. 1368, *supra* note 177; S.C. Res. 1373, *supra* note 179.

<sup>290</sup> Schmitt Lecture, *supra* note 183.

<sup>291</sup> S.C. Res. 1368(1), *supra* note 177.

<sup>292</sup> See U.N. Charter art. 39.

<sup>293</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, 219–34 (July 9) (Kooijmans, J., Separate Opinion); Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), 2005 I.C.J. 1, 2–3, ¶¶ 9–13 (Dec. 19) (Simma, J., Separate Opinion); Schmitt Lecture, *supra* note 183. *But see* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, 194, ¶ 139 (July 9).

<sup>294</sup> See *supra* note 277 and accompanying text (arguing that since Hezbollah is a political party in Lebanon, it may not be accurate to label it a non-state actor).

<sup>295</sup> Weiner, *supra* note 186, at 431 (quoting Report of the International Law Commission, U.N. GAOR Supp. No. 10, at 103, U.N. Doc. A/56/10).

<sup>296</sup> See *supra* note 194 and accompanying text.

potential threat to international peace and security.<sup>297</sup> It can hope that perhaps the non-state actor, instead of firing missiles and rockets from safety, will enter the victim state's territory, thereby constituting an armed attack and allowing for "legitimate" use of force in self-defense under Article 51.<sup>298</sup> But it can attack neither the non-state actor nor the state itself until the actions constitute an armed attack. The non-state actor's actions are absolved perpetually, by virtue of its location within a state that is either unwilling or unable to stop the unlawful attacks. This scenario cannot be within the spirit of Article 51 and a state's "inherent right to self-defense."<sup>299</sup>

This scenario, in fact, existed in Afghanistan when the Security Council passed Resolutions 1368 and 1373. Namely, the weak Afghan government appeared to be unable to control Al Qaeda.<sup>300</sup> Yet the Security Council proclaimed the actions of this non-state actor, located within Afghanistan, to be a "breach of international peace and security."<sup>301</sup> As such, its attacks satisfied Article 39's threshold requirement for the U.N. Security Council to take action under Chapter VII,<sup>302</sup> and potentially set the stage for the use of force in response.

For these reasons, even at the lower threshold of unwilling or unable to prevent terrorist attacks, Israel was justified in holding Lebanon responsible for the actions of Hezbollah. Notably, we thus have come full circle back to a union of Saint Augustine's and Saint Aquinas' theories—that in some circumstances, if all other just war criteria are met, a state can attack another state that refuses, or perhaps even neglects, to punish its own "evildoers."<sup>303</sup>

### C. Did Israel Violate the *Jus in Bello* Customary International Law Principles of Necessity and Proportionality?

Despite Israel's justification for holding Lebanon responsible for Hezbollah's actions and its right to use force in self-defense, one still must examine Israel's actions *within* the 2006 Israel-Lebanon War (i.e., the *jus in bello*). If a state unlawfully uses force while engaged in war, its decision to go to war itself may remain "just," but it is no longer prosecuting the war "justly." *Jus ad bellum* and *jus in bello*, while examined separately, are thus inexorably linked. Neither one, standing on its own, can justify a war in its totality (i.e., in both the adjectival and adverbial sense).<sup>304</sup>

Here Israel falls short. Though under both the just war theory and Article 51, Israel was justified acting in self-defense, the manner in which it chose to act did not comport with international law norms. Instead, Israel violated the customary international law principles of necessity and proportionality, and thus ultimately failed to comply with international law.

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<sup>297</sup> U.N. Charter art. 35.

<sup>298</sup> See *supra* notes 146–47 and accompanying text.

<sup>299</sup> See U.N. Charter art. 51.

<sup>300</sup> See, e.g., John Ward Anderson, *Attacks by Taliban Increase, Approach Afghanistan Capital*, WASH. POST, Sept. 28, 2007, available at [http://www.boston.com/news/world/middleeast/articles/2007/09/28/attacks\\_by\\_taliban\\_increase\\_approach\\_afghanistan\\_capital/](http://www.boston.com/news/world/middleeast/articles/2007/09/28/attacks_by_taliban_increase_approach_afghanistan_capital/).

<sup>301</sup> S.C. Res. 1368, *supra* note 177; S.C. Res. 1373, *supra* note 179.

<sup>302</sup> U.N. Charter art. 39.

<sup>303</sup> See *supra* notes 73–74, 89–91 and accompanying text (discussing the views of Saint Augustine and Saint Aquinas on the scope of punishing evildoers).

<sup>304</sup> See WALZER, *supra* note 205, at 21.

The moral reality of war is divided into two parts. War is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt. The first kind of judgment is adjectival in character: we say that a particular war is just or unjust. The second is adverbial: we say that a particular war is being fought justly or unjustly. . . . The two sorts of judgment are logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules. But this independence, though our views of particular wars often conform to its terms, is nevertheless puzzling. It is a crime to commit aggression, but the resistance is subject to moral (and legal) restraint. The dualism of *jus ad bellum* and *jus in bello* is at the heart of all that is most problematic in the moral reality of war.

*Id.* This view of a strict separation between *jus ad bellum* and *jus in bello* is more restrictive than the present author's view; yet the conclusion remains the same even if *jus ad bellum* and *jus in bello* are entirely independent: Israel was justified to use force against Lebanon in self-defense (satisfying the *jus ad bellum* criteria), but failed to prosecute a just war (violating the *jus in bello* criteria). *Contra* Schmitt Lecture, *supra* note 183 (expressing concern about the convergence between *jus ad bellum* and *jus in bello*).

## I. Necessity

“Let necessity, therefore, and not your will, slay the enemy who fights against you,” proclaimed Saint Augustine.<sup>305</sup> Saint Aquinas echoes this sentiment, asserting that rightful intention can be sullied by destroying more than what military necessity requires.<sup>306</sup> Article 52 of Additional Protocol I, providing a modern definition of military necessity, asserts that parties to a conflict must take special care to ensure that their targets are military objects, not civilian objects.<sup>307</sup> Should doubt exist as to the nature of an object, the parties are to presume that it is civilian and are not to attack it.<sup>308</sup> Military objects are those “which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>309</sup>

The death toll that Israel exacted on the Lebanese civilian population was high. Approximately 1,190 Lebanese civilians died from Israeli rocket and mortar attacks; about thirty percent of these casualties were children.<sup>310</sup> These numbers are even more staggering when compared with the relatively few Israeli civilian casualties at the hands of Lebanon: only about forty-three Israeli civilians were killed in the war.<sup>311</sup>

Most of the Lebanese civilians perished when Israel targeted civilian homes, civilian vehicles, and roads and highways upon which Lebanese civilians were attempting to evacuate.<sup>312</sup> Israel asserted that Hezbollah was using these civilians as “human shields,” hiding behind the civilian populace and infrastructure in order to launch rocket and mortar attacks against Israel.<sup>313</sup>

However, after extensive on-the-ground research and interviews with survivors and eyewitnesses, corroborated by international journalists, Human Rights Watch “found no cases in which Hezbollah deliberately used civilians as shields to protect them from retaliatory IDF attack.”<sup>314</sup> Instead, the objects of Israeli fire appeared to be purely civilian, with little to no military value.<sup>315</sup>

Military necessity did not clearly exist to support Israel’s choice of targets. Little evidence suggests that the civilian towns, homes, and persons that Israeli warplanes and rockets destroyed were military objectives.<sup>316</sup> Moreover, Israel several times launched artillery and warplane fire onto roads upon which Lebanese civilians were attempting to flee—after receiving

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<sup>305</sup> SWIFT & SWIFT, *supra* note 65, at 61.

<sup>306</sup> AQUINAS, *supra* note 84, II.2.40. Quoting Augustine regarding “rightful intention,” Aquinas reminds his readers, “True religion looks upon as peaceful those wars that are waged *not for motives of aggrandizement, or cruelty*. . . . The passion for inflicting harm the cruel thirst for vengeance, . . . and suchlike things, all these are rightly condemned in war.” *Id.*

<sup>307</sup> Additional Protocol I, *supra* note 102, art. 52(1).

<sup>308</sup> *Id.* art. 52(3).

<sup>309</sup> *Id.* art. 52(2).

<sup>310</sup> Haider Rizvi, *Israel/Lebanon: Probe of 2006 War Ignored Civilian Deaths*, IPSNEWS.NET, Jan. 31, 2008, available at <http://ipsnews.net/news.asp?idnews=41031>; *Timeline of the July War 2006*, *supra* note 45.

<sup>311</sup> Ruys, *supra* note 4, at 270.

<sup>312</sup> FATAL STRIKES: ISRAEL’S INDISCRIMINATE ATTACKS, 18 HUMAN RIGHTS WATCH No. 3, at 35–42 (Aug. 2006) [hereinafter HRW REPORT], available at <http://www.hrw.org/sites/default/files/reports/lebanon0806webwcover.pdf>.

<sup>313</sup> ISRAELI MINISTRY OF FOREIGN AFFAIRS, *Behind the Headlines: Legal and Operational Aspects of the Use of Cluster Bombs* (Sept. 5, 2006), available at <http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Legal+and+operational+aspects+of+the+use+of+cluster+bombs+5-Sep-2006.htm>.

<sup>314</sup> HRW REPORT, *supra* note 312, at 3.

<sup>315</sup> *Id.*

Since the start of the conflict, Israeli forces have consistently launched artillery and air attacks with limited or dubious military gain but excessive civilian cost. In dozens of attacks, Israeli forces struck an area with no apparent military target. In some cases, the timing and intensity of the attack, the absence of a military target, as well as return strikes on rescuers, suggest that Israeli forces deliberately targeted civilians.

*Id.*; see also AMNESTY INT’L, MDE 02/025/2006, ISRAEL/LEBANON: UNDER FIRE: HIZBULLAH’S ATTACKS ON NORTHERN ISRAEL, Sept. 2006, available at <http://www.amnesty.org/en/report/info/MDE02/025/2006>.

<sup>316</sup> HRW REPORT, *supra* note 312. That Hezbollah also exercised indiscriminate attacks is well-documented. See *id.* However, the focus of this paper is not upon the *jus in bello* actions of Hezbollah, but only those of Israel.

and complying with warnings from Israel to evacuate.<sup>317</sup> At least twenty-seven Lebanese civilians were killed in this barrage of fire.<sup>318</sup>

## 2. Proportionality

The U.S. Secretary of State Daniel Webster, in the nineteenth century *Caroline* incident, insisted that even if necessity applies, proportionality still must be taken into account. “Unreasonable or excessive force, or force used prematurely without considering other options delegitimizes a state’s actions, even when necessity exists.”<sup>319</sup> We find a helpful definition of non-proportionality in Additional Protocol I, Article 52(5)(b): An attack lacking proportionality is one “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive in relation to the concrete and direct military advantage anticipated*.”<sup>320</sup>

If one concludes that Israel targeted civilian objects, not military objects, a proportionality analysis is hardly necessary. Yet even if military necessity did exist, Israel failed to exercise the principle of proportionality. In its proportionality analysis, the party considering its targets must balance the concrete and direct military advantage gained against the potential civilian deaths, injuries, or damage anticipated. Incidental or unavoidable damage to civilian personnel and property is legally permissible, as long as it is expected to be proportional and not excessive to the military advantage to be gained.<sup>321</sup>

Perhaps Israel’s greatest lack of proportionality was displayed in its firing cluster rockets into southern Lebanon, particularly as the war drew to a close. In the last seventy-two hours prior to the August 14, 2006 ceasefire, Israel rained 1,800 cluster rockets on Lebanon.<sup>322</sup> According to Amnesty International, since the war ended, about forty people have been killed by these munitions and over 240 have been injured.<sup>323</sup> A U.N. Commission of Inquiry investigating the war found “a significant pattern of excessive, indiscriminate and disproportionate use of force by the Israel Defence Forces against Lebanese civilians and civilian objects, failing to distinguish civilians from combatants and civilian objects from military targets.”<sup>324</sup> A separate investigation by four U.N. independent experts asserted that the evidence “strongly indicates that, in many instances, Israel violated its legal obligations to distinguish between military and civilian objectives; to fully apply the

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

Israel has justified its attacks on roads by citing the need to clear the transport routes of Hezbollah fighters moving arms. Again, none of the evidence gathered by Human Rights Watch, independent media sources, or Israeli official statements indicate that any of the attacks on vehicles documented in this report resulted in Hezbollah casualties or the destruction of weapons. Rather, the attacks killed and wounded civilians who were fleeing their homes, as the IDF had advised them to do.

*Id.* at 6.

<sup>319</sup> See Webster Letter, *supra* note 127.

<sup>320</sup> Additional Protocol I, *supra* note 102, art. 51(5)(b) (emphasis added).

<sup>321</sup> See Rome Statute of the International Criminal Court para. 8(2)(b)(iv), U.N. Doc. A/CONF.183/9 (July 17, 1998), available at <http://untreaty.un.org/cod/icc/statute/rome.htm>.

<sup>322</sup> Rizvi, *supra* note 310. In the aftermath of the war, the Israel Ministry of Foreign Affairs correctly noted: “Both international law and accepted practice do not prohibit the use of the family of weapons popularly known as ‘cluster bombs.’ Consequently, the main issue in a discussion of Israel’s use of such weaponry should be the method of their use, rather than their legality.” ISRAEL MINISTRY OF FOREIGN AFFAIRS, *supra* note 313. The current author agrees with this statement, but asserts that it was indeed in Israel’s use of these cluster bombs (both in its timing at the end of the war and its target choice near civilian populations) that it failed to exercise proportionality. See *infra* notes 322–28.

<sup>323</sup> Rizvi, *supra* note 310. Victims are killed by buried unexploded ordinance which does not explode upon initial impact, but later detonates when disturbed. See *infra* note 328 and accompanying text. After the war, the Israel Ministry of Foreign Affairs claimed:

Immediately after the cease-fire the IDF gave UNIFIL maps indicating the likely locations of unexploded ordinance, to aid the international attempt to clear these areas and avoid injury to the population. Furthermore, immediately after the cease-fire the IDF distributed warning notices to the residents in the areas of warfare, and recommended that they wait a few days before returning to the south until the UNIFIL forces were deployed there and the area had been cleared of unexploded ordinance.

ISRAEL MINISTRY OF FOREIGN AFFAIRS, *supra* note 313. However, such remedial efforts do not excuse Israel from using the bombs in the first place, thus setting the conditions for future death and injury to innocent civilians. That many civilians have since perished demonstrates the fruitlessness of Israel’s post-war attempt to put the proverbial cat back in the bag.

<sup>324</sup> REPORT OF THE COMMISSION OF INQUIRY ON LEBANON PURSUANT TO HUMAN RIGHTS COUNCIL RESOLUTION S-2/1, Finding 13 (Nov. 10, 2006), available at <http://www.reliefweb.int/rw/rwb.nsf/db900SID/YAOI-6VS3P3?OpenDocument>.

principle of proportionality.”<sup>325</sup> The International Committee of the Red Cross publicly expressed concern with Israel’s use of these cluster munitions in and around civilian areas.<sup>326</sup>

Even some Israeli experts agree that Israel’s use of cluster bombs against Lebanon was legally untenable. According to the Winograd Commission,<sup>327</sup> Israel’s use of the cluster bomb failed to comply with international law. The Commission found that “[t]he cluster bomb is inaccurate, it consists of bomblets that are dispersed over a large area, and some of the bomblets do not explode [on impact] and can cause damage for a long period afterward.”<sup>328</sup>

Indeed, the Israeli Defense Force itself later admitted to targeting civilian areas in Lebanon with cluster bombs. The IDF justified this targeting by claiming that “the use of cluster munitions against built-up areas was done only against military targets where rocket launches against Israel were identified and after taking steps to warn the civilian population.”<sup>329</sup> However, such does not excuse Israel’s use of cluster munitions. If true, it merely satisfies the *military necessity* prong of *jus in bello*. Given the indiscriminate nature of cluster bombs, fired into a densely populated target area, Israel failed to meet the *proportionality* criteria. According to Israeli colonel MK Cohen,

This is a very serious matter. If cluster bombs were used in populated areas, this constitutes an indescribable crime. There is no target that cannot be hit without cluster bombs. The massive use by the IDF of cluster bombs during the war suggests an absolute loss of control and hysteria.<sup>330</sup>

The military advantage to be gained by targeting civilian property appears minimal at best. Perhaps, had Israel correctly assessed that Hezbollah itself was firing rockets into Israel from civilian homes and using Lebanese civilians as human shields, a direct and concrete military advantage might have been gained by destroying these homes. Perhaps, had Israel correctly concluded that the roads upon which Lebanese civilians were attempting to escape also provided transportation for combatants to avoid being killed or captured, a direct and concrete military advantage might have been gained by destroying these roads.

However, in balancing this putative direct and concrete military advantage, Israel would have been compelled to take into account the massive civilian deaths, injuries, and damage anticipated. Dropping warning leaflets is not enough when those civilians who flee their homes are killed by Israeli warplanes and rockets on the exit roads. The excessive loss of civilian life that Israel should have anticipated is borne out in the actual number of Lebanese civilian casualties. That over one million Lebanese civilians became internally displaced persons because of Israel’s strikes, even if these targets offered a legitimate military advantage, further demonstrates that Israel violated the principle of proportionality.<sup>331</sup>

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<sup>325</sup> Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council,” Mission to Lebanon and Israel, Oct. 2, 2006, A/HRC/2/7, para. 99, available at <http://www.universalhumanrightsindex.org/documents/841/1022/document/en/pdf/text.pdf>.

<sup>326</sup> Interview with Mr. Phillip Sundel, Deputy Legal Advisor to the Washington Regional Delegation of the International Committee of the Red Cross at Charlottesville, Va. (Mar. 13, 2008); see also ICRC, *Lebanon: Where Childhood Games are Dangerous*, Nov. 2, 2006, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/lebanon-story-021106?opendocument> (noting that since 2000, the ICRC has proposed banning the use of cluster munitions against any targets located near the civilian population).

<sup>327</sup> In September 2006, the Israeli government appointed the Winograd Commission, chaired by retired Israeli judge Eliyahu Winograd, to investigate the Israeli government’s conduct of war. See Dana Blander, *Main Issues in the Interim Report of the Winograd Commission*, ISRAEL DEMOCRACY INSTIT., July 5, 2007, available at <http://www.idi.org.il/english/article.asp?id=07052007123937> (last visited Feb. 19, 2008). On 30 January 2008, the Commission released its findings. Some organizations, such as Amnesty International, criticized the Commission’s findings as “deeply flawed” for not addressing what it considers to be IDF war crimes against the Lebanese populace during the 2006 war. See Rizvi, *supra* note 310. Other than its findings regarding cluster bombs, the Winograd Commission did not address any other of Israel’s questionable *jus in bello* practices, stating, “We did not find it appropriate to deal with issues that are part of a political and propaganda war against the state.” Yuval Yoaz, *Committee: Use of Cluster Bombs Does Not Conform to International Law*, HAARETZ.COM, Feb. 1, 2008 (quoting WINOGRAD COMMISSION REPORT (Jan. 30, 2008)).

<sup>328</sup> Yoaz, *supra* note 327 (quoting WINOGRAD COMMISSION REPORT (Jan. 30, 2008)). *Contra Israel: Cluster Bombs Used Legally Against Terrorist Targets*, ISRAEL NEWS AGENCY, Dec. 26, 2007, available at <http://www.israelnewsagency.com/lebanonwarhizbullahhezbollahterr orattacksisraelidclusterbombsdefensekatusha48122607.html> (citing an investigatory finding by the IDF Military Adjutant General (MAG) that “the IDF’s use of cluster munitions during the war was in accordance with international humanitarian law as it directly defended innocent Israeli civilians from the barbaric actions of Islamic terrorists.”). The IDF MAG self-serving conclusions ignore the principle of proportionality altogether. The issue is not whether the IDF was justified in using force to “defend[] innocent Israeli civilians,” but whether the use of cluster munitions in areas populated with civilians could have been anticipated to lead to civilian deaths disproportionate to the military advantage to be gained.

<sup>329</sup> Nir Hasson & Meron Rapoport, *IDF Admits Targeting Civilian Areas in Lebanon with Cluster Bombs*, HAARETZ.COM, Nov. 21, 2006, <http://www.haaretz.com/hasen/spages/789876.html> (quoting a release by the IDF Spokesman’s Office).

<sup>330</sup> *Id.* (quoting MK Cohen).

<sup>331</sup> See Blanford, *supra* note 37.

## VII. Conclusion

Israel's decision to attack Lebanon in its pursuit of Hezbollah was justified under both the just war theory and Article 51 of the U.N. Charter. In accordance with the just war tradition, a just cause existed—to secure the peace and to punish the evildoers. As the victim and sovereign state, Israel possessed the proper authority; by all appearances, it used force with the rightful intention; and it did so as the last resort. In keeping with Article 51 of the U.N. Charter, Israel had experienced an armed attack, and it lawfully held Lebanon responsible.

Yet because Israel's methods were not in compliance with customary international law, Israel, in the end, failed to wage a just and lawful war. Instead, it fell prey to its enemy's tactics, firing indiscriminately and disproportionately upon areas populated by civilians, rightfully drawing the ire and condemnation of the international community, and violating the law of war.

The operational difficulty of how Israel properly and effectively could have used military force against Lebanon while still abiding by *jus in bello* principles of customary international law should not be underestimated. Yet despite these challenges, a fundamental principle of international law dictates that indiscriminate firing on civilian-populated areas, resulting in disproportionate civilian casualties—even if some military gain is realized—is never permissible.

States facing circumstances similar to that of Israel, particularly states bordering anemic or apathetic states containing militant non-state actors, walk a thin line, if not indeed a tightrope. Even if a state may lawfully use military force in self-defense against another state for the actions of its non-state actors, the critical balance involves taking extreme caution to avoid unnecessary civilian casualties. States can learn from the 2006 Israel-Lebanon War that the traditional notions of warfare—with the highest emphasis on destroying the enemy and a seemingly casual acceptance of collateral damage—can only serve in the twenty-first century to isolate the victim state from the international community. They can only serve, ironically, to turn the international community's support *away from* the state that suffered the harm, and in sympathy *toward* the non-state actor and its harboring state.<sup>332</sup> Thus, not only from the standpoint of the inherent moral legitimacy of fighting a just and lawful war, but also from the more pragmatic stance of maintaining international support, does the need for careful and precise fighting, at a level not seen before, inevitably surface.

The challenges of responding to attacks by non-state actors will continue to plague modern states as they face the realities of a multi-dimensional, non-state enemy who himself may be more than willing to violate norms of international law,<sup>333</sup> hoping to entice state actors into doing the same in retaliation, and thereby leveling the moral playing field. Abiding by the rules arguably has not been this challenging since Saint Augustine's time, when the Vandals and Visigoths pressed in on the Romans, committing horrific acts on civilians in their path and showing no mercy to surrendering soldiers. Yet the principles remain the same: civilized nations fight just wars, abide by international law, and treat enemy civilians humanely. To do otherwise is to give up that which distinguishes the civilized state from the non-state actor—an abiding sense of justice, and a faith that adhering to these principles ultimately will reinforce their strength and efficacy for future generations.

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<sup>332</sup> Schmitt Lecture, *supra* note 183 (discussing the “bully syndrome,” whereby the state that has suffered the attack from a non-state actor is often still considered the “bully” by the international community due to that victim state's military response to the smaller state containing the militant non-state actors. Often, a primary reason for the emergence of the bully syndrome is the perception that the bully state uses more force, and causes more collateral damage, than necessary.)

<sup>333</sup> *Id.*

## The GAO Bid Protest: The First Thirty Days—A Procedural Guide For the Local Counsel

Phillip E. Santerre\*

### Introduction

This article serves as a brief practical guide for practitioners assigned to the Corps of Engineers dealing with the administrative aspects of a Government Accountability Office (GAO) bid protest. Although practitioners working in the regular contracting offices of the U.S. Army and Air Force follow a very different procedure through a central contracting office, this article provides them a useful overview of the GAO process. This article provides a reference for regulatory and policy requirements and offers practical tips on preparing and filing documents through the Corps of Engineers. It is intended for Judge Advocates (JAs) and civilian attorneys who directly represent the Corps of Engineers as well as for those who support a central agency bid protest litigation group. This article does not attempt to discuss substantive legal or contract issues that may arise in a protest.

Take the following hypothetical. It is Friday noon, the day before a three day holiday weekend. As the organization's backup contract attorney, you're breathing a sigh of relief because the protest time period will expire today on a critical contract award. The primary contract attorney, who left on indefinite emergency leave yesterday, told you he was concerned because the debriefing of one unsuccessful offeror was very contentious. Although you have done some contracts work (and even attended The Judge Advocate General's School's Contract Attorneys Course), you see the GAO protest process as a confusing maze and are not sure if there is a piece of cheese at the end—if there is an end. The contracting officer told you not to worry, this offeror was just blowing off steam. So naturally, the contracting officer now walks in your office saying, "I just got this fax copy of offeror X's protest. It says he filed it with the GAO today." Having never worked with a GAO protest, you now feel like the mouse dropped in that confusing maze. What do you do?

### Filing and Notice of Protest

The GAO regulations require that the protester furnish a copy of a protest to the contracting agency (a designated office) within one day after the protest is filed.<sup>1</sup> The "official" GAO notification may not be received for several days, depending on the timing and efficiency of the intra-agency communication when the GAO notifies the designated official agency contact.<sup>2</sup> Protesters' attorneys will often provide a copy to the local contracting officer on the same day as filing the protest with the GAO. Receipt of this copy from the protester allows the contract attorney to perform the following preliminary tasks:

- (1) Check the GAO docket at <http://www.gao.gov/decision/docket/> to ensure the protest has actually been filed.<sup>3</sup>
- (2) Notify appropriate agency officials, such as the central agency protest litigation office, to ensure all relevant parties have received a copy.<sup>4</sup>
- (3) Coordinate with the contracting officer to ensure the appropriate Competition in Contracting Act (CICA) stay actions are prepared to be taken pursuant to 31 U.S.C. § 3553(c) or (d), either withholding the award or suspending contract performance.<sup>5</sup>
- (4) Ensure agency decision makers are informed. Consider whether the project is so important as to merit a request (pursuant to CICA override provisions in 31 U.S.C. § 3553(c)(2) or (d)(3)) to award or to

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<sup>1</sup> 4 C.F.R. § 21.1(e) (2008).

<sup>2</sup> *Id.* § 21.3(a).

<sup>3</sup> U.S.GAO: GAO Bid Protest Docket, <http://www.gao.gov/decision/docket/> (last visited Mar. 28, 2009).

<sup>4</sup> See, e.g., U.S. ARMY CORPS OF ENGINEERS, FEDERAL ACQUISITION REG. SUPP. pt. 33.104-100(a) (Apr. 2007) [hereinafter EFARS].

<sup>5</sup> 4 C.F.R. § 21.6; GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 33.104(b)(1), (c)(1) (Oct. 2008) [hereinafter FAR].

continue contract performance notwithstanding a protest.<sup>6</sup> Such an override of the CICA stay is very difficult to obtain. The contracting officer must prepare a determination and findings for signature by the Head of Contracting Activity, clearly explaining the damage the United States will suffer with and without the override, and obtain approval by the Deputy Assistant Secretary of the Army (Policy and Procurement). The contracting officer must also prepare a request for approval discussing the merits and expected resolution of the protest, and including details of any Congressional interest.<sup>7</sup>

(5) Review the protest for potential reasons for dismissal,<sup>8</sup> including timeliness and interested party questions. These should be filed as soon as practicable.<sup>9</sup>

(6) Coordinate with the contracting officer to begin gathering of all relevant documents. Getting a head start on this action is critical given the short time (thirty days) in which to file the agency response.<sup>10</sup>

(7) Upon receipt of notice from the GAO, notify the contractor if award has been made. If award has not been made, notify all bidders or offerors who appear to have a substantial prospect of receiving an award.<sup>11</sup> Furnish a copy of the protest submissions to those parties, except when disclosure of the information is prohibited by law, with instructions to communicate further directly with the GAO.<sup>12</sup>

(8) File a notice of appearance with the GAO, copying the protester or his counsel. This will ensure communications from the GAO and other interested parties reach you in a timely manner.<sup>13</sup> Without a notice of appearance, the GAO will send communications to the last known agency point of contact, which is likely agency headquarters.

Notification of the awardee (contractor) and other bidders or offerors must be done with care. The GAO requires certain parties to receive copies of protest submissions, except when disclosure is prohibited by law.<sup>14</sup> Protest submissions should contain a statement advising that the protest contains information that should be withheld, identifying this information whenever it appears.<sup>15</sup> If this restrictive legend appears in a protest, the JA must ensure that the protest is not provided to anyone outside the government until the protester provides a redacted copy.<sup>16</sup> Always be careful even if the protest does not contain a restrictive legend. Depending upon the substance of the protest, call the protester's attorney (or, if unrepresented, the protester) to confirm that the protest does not contain protected information. This will avoid issues of competitive disadvantage in later stages of the procurement, such as, if the protest results in reevaluation of proposals.

### Initial Evaluation

Following the initial review and administrative actions, the JA should examine the protest for potential grounds for early dismissal. In some cases, when a defect is plain on the face of the protest, the GAO will dismiss the protest without an

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<sup>6</sup> FAR, *supra* note 5, pt. 33.104(b)(1), (c)(2); *see also* U.S. DEP'T. OF ARMY, FEDERAL ACQUISITION REG. SUPP. pt. 5133.104(b), (c) (AFARS Revision 21, May 22, 2007) (setting forth procedures for such requests).

<sup>7</sup> *Id.* Overrides are rare; the author has not seen one processed in the course of eighteen years in the Corps of Engineers.

<sup>8</sup> 4 C.F.R. § 21.5.

<sup>9</sup> *Id.* § 21.3(b).

<sup>10</sup> *Id.* § 21.3(c).

<sup>11</sup> *Id.* § 21.3(a).

<sup>12</sup> *Id.*; *see* Trade Secrets Act, 18 U.S.C. § 1905 (2006) (giving an example of a legal prohibition of disclosures).

<sup>13</sup> *Id.* ("All protest communications shall be sent by means reasonably calculated to effect expeditious delivery."); *see* EFARS, *supra* note 4, pt. 33.104-100(a)(5) (showing an example of an agency provision for notice of appearance).

<sup>14</sup> *Id.*; *see* Trade Secrets Act § 1905 (giving an example of a legal prohibition of disclosures).

<sup>15</sup> 4 C.F.R. § 21.1(g).

<sup>16</sup> *Id.*

agency request.<sup>17</sup> However, do not make the assumption this will occur; prepare a draft request for dismissal as soon as possible and coordinate it up the chain of command as required.

For example, untimeliness is an important ground for dismissal,<sup>18</sup> the assertion of which can quickly derail a protest. There are numerous reasons a protest may be untimely but the key is that the issue be raised immediately, since a request for dismissal on this ground may eliminate the need for submitting a full agency report.<sup>19</sup> Because a protest that raises significant procurement issues may be considered despite its lateness,<sup>20</sup> the JA should be sure to explain in the dismissal request why this particular protest does not raise such issues.

Only interested parties may file a protest under the GAO regulations.<sup>21</sup> Although the protest itself should contain an explanation establishing that the protester is an interested party,<sup>22</sup> examine the information provided and determine whether this may be a ground for dismissal. The protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by award or failure to award a contract.<sup>23</sup>

Judge Advocates should review 4 C.F.R. § 21.5 (protest issues not for consideration) to determine if the protest raises any of the protest grounds not for consideration by the GAO.<sup>24</sup> These grounds include Small Business Administration issues, affirmative determinations of responsibility, procurement integrity violations, and subcontract protests, among others.<sup>25</sup> Identification of these issues and submission of a request for dismissal can eliminate or shrink the issues to be resolved. When specific protest allegations are dismissed, the agency report shall be filed on only the remaining allegations.<sup>26</sup>

When a dismissal is not a viable option or is denied, the JA must evaluate whether or not the GAO's express option or other alternative procedures may be appropriate to resolve the protest.<sup>27</sup> The GAO may adopt the express option at its discretion, either upon request or on its own initiative, and only in those cases suitable for resolution within sixty-five days.<sup>28</sup> Shorter filing deadlines accompany this option.<sup>29</sup> The request for an express option must be made within five days after the protest is filed.<sup>30</sup> If an agency need for a fast decision can be articulated and the facts are not overly complex, this may be a useful option to obtain a quicker decision.<sup>31</sup> If the express option is unsuitable for the protest, evaluate other options, such as an accelerated schedule or alternative dispute resolution.<sup>32</sup>

An early status conference<sup>33</sup> with the assigned GAO attorney will be of great assistance in identifying and resolving administrative issues. Such conferences involve all participating parties and are intended to address issues in such a way as to promote the expeditious development and resolution of the protest.<sup>34</sup> Such a conference may be requested by telephone or

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<sup>17</sup> *Id.* §§ 21.1(i), 21.2(b), 21.5.

<sup>18</sup> *Id.* § 21.2.

<sup>19</sup> *Id.* § 21.3(b).

<sup>20</sup> *Id.* § 21.2(c).

<sup>21</sup> *Id.* §§ 21.1(a), 21.0(a)(1) (definition of interested party).

<sup>22</sup> *Id.* § 21.1(e)(5).

<sup>23</sup> *Id.* § 21.0(a)(1).

<sup>24</sup> *Id.* § 21.5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* § 21.10.

<sup>28</sup> *Id.* § 21.10(b).

<sup>29</sup> *Id.* § 21.10(d).

<sup>30</sup> *Id.* § 21.10(c).

<sup>31</sup> *See, e.g.,* B&S Transp., Inc., B-299144, Jan. 22, 2007, 2007 CPD ¶ 16.

<sup>32</sup> 4 C.F.R. § 21.10(e).

<sup>33</sup> *Id.* § 21.10(f).

<sup>34</sup> *Id.*

e-mail, coordinating with other parties as necessary. Typically, a telephone conference is set up by the GAO attorney and an agenda distributed. This agenda is normally generated by the GAO, but may be supplemented at the request of the parties. This is an opportunity to raise questions on the method of filing, time extensions, document delivery, protective orders, and anything else which is unclear. Take advantage of the GAO conference call whenever needed throughout the process.

### Protective Orders

Many bid protests involve issues requiring the review of proprietary, confidential, source selection sensitive material, or other information the release of which could result in competitive advantage to other firms. The GAO may issue a protective order to allow limited access to such protected information and to control the treatment of protected information.<sup>35</sup> Because the protective order facilitates the pursuit of a protest by a protester's counsel, protester's counsel is responsible for requesting the order and submitting timely applications for admission to the order.<sup>36</sup> Detailed guidance on protective orders is found in the *Guide to GAO Protective Orders*.<sup>37</sup>

As agency counsel, the JA has a responsibility to ensure that protected material is not improperly released. When a protective order has not been issued, the GAO permits the agency to withhold from the parties the portions of its report that would be subject to a protective order.<sup>38</sup> This includes documents filed as part of the report. The GAO will review withheld information in camera.<sup>39</sup> They generally will not issue a protective order when the protester is proceeding without an attorney.<sup>40</sup> The protester's attorney often will include a request for protective order in the initial protest filing. The GAO may issue a protective order on its own initiative whenever it appears appropriate and the protester has counsel.<sup>41</sup> The protective order package will be issued soon after a protest is filed, possibly with the protest acknowledgement notice.<sup>42</sup>

When the JA receives the GAO protective order in the protest, can unrestricted information be sent to protester's counsel? Not yet. Counsel (and any consultants) must apply to be admitted to the protective order.<sup>43</sup> Application forms come with the order package. Each individual seeking admission to the order must file a separate application to establish that the individual is appropriate for admission, is not involved in competitive decision-making, has read the protective order, and will comply with its terms and conditions.<sup>44</sup> Counsel has two days from receipt of the application to make any objections to the proposed admission.<sup>45</sup> Consult the *Guide to Protective Orders* for examples of admissions and denials of admissions to protective orders.<sup>46</sup>

Working with our hypothetical, the protester's counsel and their associate have now been admitted to the protective order in your protest. They provided a redacted copy of the protest, filed within one day of the filing of the protest. How does the existence of the protective order affect planning for future filings?

Any party preparing a filing under the protective order must submit a redacted version of the filing which omits protective information so you must build in time to redact documents and the agency report.<sup>47</sup> This places a greater

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<sup>35</sup> 31 U.S.C. § 3553(f)(2) (2006); 4 C.F.R. § 21.4(a).

<sup>36</sup> 4 C.F.R. § 21.4(A).

<sup>37</sup> U.S. GOV'T ACCOUNTING OFFICE, GAO-06-716SP, GUIDE TO GAO PROTECTIVE ORDERS (May 2006) [hereinafter GAO-06-716SP], available at <http://www.gao.gov/legal/bidprotest.html>.

<sup>38</sup> 4 C.F.R. § 21.4(b).

<sup>39</sup> *Id.*

<sup>40</sup> GAO-06-716SP, *supra* note 37, at 4.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> 4 C.F.R. § 21.4(c).

<sup>44</sup> GAO-06-716SP, *supra* note 37, at 6.

<sup>45</sup> 4 C.F.R. § 21.4(c).

<sup>46</sup> GAO-06-716SP, *supra* note 37, at 8–11.

<sup>47</sup> *Id.* at 4.

administrative burden on agency counsel because two filings are now required. Work with the contracting officer to initially identify protected documents. Do not forget the waiting period before release of redacted documents to parties outside the protective order. When sending or receiving unprotected or redacted documents, a party may not release those documents to anyone not admitted to the protective order until the end of the second day following receipt of the document by all parties.<sup>48</sup> This allows time to identify any mistakenly unprotected documents.<sup>49</sup> All protected material provided under the order must contain the required markings.<sup>50</sup> With appropriate software, the markings may be applied electronically.

Transmitting the protected and redacted documents can be time-consuming. Electronic transmission may assist with this issue. When a protective order has been issued, documents may be transmitted by e-mail, unless objected to by a party to the protest.<sup>51</sup> This is an example of when a GAO telephone conference may be helpful. Judge Advocates should request a conference well before the report is due. Tell the parties and the GAO attorney that you plan to submit the agency report, including the documents, by e-mail with attachments (use CD/DVD for voluminous documents). Assure the parties that documents provided on a CD/DVD format will be appropriately protected from modification and that electronic redactions are effective. Try to respond to any potential objections as soon as possible. Electronic and CD/DVD delivery of documents will save time, money, paper, and promote efficiency of the process. Confirm that the agency report (less voluminous documents) will be submitted by e-mail to the GAO's electronic filing address.<sup>52</sup>

### Preparing the Documentary Record

Agency counsel must file a report on the protest with the GAO within thirty days after telephone notice from the GAO.<sup>53</sup> If telephone notice was given to the agency headquarters, find out from them when it was received. If there is any doubt, raise the issue in an early conference call. Documents to be produced as part of the report may be filed with the report or produced prior to filing of the report.<sup>54</sup> Be aware of the requirement to file a list of documents five days prior to filing of the report.<sup>55</sup> This filing requirement is triggered by the protester's filing a request for specific documents.<sup>56</sup> The initial protest will likely contain such a request. The agency list must identify documents already released or intended to be provided with the report, and identify any documents the agency intends to withhold and the reasons for the proposed withholding.<sup>57</sup> Any objections to the proposed withholding must be filed within two days of receipt of the list.<sup>58</sup> The agency may request an extension of time for filing the list or the report.<sup>59</sup> If more time is needed, request it soon. Don't ask for more than a few days; any time extension will cut into the GAO's 100-day time for decision,<sup>60</sup> which it takes very seriously.

There is no prescribed format for organizing the documents to be filed as part of the agency report. However, strive to make the review of these documents as user-friendly as possible. An unorganized pile of paper will not suffice. Build time in the schedule to consider the order of the documents, any tabbing, and even page numbering where a lengthy document has no internal numbering. The most efficient way to deal with a lot of documents is to (1) put them in order, (2) use a scanning program to create an electronic read-only document file, (3) use a bookmarking hyperlink system to create a table of contents which the reader can use to jump to different documents and pages, and (4) use a word-searchable program. This will

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<sup>48</sup> *Id.* at 4–5.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 17–18.

<sup>51</sup> *Id.* at 3.

<sup>52</sup> U.S. GAO: Bid Protest Filings by E-Mail, <http://www.gao.gov/decisions/moreinfo.html> (last visited Mar. 28, 2009).

<sup>53</sup> 4 C.F.R. § 21.3(c).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* § 21.3(f).

<sup>60</sup> *Id.* § 21.9(a).

provide all parties with an efficient navigation system for a voluminous record. Parties may print all or part of the documents as desired.

Work with the contracting officer to get started on document identification and organization as soon as possible. Call a strategy meeting of the protest team as soon as possible and check status of tasks regularly. Take advantage of the efficiencies offered by electronic document management programs. Ensure there are no objections to electronic filing. The contract specialist, working with a paralegal, can make the administrative job much easier, allowing the attorney to focus on planning the protest response, dealing with protester's counsel, and writing the substantive agency report. In a document-intensive protest, thirty days will go by quickly.

### **Conclusion**

Let us return to our hypothetical. It is now thirty days after that fateful day the contracting officer gave you a copy of the protest. You just filed the agency report after successfully navigating the complexities of notifications, CICA stays, protective orders, filing choices, and organization of documents. It feels good to have learned how that black box of protests works. Now it's time to go attend the latest debriefing of an unsuccessful proposer. No big deal. After all, the contracting officer told you, "This guy just likes to blow off steam."

## Claims Report

U.S. Army Claims Service

Claims Management Note

### Claims Training on JAG University

Colonel R. Peter Masterton

The U.S. Army Claims Service recently posted claims training materials on the JAG University link of JAGCNet, the web site of the Army Judge Advocate General's Corps.<sup>1</sup> JAG University is an on-line training resource of The Judge Advocate General's Legal Center and School. The claims training materials include information on deployment claims, affirmative claims, receiving claims and interviewing witnesses.

Those who wish to settle claims in deployed areas, such as Iraq and Afghanistan, are required to review the material on deployment claims.<sup>2</sup> Claims from foreign nationals in these areas are typically settled under the Foreign Claims Act.<sup>3</sup> Those who settle these claims, known as Foreign Claims Commissions, require a special appointment, generally issued by the Commander of the U.S. Army Claims Service at Fort Meade.<sup>4</sup> Staff Judge Advocates may request appointments of Foreign Claims Commissions by sending a memorandum to the Foreign Claims Branch of the U.S. Army Claims Service.<sup>5</sup> The request should include the name, rank, social security number (last four numbers only), unit, unit mailing address, e-mail address and DSN number of the person to be appointed. The request also should indicate whether the person will be appointed as a one-member or three-member commission.<sup>6</sup>

The training requirement is designed to ensure that all Foreign Claims Commissions are aware of their responsibilities and have the latest guidance. The on-line deployment claims training covers a number of topics, including investigation and settlement of claims under the Foreign Claims Act, single-service claims responsibility<sup>7</sup> and *solatia* payments.<sup>8</sup> Foreign Claims Commissions must also take and pass an exam before they can assume their duties.<sup>9</sup> The training should improve the quality of claims support in the field, improving our ability to support commanders.

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<sup>1</sup> The U.S. Army Judge Advocate General's Corps, JAG University, available at <https://jag.learn.army.mil/webapps/portal/frameset.jsp> (follow "My Organizations" hyperlink; then follow "TJAG Training" hyperlink; then follow "Core Legal"; then follow "Claims" hyperlink). A JAGCNet account is required to access the site.

<sup>2</sup> *Id.* (follow "TJAG Training" hyperlink under "My Organizations"; then follow "Core Legal" hyperlink; then follow "Claims" hyperlink; then follow "Deployment Claims" hyperlink; then follow "Deployment Claims Presentation" hyperlink).

<sup>3</sup> 10 U.S.C. § 2734 (2006).

<sup>4</sup> U.S. DEP'T OF ARMY REG. 27-20, CLAIMS para. 10-6 (Feb 8, 2008) [hereinafter AR 27-20].

<sup>5</sup> These may be telefaxed to DSN 622-6652 or commercial (301) 677-6652.

<sup>6</sup> One member foreign claims commissions have the authority to settle claims for up to \$5000; one-member foreign claims commissions who are Judge Advocates or claims attorneys may settle claims for up to \$15,000; three-member foreign claims commissions may settle claims for up to \$50,000. AR 27-20, *supra* note 4, para. 10-9. If the request is for a three-member commission, it should state which position each person should have (president, member or alternate member).

<sup>7</sup> Each service has been assigned responsibility to investigate and settle tort claims in certain countries under Department of Defense Instruction 5515.08. U.S. DEP'T OF DEFENSE, INSTR. 5515.08, ASSIGNMENT OF CLAIMS RESPONSIBILITY (Nov. 11, 2006). The Army has been assigned single-service claims responsibility for Iraq, Kuwait and Afghanistan. *Id.*

<sup>8</sup> *Solatia* payments are condolence payments made to those who are injured or killed or who have suffered property loss as a result of activities of U.S. forces. They are not admissions of liability and are not made from claims funds. AR 27-20, *supra* note 4, para. 10-11. The Department of Defense General Counsel has determined that *solatia* payments are authorized in Iraq and Afghanistan. Memorandum from Deputy General Counsel (International Affairs), Department of Defense, to Chairman, Joint Chiefs of Staff, subject: *Solatia* (26 Nov. 2004).

<sup>9</sup> The exam is currently available by contacting the Foreign Torts Branch, U.S. Army Claims Service, at (301) 677-7009, extension 252, (DSN 622-7009). The exam will eventually be located on the same web-site as the deployment claims training materials.

## SETTING THE DESERT ON FIRE<sup>1</sup>

REVIEWED BY MAJOR JENNIFER CLARK<sup>2</sup>

### I. Introduction

On 14 February 2003, about a year and a half after the terrorist attacks of 11 September, Osama bin Laden gave a speech that looked back upon the Arab revolt of 1916–1918. He stated:

As I speak, the blood of Muslims continues to be shed in vain . . . and our children are dying because of the American sanctions in Iraq. As I speak, our wounds have yet to heal . . . from the Sykes-Picot Agreement of 1916 between France and Britain, which brought about the dissection of the Islamic world into fragments. The Crusaders' agents are still in power to this day, in light of a new Sykes-Picot agreement, the Bush-Blair axis, which has the same banner and objective, namely the banner of the Cross and the objective of destroying and looting of our beloved Prophet's *umma*.<sup>3</sup>

James Barr, author of *Setting the Desert on Fire*, notes bin Laden's speech at the end of the book.<sup>4</sup> After reading the book, audiences will undoubtedly be left with a feeling that they now have some insight into the roots of modern-day turmoil in the Middle East, and insight into those who express sentiment similar to bin Laden's. It is important to read this book in the context of the current situation in the Middle East, to gain an appreciation of the author's main purpose of the book, which is to show that the Arab revolt from 1916–1918 has left lasting effects that reverberate today throughout the world—especially in the desert.

This review gives a background of the book and then focuses on the three themes woven throughout it that support Barr's main purpose. The first theme is a lesson on the importance of understanding the culture and geography of a foreign land while fighting there. Next, is a look at the consequences of Britain's deceptive dealings with the Arabs. The last topic is a consideration of the effects of Western aid to insurgent aggression.

### II. Background

Barr, an Oxford scholar and a historian, spent four years researching this book and traveling the unforgiving desert to the areas of battle.<sup>5</sup> This book is well organized chronologically, and very well supported by private letters from the British and the Arabs, diaries, photographs, archives, and numerous books and articles.<sup>6</sup> Although a historical compilation, this book read like an adventure novel. Barr brought the players to life with humorous anecdotes and detailed descriptions that he was able to draw from personal letters and diaries. His placement of maps and a legend of key figures at the beginning of the book made it easier to keep track of all the people and places that touched the revolt.

*Setting the Desert on Fire* takes us on a journey from 1916 to 1918 that centers on T.E. Lawrence—better known as “Lawrence of Arabia”—a brilliant British intelligence officer. Lawrence was a natural leader, “a strategist of genius”<sup>7</sup> where “one [would have] that feeling that things [could] not go wrong while he [was] there.”<sup>8</sup> Lawrence held the Arabs and British officials together through many disagreements.<sup>9</sup>

<sup>1</sup> JAMES BARR, *SETTING THE DESERT ON FIRE* (2008).

<sup>2</sup> U.S. Army. Student, 57th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

<sup>3</sup> *MESSAGES TO THE WORLD: THE STATEMENTS OF OSAMA BIN LADEN* 187 (Bruce Lawrence ed., London 2005).

<sup>4</sup> See BARR, *supra* note 1, at 323.

<sup>5</sup> *Id.* at inside back cover.

<sup>6</sup> *Id.* at 204. Barr even analyzed Lawrence's diary through an electrostatic detection apparatus to try to see what was written on a missing page. *Id.* He was unsuccessful and the page still remains a mystery. *Id.*

<sup>7</sup> *Id.* at 317 (quoting BASIL LIDDELL HART, *T.E. LAWRENCE IN ARABIA AND AFTER* 438 (1934)).

<sup>8</sup> *Id.* at 269 (quoting Diary of Robin Buxton, 16 Aug. 1918, in JEREMY WILSON, *LAWRENCE OF ARABIA: THE AUTHORIZED BIOGRAPHY OF T.E. LAWRENCE* 537 (1989)).

<sup>9</sup> See, e.g., *id.* at 259–60 (showing Lawrence's involvement in the discussions between the British and the Syrians).

Britain's priority in the Middle East at the start of World War I was to protect its sea route through the Suez Canal.<sup>10</sup> Furthermore, the Ottoman Empire just declared their support for Germany and Austro-Hungary, and declared a jihad against Britain and France.<sup>11</sup> The British government therefore devised a plan to take the Ottomans out of the fight.<sup>12</sup> This plan consisted of leading an Arab revolt against the Turks and replacing the current Ottoman sultan with the emir of Mecca, Sharif Husein.<sup>13</sup>

The first uprising occurred in June of 1916 at Mecca and ended with the capture of Damascus in September of 1918. The British and Arabs focused their efforts in this "secret war" by targeting and destroying portions of the approximately thousand-mile long Hijaz Railway the Ottomans had constructed with supplies from the Germans.<sup>14</sup> The British, with Lawrence's help, recruited various Arab tribes in the region to aid in this mission.<sup>15</sup>

T.E. Lawrence admired the Arabs as a result of working with them on archaeological digs.<sup>16</sup> He was a staunch advocate for Arab independence and made it his goal to prevent French influence.<sup>17</sup> Lawrence deeply venerated one of Husein's sons, Sharif Feisal ibn Husein, and steered him to become king of Iraq.<sup>18</sup> Lawrence and Feisal worked closely together during the two years of the Arab war, and their successful relationship can be attributed to Lawrence's strong commitment to assimilate himself into Feisal's culture—a lesson from the book.

### III. Winning a Conflict on Foreign Soil Requires Understanding Culture and Geography

The Arabs were victorious against the Turks due to the leadership of, and monetary aid from, the British.<sup>19</sup> The British succeeded due to the recruitment of tribesmen to carry out the fight.<sup>20</sup> T.E. Lawrence was the person that linked the two worlds together.

*Setting the Desert on Fire* does an excellent job of showing Lawrence's leadership and genius in assimilating himself into Arab culture. The book also subtly shows Lawrence's veracity and lack of professionalism that made him unique.<sup>21</sup> Unlike most other British officers involved in the revolt, Lawrence shed his khakis (at Feisal's request) for Arab robes.<sup>22</sup> He

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<sup>10</sup> *Id.* at 16.

<sup>11</sup> *Id.* at 18.

<sup>12</sup> *Id.*

<sup>13</sup> *See id.*

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *See id.* at 32–33, 86–87.

<sup>16</sup> *Id.* at 11. Lawrence was a medieval historian and worked with Arab laborers on several archaeological digs in Syria. *Id.* The author accounts that Lawrence would get so excited on digs, he would fire his pistol in the air when he uncovered an interesting find. *Id.* "The experience left him with a deep admiration for the Arabs, who were clearly enthusiastic in turn: Lawrence gained a reputation for 'getting on very well with natives.'" *Id.* (quoting JEREMY WILSON, LAWRENCE OF ARABIA: THE AUTHORISED BIOGRAPHY OF T.E. LAWRENCE 138 (1989)).

<sup>17</sup> *See id.* at 103, 136, 145.

<sup>18</sup> *Id.* at 71, 314–15. Lawrence felt Feisal was the leader that could take the Arabs to Damascus, and stated, "I felt at first glance that [Feisal] was the man I had come to Arabia to seek." *Id.* at 71.

<sup>19</sup> *See id.* at 89, 117, 322. "The British joked at the time that the Bedu could smell gold on the wind, for the tribesmen were obsessed by the metal." *Id.* at 89.

<sup>20</sup> *See id.* at 322.

<sup>21</sup> While T.E. Lawrence is venerated for his bravery and accomplishments, he often had an unprofessional and almost mutinous attitude toward authority. In 1916, one senior officer accounted:

I had assumed [Lawrence] was one of the military officers sent over and was a little astonished when a small, untidily dressed and most unmilitary figure strolled up to me . . . hands in pockets and so without a salute: "I am going over to Port Sudan in this ship."

*Id.* at 73 (quoting EARL OF CORK & ORRERY, MY NAVAL LIFE 99 (1942)). Lawrence also communicated to his superiors that all was going well with the Arabs when in actuality he was having problems of treachery. *Id.* at 169. "Lawrence had no qualms about lying to his superiors when it was expedient for him to do so." *Id.* Lawrence, himself, admitted to a friend in a letter, "I don't like responsibility, and I don't obey orders." *Id.* at 261 (quoting Letter from T.E. Lawrence to Richards, in THE LETTERS OF T.E. LAWRENCE 243–46 (David Garnett ed. 1938)).

<sup>22</sup> *See id.* at 80.

ate, slept, suffered serious illness, and traveled the treacherous desert with the Arabs during the entire time of the revolt.<sup>23</sup> He gained the confidence of Feisal that “sealed his reputation as indispensable” and made him of “inestimable value.”<sup>24</sup> Lawrence was even mistaken for an Arab by fellow British soldiers.<sup>25</sup> Lawrence’s lasting advice was, “[g]et to know [the Arab’s] families, clans and tribes, friends and enemies, wells, hills and roads. If you wear Arab things at all, go the whole way. Leave your English friends and customs on the coast, and fall back on Arab habits entirely.”<sup>26</sup>

Importantly, Lawrence understood the tribesmen he was working with, and this allowed the British to accomplish their mission.<sup>27</sup> Lawrence’s influence can be seen in one particular excerpt. The tensions between the Arabs and British soldiers in camp were increasingly mounting, and several British soldiers were about to deal with the Arabs using hand grenades.<sup>28</sup> Lawrence stood in the middle of the camp, flung back his cloak and raised his hand.<sup>29</sup> One soldier accounted that “[i]mmediately the firing ceased, the hubbub died down and we had a peaceful night.”<sup>30</sup>

Lawrence’s knowledge of the geography proved invaluable as well. In early 1917, Lawrence met with a French commander who suggested to Lawrence that the British join in a French attack of the port at Aqaba.<sup>31</sup> Lawrence knew Aqaba was surrounded by cliffs that would give the Turks the advantage of picking off any soldier that came to the port, and so he managed to get Feisal to oppose the plan, and likely saved lives.<sup>32</sup>

This lesson taken from the Arab revolt holds true today. The success of counterinsurgency (COIN) operations in Iraq and Afghanistan depends on understanding the society, culture, and geography of the host nation. This principle is emphasized in Army Field Manual (FM) 3-24, *Counterinsurgency*.<sup>33</sup> The FM states:

In most COIN operations . . . , insurgents hold a distinct advantage in their level of local knowledge. They speak the language, move easily within the society, and are more likely to understand the population’s interests. Thus, effective COIN operations require a greater emphasis on certain skills, such as language and cultural understanding, than does conventional warfare. The interconnected, politico-military nature of insurgency and COIN requires immersion in the people and their lives to achieve victory. . . . Without this understanding of the environment, intelligence cannot be understood and properly applied.<sup>34</sup>

Successful leaders know the “people, topography, economy, history, and culture,” as well as “every village, road, field, population group, tribal leader, and ancient grievance within” their area of operations.<sup>35</sup> Judge Advocates, to be effective advisors to these commanders, need to have as much knowledge in these areas as they can. While only our specially trained

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<sup>23</sup> See *id.* at 116–17, 142–45.

<sup>24</sup> *Id.* at 105.

<sup>25</sup> See *id.* at 229. At Bir Salem, a British corporal guard arrested Lawrence having mistook him for a “short and unusually ruddy ‘Arab.’” *Id.* “‘It often happens,’ sighed Lawrence. It was the second time that day he had been stopped.” *Id.* (quoting Hogarth Papers, Hogarth to “Billy,” (Feb. 25, 1918) (Middle East Ctr., Oxford))

<sup>26</sup> *Id.* at 142 (quoting T.E. Lawrence, Twenty-seven Articles, ARAB BULL. No. 60 (20 Aug. 1917) (Nat’l Archive, London, FO 882/26)).

<sup>27</sup> See *id.* at 125. The author accounts:

[Lawrence knew] his role was to steer [the Bedu tribesmen], and not to command. He knew that there was no way of changing the Bedu’s unique style of fighting. . . . [T]he tribesmen would always rather flee and live to fight another day unless their honor was at stake. To force them to stand and fight . . . would lead to casualties that would break the tribesmen’s brittle morale . . . .

*Id.* (citing Clayton Papers, 470/6, Wilson to Clayton (Jan. 16, 1917) (Sudan Archive, Durham)).

<sup>28</sup> See *id.* at 264.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (quoting Laurence Moore, in GEOFFREY INCHBALD, THE IMPERIAL CAMEL CORPS 131–32 (1970)).

<sup>31</sup> See *id.* at 102.

<sup>32</sup> See *id.*

<sup>33</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY pp. 1-22 to 1-23 (15 Dec. 2006) [hereinafter FM 3-24].

<sup>34</sup> *Id.* para. 1-125.

<sup>35</sup> *Id.* para. 7-7. This instruction is almost identical to Lawrence’s advice quoted previously in this section.

military go as far as T.E. Lawrence did, the more cultural and geographical knowledge leaders and their advisors have before arriving overseas, the greater the chances are for success.

The danger exists of assimilating too far into another's culture. Both the Arabs (with Lawrence fighting with them) and Turks committed numerous law of war violations<sup>36</sup> that today would guarantee a court-martial for an American servicemember. While it is important to understand the culture of a host nation, leaders must know their boundaries within laws, rules, and regulations, because they may not be the same boundaries the host nation follows.<sup>37</sup>

Another part of understanding the culture of a host nation is garnering the people's trust. *Setting the Desert on Fire* revealed that the British had significant problems in this area during, and in the aftermath of, the revolt.

#### IV. Effects of Western Deception

*Setting the Desert on Fire* focuses on two underhanded British negotiations during the Arab revolt. The effects of these negotiations are still prevalent. The first involves Sir Henry McMahon's dealings with Sharif Husein.

London tasked McMahon, high commissioner in Egypt at the time, to negotiate with Husein.<sup>38</sup> Unfortunately, McMahon did not give much thought to Husein's demands of complete independence of the Arabian Peninsula in exchange for Arab support.<sup>39</sup> McMahon purposely made vague promises to the Arab leader.<sup>40</sup> This caused confusion in interpretation over twenty years later.<sup>41</sup>

The clear intent of this communication was to secure the Arabs for the British cause by letting them think they would end up autonomous, while concurrently avoiding commitment of the British government to such an agreement.<sup>42</sup> This backfired on the British in the 1930s when the influx of Jewish immigrants into Palestine aggravated the Arabs who felt that McMahon had offered the land to them.<sup>43</sup> Effects of this conflict, born from the Arab revolt, have been seen in the media for

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<sup>36</sup> The Arabs would leave the dead on the battlefield. BARR, *supra* note 1, at 98. One British soldier accounted after a battle that "[t]he dead were still lying about, the houses had been ransacked from roof to floor, paper everywhere, boxes and cupboards cut open and even the mattresses cut open to find hidden treasure." *Id.* at 99 (quoting ARAB BULL. No. 41 (Feb. 6, 1917) (Nat'l Archive, London, FO 882/27)). "The Arabs had moved from house to house, shooting and looting . . ." *Id.* at 99 (citing N.N.E. BRAY, SHIFTING SANDS 123 (1934)). One night, as Lawrence settled down from a mission to Wadi Ais, a Moroccan tribesman shot and killed an Ageyl tribesman as a result of an escalating blood feud. *Id.* at 116-17. Lawrence, feeling that the only way to prevent the feud from escalating even further was to kill the Moroccan himself, as a foreigner, shot the man in a dank gully. *Id.* at 117. "Lawrence gingerly shot him once, twice, a third time before [the Moroccan] finally stopped moving." *Id.* (British Library Add 4595, f. 22 ). Probably the most horrific account of violations in the book was the Turkish massacre of the village of Tafas. *Id.* at 292. Lawrence and the Arab tribesmen witnessed a little girl, about four years old and covered in blood, try to scream to them before she died. *Id.* They also found a pregnant woman who had been stripped and nailed by a bayonet over a mud wall. *Id.* The Arabs were outraged and chased after the disappearing Turkish Soldiers and fought them savagely. *Id.* at 293. The Arabs took no prisoners alive. *Id.*

<sup>37</sup> The field manual on counterinsurgency discusses social norms of a host nation, and states, "Some norms that may impact military operations include . . . [t]he requirement for revenge if honor is lost," and "local business practices, such as bribes and haggling." FM 3-24, *supra* note 33, para. 3-35. It is important to learn a host nation's allowable practices to establish boundaries from the start of operations.

<sup>38</sup> BARR, *supra* note 1, at 25.

<sup>39</sup> *Id.* at 318. McMahon is quoted as saying:

I do not for one moment go to the length of imagining that the present negotiations will go far to shape the future form of Arabia or to either establish our rights or bind our hands in that country. What we have to arrive at now is to tempt the Arab people onto the right path, detach them from the enemy and bring them on to our side.

*Id.* (quoting Sir Henry McMahon, in ELIE KEDOURIE, IN THE ANGLO-ARAB LABYRINTH 119 (1976)).

<sup>40</sup> *Id.* at 25.

<sup>41</sup> See *id.* at 29-30, 320-21. Britain's foreign secretary, Edward Grey, told McMahon that during negotiations, McMahon must make very clear to both the French and the Arabs, what the British were offering. *Id.* at 29. McMahon ignored this and deliberately made vague representations to Husein, particularly regarding Palestine. *Id.*

<sup>42</sup> See *id.* at 25-30, 318.

<sup>43</sup> See *id.* at 320-21. What exactly McMahon promised was never resolved, and the British eventually stated since the French had a claim in Palestine, Britain could not have promised it to Husein. *Id.* The author finds this incredulous since the British policy during the war was to undermine French influence. *Id.* at 322. In 1917, the British had issued the Balfour Declaration that declared Palestine as a national home for the Jewish people, and made it understood nothing was to prejudice the rights of non-Jewish communities in Palestine. *Id.* at 207-08. This caused much consternation in the region.

the past several decades.<sup>44</sup>

The second negotiation was the Sykes-Picot agreement<sup>45</sup> (mentioned in bin Laden's speech at the beginning of this review). Sir Mark Sykes, a member of the British Parliament spent the winter of 1915–1916 negotiating a clandestine agreement with French consul, Francois Georges-Picot, to divide up the Ottoman Empire; this product would be known as the Sykes-Picot Agreement.<sup>46</sup> The agreement divided Arabia into northern and southern areas of either British or French control, to include the area that McMahon had just committed to Husein.<sup>47</sup> Importantly, Sykes secretly promised Syria and Lebanon to the French.<sup>48</sup> Lawrence was astonished when he discovered these details of the Sykes-Picot agreement.<sup>49</sup>

The British government again put themselves in a quandary, and one British official described it, stating, "If we keep our part with the French the Arabs will rightly say we have sold them . . . . If we don't keep our pact with France the world will say 'Oh Yes! England land grabbing again.'"<sup>50</sup> The French eventually got Syria, and the land promised to Husein started to disappear.<sup>51</sup> One criticism of the book is that *Setting the Desert on Fire* reads very sympathetically to the Arab plight, but glosses over the British government's reasons for their actions, except to imply they were all self-serving.<sup>52</sup>

These two secret negotiations caused the Arabs to feel betrayed, and still have effects today.<sup>53</sup> When a country steps onto foreign soil, its leaders must win the trust of the host nation. This principle is just as important now, and we bring it into our military operations as instructed in Field Manual 3-24, The manual states:

[United States] agencies . . . should avoid making unrealistic promises. In some cultures, failure to deliver promised results is automatically interpreted as deliberate deception, rather than good intentions gone awry. . . . In the end, victory comes, in large measure, by convincing the populace that their life will be better under the [host-nation] government than under an insurgent regime.<sup>54</sup>

While we cannot change the past that *Setting the Desert on Fire* explored, the military and civilian leadership of today can ensure that unrealistic promises—whether big or small—are avoided. *Setting the Desert on Fire* gives the reader an understanding of why Arab distrust of Western powers exists still today, and an understanding of the roots of Middle Eastern conflict—in particular, Palestine. Not only has Britain's deception in the 1920's had lasting effects throughout the world, so has its aid to the insurgent revolt.<sup>55</sup> Barr discusses this in the epilogue of his book.<sup>56</sup>

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<sup>44</sup> See, e.g., Ken Ellingwood & Richard Boudreaux, *Jerusalem: Struggle for the Holy City, Part One: Dueling Visions: A Holy City Still Divided*, L.A. TIMES, June 3, 2007, at A1 (summarizing the violence between the Arab and Jewish states since the 1967 Middle East War); Steven Erlanger, *A Life of Unrest*, N.Y. TIMES, July 15, 2007, at MM42 (describing the current, brutal state of Gaza).

<sup>45</sup> See BARR, *supra* note 1, at 30.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 31.

<sup>48</sup> *Id.*

<sup>49</sup> See *id.* at 136.

<sup>50</sup> *Id.* at 306 (quoting Stirling Papers, Stirling to his sister (Nov. 5, 1918), Imperial War Museum, London).

<sup>51</sup> See *id.* at 313.

<sup>52</sup> For a different perspective of the revolt, see EFRAIM KARSH & INARI KARSH, *EMPIRES OF THE SAND: THE STRUGGLE FOR MASTERY IN THE MIDDLE EAST, 1789–1923*, at 191–94 (1999). This book describes Husein as a double-dealer for British gold, and the creation of his own kingdom.

<sup>53</sup> See KUWAITI MINISTRY OF AWQAF AND ISLAMIC AFF., *ARAB PERCEPTIONS OF THE WEST* 34 (Gabrielle Mogannam et al. eds., 2006), available at <http://islamperceptions.org/Arab%20Perception%20of%20the%20West.pdf> (stating that the Western image problem is deeply rooted in the Arabs' historical experience with the West, and that Arab public perceptions of American and British policies in the Middle East are those of hypocrisy); see also *id.* at 43 (explaining that historically, Arabs have perceived their experience with the West as a struggle with mistrust—from European colonialism to current military presence in Iraq and Palestine).

<sup>54</sup> FM 3-24, *supra* note 33, para. 1-139.

<sup>55</sup> See generally Rashid Khalidi, *International Law and Legitimacy and the Palestine Question*, 30 HASTINGS INT'L & COMP. L. REV. 173 (2007) (discussing Palestine's long-term struggles with Western powers that have followed shortsighted policies Khalidi describes as "lip service to the principle of self-determination").

<sup>56</sup> See BARR, *supra* note 1, at 314–23.

## V. Effects of Western Aid to Insurgent Aggression.

At the end of his book, to emphasize the lasting effects of Western aid to insurgent aggression, Barr draws a parallel between the British support to the Arab revolt, and past U.S. support to Afghanistan. He states:

Just as Husein was armed by the British government in 1916, Osama bin Laden was one of those armed by the U.S. government in the 1980s to fight a war against the Soviet Union in Afghanistan. The supply of gold and guns to both recipients has had disturbing and unforeseen consequences: such are the dangers of war by proxy.<sup>57</sup>

“War by proxy” is a curious term for Barr to use. “Proxy” means to act on another’s behalf for a presumably mutual interest.<sup>58</sup> However, throughout the book, Barr highlights the British government’s deception. Therefore, while both sides aimed for the fall of the Ottoman Empire, the two sides were ultimately fighting for divergent interests.

What Barr does though, is make it clear to the reader that the British self-serving plan of using the Arabs to bring down the Ottoman Empire turned out to be a series of decisions that caused significant unrest within the Arab population.<sup>59</sup> *Setting the Desert on Fire* explored the Arabs’ increasing dependence on British money and supplies, and the acknowledgement of both Husein and Feisal of their dependency.<sup>60</sup> The book gives great insight on how British aid to this guerilla war set the stage for future conflict in the Middle East. However, the book lacks discussion of beneficial aspects, which could be seen as Arab independence, the experience of victory, money for the tribes, and the receipt of then modern-day weapons and equipment. The book also fails to address whether the British (besides Lawrence) knew of the law of war violations that occurred during the revolt, and if so, how the leaders reacted to it.<sup>61</sup>

Going back a couple of decades, one can also see effects that Barr mentioned of U.S. aid to the Mujahedeen, in particular the rise of the Taliban.<sup>62</sup> While today in the Middle East, Western powers focus on aiding countries in *countering* insurgents, Barr hints that this effort may cause history to repeat itself. In Iraq, Western policymakers must ensure that Arab leaders do not lose their legitimacy (again) through foreign influence.<sup>63</sup> Barr states, “[T]o the Arabs today the British role behind their uprising ninety years ago remains unforgotten, and largely unforgiven.”<sup>64</sup>

## VI. Conclusion

*Setting the Desert on Fire* was an easy-to-read, informative book that would satisfy both the novice and seasoned historian of the Middle East. Barr takes the reader on an entertaining journey through a critical period in the birth of the Arab nations. Lawrence of Arabia stated, “[T]he rebellion of the Sherif of Mecca came to most as a surprise, and found the Allies unready. It aroused mixed feelings and made strong friends and strong enemies, amid whose clashing jealousies its affairs began to miscarry.”<sup>65</sup> This book showed the revolt was wrought with deception, lack of supplies, brutal bloodshed, and numerous law of war violations from both sides.<sup>66</sup> Through it all, the reader learns the importance of understanding a foreign

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<sup>57</sup> *Id.* at 322–23.

<sup>58</sup> See WEBSTER’S NEW WORLD DICTIONARY 1083 (3d ed. 1988) (defining “proxy” as empowered to act for another).

<sup>59</sup> See BARR, *supra* note 1, at 310–13.

<sup>60</sup> See *id.* at 139, 310–11.

<sup>61</sup> The book does show Lawrence’s internal struggle when he shot the Moroccan, *id.* at 117, and that he tried to stop the Arabs from massacring the Turkish and German prisoners after the destruction of the village in Tafas. *Id.* at 117, 293.

<sup>62</sup> See MARK HUBAND, WARRIORS OF THE PROPHET: THE STRUGGLE FOR ISLAM 14–16 (1998) (explaining how the CIA secretly sent weapons through Pakistan to aid the Mujahedeen in countering the Soviet forces in Afghanistan). The Mujahedeen were successful; however, the Taliban emerged in response to the growing chaos in southern Afghanistan that was under Mujahedeen control. See *id.*

<sup>63</sup> See Andrew J. Bacevich, *Surge to Nowhere*, WASH. POST, Jan. 20, 2008, at B1 (commenting on the effects of the Iraq War). The president’s goal was to start a global democratic revolution from “Damascus to Tehran,” which was much like the British goal in 1916 of eliminating Ottoman control from Medina to Damascus. See *id.*

<sup>64</sup> BARR, *supra* note 1, at 323.

<sup>65</sup> T.E. LAWRENCE, SEVEN PILLARS OF WISDOM 9 (Wordsworth ed. 1997) (1935).

<sup>66</sup> See *supra* Parts III–V.

nation's culture, and by looking back at British deception and effects of British aid to the insurgents, *Setting the Desert on Fire* gives great insight into current unrest in the Middle East.

# DESCENT INTO CHAOS: THE UNITED STATES AND THE FAILURE OF NATION BUILDING IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA<sup>1</sup>

REVIEWED BY MAJOR WILLIAM JOHNSON<sup>2</sup>

## Introduction

*Six weeks before 9/11, an old Afghan friend of mine came to spend the day with me at my home in Lahore. We had lunch and then began an intense discussion that went on until the evening, without reaching a conclusion. He had come to discuss a specific problem he faced. At issue was his future, his safety, and the fate of his country, which was inextricably linked to my life as a journalist for the past twenty-three years and to the fate of my own country, Pakistan.*<sup>3</sup>

So begins Ahmed Rashid's journey into the fate of Afghanistan, Pakistan, and the Central Asian region. In his next breath, the author exposes his visiting friend as Hamid Karzai, future president of Afghanistan.<sup>4</sup> Ahmed Rashid's personal involvement in the events he portrays remains a prevalent source of information throughout his book. *Descent Into Chaos* is the fourth in a series of books by Rashid dedicated to documenting the effects of powerful nations and radical Islam on the governments and people of Central Asia.<sup>5</sup> Ahmed Rashid is a Pakistani journalist living in the midst of the events he reports.<sup>6</sup> He is often trusted by both sides of a conflict for his objectivity,<sup>7</sup> and respected by leaders within the region.<sup>8</sup>

*Descent Into Chaos* diligently portrays the complex history of central Asia and in particular Afghanistan and Pakistan, but fails to adequately address the author's overall thesis: Nation Building failed in Afghanistan because the U.S. invasion of Iraq diverted essential resources.<sup>9</sup> Ahmed Rashid provides only anecdotal evidence to support this assertion. Rashid's failure to fully develop and analyze how the Iraq war affected Afghanistan undermines the effectiveness of the book.

## Chaos, Hope, Chaos

The journey into the fate of modern central Asia begins with an understanding of the history of Pakistan and the establishment of a military dominated Islamic regime in the 1970s.<sup>10</sup> As the influence of the Soviet empire in Central Asia rapidly dissolves in the late 1980s, the rise of the Taliban in Afghanistan, and the increasing violence in Kashmir combine to create a safe haven for extremism in Afghanistan.<sup>11</sup>

In 1999, Ahmed Rashid and a collection of international scholars met with U.S. and Iranian diplomats to suggest solutions to the growing extremist threat in Afghanistan.<sup>12</sup> Without support from the Clinton administration to mobilize an international effort, the diplomatic approach faced certain failure.<sup>13</sup> In 1999, the outgoing Clinton administration addressed

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<sup>1</sup> AHMED RASHID, *DESCENT INTO CHAOS: THE UNITED STATES AND THE FAILURE OF NATION BUILDING IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA* (2008)

<sup>2</sup> Student, 57th Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

<sup>3</sup> RASHID, *supra* note 1, at 3.

<sup>4</sup> *Id.*

<sup>5</sup> Ahmed Rashid's previous works include *The Resurgence of Central Asia: Islam or Nationalism* (Zed Books 1994), *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (2001), and *Jihad: The Rise of Militant Islam in Central Asia* (Penguin Books 2003).

<sup>6</sup> RASHID, *supra* note 1, at inside back cover.

<sup>7</sup> *Id.* at 10.

<sup>8</sup> *See id.* at 126, 392-93.

<sup>9</sup> *See id.* at XLI, 65, 182, 185, 194-95, 196; *see also The Charlie Rose Show: A Conversation with Ahmed Rashid* (television broadcast June 17, 2008), available at <http://www.charlierose.com/view/interview/9135>.

<sup>10</sup> *See* RASHID, *supra* note 1, at 36-39.

<sup>11</sup> *Id.* at 24-43.

<sup>12</sup> *Id.* at 54-55.

<sup>13</sup> *Id.* at 55-56.

the al Qaeda threat in Afghanistan and drafted concept papers calling for the rearmament of the Northern Alliance.<sup>14</sup> The incoming Bush administration, anxious to undermine Clinton-era foreign policy, essentially ignored the information.<sup>15</sup> The Bush administration elected to focus its foreign policy on gaining the support of Pakistan's over empowered intelligence organization, the Inter-Services Intelligence Directorate (ISI).<sup>16</sup>

On 11 September 2001, al Qaeda and Afghanistan took center stage for U.S foreign policy. Within three weeks of the 9/11 attacks, U.S. agents were already organizing Afghan Northern Alliance leaders.<sup>17</sup> By the end of 2001, new hope emerged in Afghanistan. The Taliban's defeat promised peace after decades of war.<sup>18</sup> However, that hope quickly disappeared. By early 2002, Ahmed Rashid understood "that the United States had no intentions of rebuilding Afghanistan, disillusionment set in as I saw that Iraq was the real target."<sup>19</sup>

The reconstruction of Afghanistan, both its government and its infrastructure, proved to be a herculean task. "Afghanistan had been more comprehensively destroyed after twenty-two years of continuous war than any country since World War II apart from Vietnam."<sup>20</sup> The world community called for a "Marshall Plan for Afghanistan,"<sup>21</sup> but, "the Bush neocons had simply no interest before or after the war in doing anything like this."<sup>22</sup> Without a centrally coordinated effort, aid agencies and non-governmental organizations poured money into a haphazard reconstruction effort. Fraud, waste, and duplicated efforts frustrated the reconstruction of Afghanistan.<sup>23</sup> The United States, preoccupied with Iraq, failed to provide the proper leadership during the critical stages of the reconstruction effort.<sup>24</sup>

The hunt for Bin Laden also obscured the importance of nation building in Afghanistan.<sup>25</sup> The United States sought the assistance of Afghan warlords and Pakistan's military regime to continue the hunt for Bin Laden.<sup>26</sup> United States support to these entities frustrated the establishment of a functioning central Afghan government.<sup>27</sup> With cash flowing from the CIA, warlords in remote regions, and even those working directly for Hamid Karzai, increased a feudal power base that directly subverted the Karzai government's bid to tame and rebuild the nation.<sup>28</sup> Pakistan's ISI continued to support the Taliban and spur unrest in the border areas of Northern Pakistan.<sup>29</sup> The United States simultaneously supported rogue leaders in Central Asian nations to secure real estate for military logistical operations.<sup>30</sup> United States support to warlords and duplicitous regimes directly contributed to the continued destabilization of the region. Instability provided the necessary conditions to allow al Qaeda to flourish, extremism to thrive, and the Taliban to reorganize.<sup>31</sup>

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<sup>14</sup> *Id.* at 56.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 56–57.

<sup>17</sup> *Id.* at 63.

<sup>18</sup> *Id.* at 64.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 171.

<sup>21</sup> *Id.* at 172.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 177–81.

<sup>24</sup> *Id.* at 182.

<sup>25</sup> *Id.* at 124, 125, 132.

<sup>26</sup> *Id.* at 128, 131–32.

<sup>27</sup> *Id.* at 132–33.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 265–87.

<sup>30</sup> *Id.* at 342–47.

<sup>31</sup> *Id.* at 384–87.

The current state of Afghanistan is a loss of the optimism and hope experienced after the defeat of the Taliban. Pakistan is experiencing severe unrest; the Taliban is reconstituted; al Qaeda continues to threaten security and peace throughout the world; and the whole of Central Asia has descended into chaos.<sup>32</sup> Rashid believes Iraq caused the descent.<sup>33</sup>

### Why Iraq? Where is Afghanistan?

Ahmed Rashid is a dedicated and courageous journalist<sup>34</sup> and a vast resource of knowledge for world leaders and anyone concerned with the future of mankind. *Descent Into Chaos* is a key hole for the reader to tap into that wealth of knowledge. The stated purpose of the book is to “attempt to define history in the making.”<sup>35</sup> *Descent Into Chaos* is a history book and a journalistic portrayal of current events, but it is also a critique of the decisions and actions of the individuals and nations creating that history.

Ahmed Rashid primarily critiques the Bush Administration and “the neocons.”<sup>36</sup> As the title portrays, the book is about how the United States failed at nation building. Unfortunately, the title and the general tone of the introduction create an initial impression that *Descent Into Chaos* is a typical and unrevealing assault against the Bush administration. Contrary to that initial impression, Ahmed Rashid presents a squarely objective, analytical, and readable portrayal of the issues facing Central Asia. However, when the author addresses the U.S. invasion of Iraq, objectivity and thorough analysis fall by the wayside.

Ahmed Rashid’s primary and overarching theme is that the Bush Administration saw Iraq as the prize and failed to recognize that stability in Afghanistan held the key to blocking the spread of radical, Islamic terrorism.<sup>37</sup> A stable Afghanistan would improve the lives of the people of central Asia and undermine the resources of al Qaeda.<sup>38</sup> The idea of Iraq diverting emphasis away from the importance of Afghanistan is not a new concept. In the 2004 presidential election campaign, “[t]he contention that the Iraq invasion was an unwise diversion in confronting terrorism [was] central to Kerry’s critique of Bush’s performance.”<sup>39</sup> Despite a broad acceptance of this thesis, *Descent Into Chaos* does not utilize the conclusion to synthesize a solution or direction for nation building in Afghanistan.

Ahmed Rashid fails to provide a framework for why and how the invasion of Iraq frustrated U.S. efforts in Afghanistan. Marvin G. Weinbaum articulates six prerequisites to nation building.<sup>40</sup> The prerequisites range from functioning government institutions to support for visionary leaders.<sup>41</sup> These prerequisites can provide a framework for mapping future efforts in Afghanistan. The invasion of Iraq cannot be undone. However, analysis of the effects of Iraq on Afghanistan can light the path for improvements in both countries. Analyzing the effects in terms of a framework similar to Dr. Weinbaum’s prerequisites more clearly identifies a future strategy for regional and world leaders.

Regardless of the framework used, the analysis should extend beyond the scope of dollar values and numbers of troops.<sup>42</sup> “Nation-building outcomes naturally result from much more than quantity of inputs. Success depends on the wisdom with

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<sup>32</sup> *Id.* at 374–404.

<sup>33</sup> *See id.* at 64–65.

<sup>34</sup> Ahmed Rashid received the 2001 Nisar Osmani Award for Courage in Journalism from the Human Rights Society of Pakistan. *See* Ahmed Rashid, *Biography*, [www.ahmedrashid.com/biography](http://www.ahmedrashid.com/biography) (last visited Mar. 26, 2009).

<sup>35</sup> *E.g.*, RASHID, *supra* note 1, at XL.

<sup>36</sup> *Id.* at 64–65.

<sup>37</sup> *See id.*

<sup>38</sup> *Id.*

<sup>39</sup> Barton Gellman & Dafna Linzer, *Afghanistan, Iraq: Two Wars Collide*, WASH. POST, Oct. 22, 2004, at A01, available at <http://www.washingtonpost.com/ac2/wp-dyn/A52673-2004Oct21>.

<sup>40</sup> Marvin G. Weinbaum, *Rebuilding Afghanistan: Impediments, Lessons, and Prospects*, in *NATION BUILDING: BEYOND AFGHANISTAN AND IRAQ* 126–28 (Francis Fukuyama, ed. 2006).

<sup>41</sup> *Id.*

<sup>42</sup> JAMES DOBBINS ET AL., *THE UN’S ROLE IN NATION-BUILDING: FROM THE CONGO TO IRAQ* 225 (2005).

which such resources are employed and on the susceptibility of the society in question to the changes being fostered.”<sup>43</sup> *Descent Into Chaos* does not analyze how the U.S. invasion of Iraq left the international effort in Afghanistan wanting for qualitative and quantitative U.S. resources. Ahmed Rashid states only that the Iraq invasion *had* qualitative and quantitative effects on nation building in Afghanistan.<sup>44</sup> The reader is left frustrated by U.S. policy decisions, but lacking a clear understanding of how those decisions affected a particular aspect of nation building in Afghanistan.

In support of its thesis that nation building in Afghanistan failed due to the war in Iraq, *Descent Into Chaos* discusses the loss of intelligence satellites.<sup>45</sup> The loss of the satellites to Iraq contributed to the conditions that allowed Taliban forces in southern Afghanistan to reorganize.<sup>46</sup> This is but one resource. Rashid does not address how Iraq absorbed more ambiguous resources such as public support,<sup>47</sup> attention,<sup>48</sup> and leadership.<sup>49</sup> *Descent Into Chaos* does not address how harnessing these resources would improve nation building in Central Asia nor where they should be concentrated.

Aside from the Iraq issue, *Descent Into Chaos* meticulously analyzes several aspects of the U.S. approach to Afghanistan. For instance, Ahmed Rashid is critical of continued U.S. support to Afghan warlords despite the warlord power base undermining the establishment of a legitimate Afghan central government.<sup>50</sup> During an interview on the Charlie Rose television program, Ahmed Rashid spoke candidly to this issue with a former CIA agent, Milt Beardon.<sup>51</sup> Rashid agreed in some respects with the necessity of the U.S. approach to warlords.<sup>52</sup> Rashid’s analysis exposes the shortcomings of the approach and recognizes some of the necessities.<sup>53</sup>

Ahmed Rashid also remains critical of the U.S. relationship with various dictators throughout Central Asia. In particular, the United States and Musharraf relationship is a recurring theme.<sup>54</sup> The duplicitous dealings of Musharraf and the Pakistani ISI exposed by the author call into question many of the actions taken by the United States in dealing with Pakistan.<sup>55</sup> However, *Descent Into Chaos* provides the background for the reader to analyze U.S. involvement and support to Pakistan.<sup>56</sup> Was the United States fool hardy or did U.S. support to Musharraf amount to a calculated risk in a complex, diplomatic situation? Rashid provides the information and background necessary for the reader to recognize the complexity of such a question.

Despite the lack of support for the main theme, one may safely assume that the invasion of Iraq detracted from the U.S. effort in Afghanistan. However, Ahmed Rashid’s purpose in writing *Descent Into Chaos* was not to simply criticize the United States or expose some fatal flaw in the Iraq invasion. “If we can better understand what has happened before, what has gone wrong, and what needs to go right, as this book attempts to do, then we can better face up to our collective future.”<sup>57</sup> Had *Descent Into Chaos* fully addressed how the Iraq invasion affected progress in Central Asia, the book would have produced a clearer roadmap for future international efforts in the region.

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<sup>43</sup> *Id.*

<sup>44</sup> RASHID, *supra* note 1, at 182, 185.

<sup>45</sup> *Id.* at 223, 248, 359.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 195.

<sup>48</sup> *Id.* at 64.

<sup>49</sup> *Id.* at 173.

<sup>50</sup> *Id.* at 125–44.

<sup>51</sup> *The Charlie Rose Show: A Conversation about Afghanistan, with Ahmed Rashid and Milt Beardon* (television broadcast Jan. 30, 2002), available at <http://www.charlierose.com/view/interview/2707>.

<sup>52</sup> *Id.*

<sup>53</sup> RASHID, *supra* note 1, at 125–44.

<sup>54</sup> *Id.* at 57–60, 236–37.

<sup>55</sup> *Id.* at 219–39.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 404.

## Conclusion

In *Descent Into Chaos*, Ahmed Rashid shares with the western world a concise and in depth history and analysis of Afghanistan, Pakistan, and Central Asia. Once the reader overcomes any assumptions of the book garnered from the tone of the introductory pages, Ahmed Rashid's journey into the history and recent events of this pivotal region are sure to produce a lasting impression. A deeper respect for the plight of the Afghan people and a desire to see positive changes in the U.S. approach to central Asia are inescapable results of reading this book. Despite the shortcomings of support for the overall theme, *Descent Into Chaos* provides a starting point for searching for positive solutions to the maddening situation in central Asia. *Descent Into Chaos* is essential reading for any military officer preparing to do "what needs to go right"<sup>58</sup> in Afghanistan.

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<sup>58</sup> *Id.*

## CLE News

### 1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

### 2. TJAGLCS CLE Course Schedule (2008—September 2009) (<http://www.jagenet.army.mil/JAGCNETINTER/NET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
<b>GENERAL</b>		
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
5F-F1	207th Senior Officer Legal Orientation Course	8 – 12 Jun 09
5F-F52	39th Staff Judge Advocate Course	1 – 5 Jun 09
5F-F52S	12th SJA Team Leadership Course	1 – 3 Jun 09
600-BNCOC	5th BNCOC Common Core (Ph 1)	12 – 29 May 09
600-BNCOC	6th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	1 Jun – 8 Jul 09
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09

512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	2 Apr – 2 May 09
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	1 Jun – 8 Jul 09
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	26 Aug – 30 Sep 09
<b>WARRANT OFFICER COURSES</b>		
7A-270A1	20th Legal Administrators Course	15 – 19 Jun 09
7A-270A2	10th JA Warrant Officer Advanced Course	6 – 31 Jul 09
<b>ENLISTED COURSES</b>		
512-27D/DCSP	18th Senior Paralegal Course	22 – 26 Jun 09
512-27DC5	29th Court Reporter Course	20 Apr – 19 Jun 09
512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC6	9th Senior Court Reporter Course	14 – 18 Jul 09
<b>ADMINISTRATIVE AND CIVIL LAW</b>		
5F-F21	7th Advanced Law of Federal Employment Course	26 – 28 Aug 09
5F-F22	62d Law of Federal Employment Course	24 – 28 Aug 09
5F-F28H	2009 Hawaii Income Tax CLE Course	12 – 16 Jan 09
5F-F29	27th Federal Litigation Course	3 – 7 Aug 09
<b>CONTRACT AND FISCAL LAW</b>		
5F-F10	162d Contract Attorneys Course	20 – 31 Jul 09
5F-F12	80th Fiscal Law Course	11 – 15 May 09
5F-DL12	3d Distance Learning Fiscal Law Course	19 – 22 May 09
<b>CRIMINAL LAW</b>		
5F-F301	12th Advanced Advocacy Training Course	27 – 29 May 09
5F-F31	15th Military Justice Managers Course	24 – 28 Aug 09
5F-F33	52d Military Judge Course	20 Apr – 8 May 09
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
<b>INTERNATIONAL AND OPERATIONAL LAW</b>		
5F-F41	5th Intelligence Law Course	22 – 26 Jun 09
5F-F43	5th Advanced Intelligence Law Course	24 – 26 Jun 09
5F-F44	4th Legal Issues Across the IO Spectrum	13 – 17 Jul 09

5F-F47	52d Operational Law of War Course	27 Jul – 7 Aug 09
5F-F47E	2009 USAREUR Operational Law CLE	10 – 14 Aug 09
5F-F48	2d Rule of Law	6 – 10 Jul 09

### 3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

<b>Naval Justice School Newport, RI</b>		
<b>CDP</b>	<b>Course Title</b>	<b>Dates</b>
0257	Lawyer Course (030) Lawyer Course (040)	26 May – 24 Jul 09 3 Aug – 2 Oct 09
0258	Senior Officer (050) (Newport) Senior Officer (060) (Newport) Senior Officer (070) (Newport) Senior Officer (080) (Newport)	15 – 19 Jun 09 (Newport) 27 – 31 Jul 08 (Newport) 24 – 28 Aug 09 (Newport) 21 – 25 Sep 09 (Newport)
2622	Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	8 – 12 Jun 09 (Pensacola) 15 – 19 Jun 09 (Quantico) 22 – 26 Jun 09 (Camp Lejeune) 27 – 31 Jul 09 (Pensacola) 21 – 25 Sep 09 (Pensacola)
BOLT	BOLT (040) BOLT (040)	27 – 31 Jul 09 (USMC) 27 – 31 Jul 09 (USN)
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	22 – 26 Jun 09 21 – 25 Sep 09
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	11 – 22 May 09 20 – 31 Jul 09
4044	Joint Operational Law Training (010)	27 – 30 Jul 09
4046	SJA Legalman (020)	11 – 22 May 09 (Norfolk)
627S	Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160)	26 – 28 May 09 (Norfolk) 26 – 28 May 09 (San Diego) 30 Jun – 2 Jul 09 (San Diego) 10 – 12 Aug 09 (Millington) 9 – 11 Sep 09 (Norfolk) 14 – 16 Sep 09 (Pendleton)
748A	Law of Naval Operations (010)	14 – 18 Sep 09
748B	Naval Legal Service Command Senior Officer Leadership (010)	6 – 19 Jul 09

748K	USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	11 – 15 May 09 (Okinawa, Japan) 18 – 22 May 09 (Pearl Harbor) 14 – 18 Sep 09 (San Diego)
846L	Senior Legalman Leadership Course (010)	20 – 24 Jul 09
846M	Reserve Legalman Course (Ph III) (010)	4 – 15 May 09
850V	Law of Military Operations (010)	1 – 12 Jun 09
932V	Coast Guard Legal Technician Course (010)	3 – 14 Aug 09
961J	Defending Complex Cases (010)	11 – 15 May 09
525N	Prosecuting Complex Cases (010)	18 – 22 May 09
03RF	Legalman Accession Course (030)	11 May – 24 Jul 09
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020)	15 – 26 Jun 09 (Norfolk) 13 – 24 Jul 09 (San Diego)
5764	LN/Legal Specialist Mid-Career Course (020)	4 – 15 May 09
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Oct 09 5 – 8 Jan 09 6 – 9 Apr 09 6 – 9 Jul 09
NA	Legal Specialist Course (030) Legal Specialist Course (040)	30 Mar – 29 May 09 26 Jun – 21 Aug 09

NA	Speech Recognition Court Reporter (030)	25 Aug – 31 Oct 09
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**Naval Justice School Detachment  
Norfolk, VA**

0376	Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	27 Apr – 15 May 09 1 – 19 Jun 09 13 – 31 Jul 09 17 Aug – 4 Sep 09
0379	Legal Clerk Course (060) Legal Clerk Course (070))	13 – 24 Jul 09 17 – 28 Aug 09
3760	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	18 – 22 May 09 10 – 14 Aug 09 14 – 18 Sep 09

**Naval Justice School Detachment  
San Diego, CA**

947H	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	4 – 22 May 09 8 – 26 Jun 09 20 Jul – 7 Aug 09 17 Aug – 4 Sep 09
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947J	Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	4 – 15 May 09 8 – 19 Jun 09 27 Jul – 7 Aug 09 17 Aug – 4 Sep 08
3759	Senior Officer Course (070) Senior Officer Course (080)	1 – 5 Jun 09 (San Diego) 14 – 18 Sep 09 (Pendleton)

#### 4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Paralegal Apprentice Course, Class 09-04	28 Apr – 10 Jun 09
Advanced Labor & Employment Law Course, Class 09-A	4 – 8 May 09
CONUS Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	11 – 15 May 09
Operations Law Course, Class 09-A	11 – 21 May 09
Negotiation and Appropriate Dispute Resolution Course, Class 09-A	18 – 22 May 09
Environmental Law Update Course (DL), Class 09-A	27 – 29 May 09
Reserve Forces Paralegal Course, Class 09-A	1 – 12 Jun 09
Staff Judge Advocate Course, Class 09-A	15 – 26 Jun 09
Law Office Management Course, Class 09-A	15 – 26 Jun 09
Paralegal Apprentice Course, Class 09-05	23 Jun – 5 Aug 09
Judge Advocate Staff Officer Course, Class 09-C	13 Jul – 11 Sep 09
Paralegal Craftsman Course, Class 09-03	20 Jul – 27 Aug 09
Paralegal Apprentice Course, Class 09-06	11 Aug – 23 Sep 09
Trial & Defense Advocacy Course, Class 09-B	14 – 25 Sep 09

#### 5. Civilian-Sponsored CLE Courses

**For additional information on civilian courses in your area, please contact one of the institutions listed below:**

AAJE: American Academy of Judicial Education  
P.O. Box 728  
University, MS 38677-0728  
(662) 915-1225

ABA: American Bar Association  
750 North Lake Shore Drive  
Chicago, IL 60611  
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation  
Arizona Attorney General's Office  
ATTN: Jan Dyer  
1275 West Washington  
Phoenix, AZ 85007  
(602) 542-8552

ALIABA: American Law Institute-American Bar Association  
Committee on Continuing Professional Education  
4025 Chestnut Street  
Philadelphia, PA 19104-3099  
(800) CLE-NEWS or (215) 243-1600

APRI: American Prosecutors Research Institute  
99 Canal Center Plaza, Suite 510  
Alexandria, VA 22313  
(703) 549-9222

ASLM: American Society of Law and Medicine  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, MA 02215  
(617) 262-4990

CCEB: Continuing Education of the Bar  
University of California Extension  
2300 Shattuck Avenue  
Berkeley, CA 94704  
(510) 642-3973

CLA: Computer Law Association, Inc.  
3028 Javier Road, Suite 500E  
Fairfax, VA 22031  
(703) 560-7747

CLESN: CLE Satellite Network  
920 Spring Street  
Springfield, IL 62704  
(217) 525-0744  
(800) 521-8662

ESI: Educational Services Institute  
5201 Leesburg Pike, Suite 600  
Falls Church, VA 22041-3202  
(703) 379-2900

FBA: Federal Bar Association  
1815 H Street, NW, Suite 408  
Washington, DC 20006-3697  
(202) 638-0252

FB: Florida Bar  
650 Apalachee Parkway  
Tallahassee, FL 32399-2300  
(850) 561-5600

GICLE: The Institute of Continuing Legal Education  
P.O. Box 1885  
Athens, GA 30603  
(706) 369-5664

GII: Government Institutes, Inc.  
966 Hungerford Drive, Suite 24  
Rockville, MD 20850  
(301) 251-9250

GWU: Government Contracts Program  
The George Washington University  
National Law Center  
2020 K Street, NW, Room 2107  
Washington, DC 20052  
(202) 994-5272

IICLE: Illinois Institute for CLE  
2395 W. Jefferson Street  
Springfield, IL 62702  
(217) 787-2080

LRP: LRP Publications  
1555 King Street, Suite 200  
Alexandria, VA 22314  
(703) 684-0510  
(800) 727-1227

LSU: Louisiana State University  
Center on Continuing Professional Development  
Paul M. Herbert Law Center  
Baton Rouge, LA 70803-1000  
(504) 388-5837

MLI: Medi-Legal Institute  
15301 Ventura Boulevard, Suite 300  
Sherman Oaks, CA 91403  
(800) 443-0100

NCDA: National College of District Attorneys  
University of South Carolina  
1600 Hampton Street, Suite 414  
Columbia, SC 29208  
(803) 705-5095

NDAA: National District Attorneys Association  
National Advocacy Center  
1620 Pendleton Street  
Columbia, SC 29201  
(703) 549-9222

NITA: National Institute for Trial Advocacy  
1507 Energy Park Drive  
St. Paul, MN 55108  
(612) 644-0323 (in MN and AK)  
(800) 225-6482

NJC: National Judicial College  
Judicial College Building  
University of Nevada  
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association  
P.O. Box 301  
Albuquerque, NM 87103  
(505) 243-6003

PBI: Pennsylvania Bar Institute  
104 South Street  
P.O. Box 1027  
Harrisburg, PA 17108-1027  
(717) 233-5774  
(800) 932-4637

PLI: Practicing Law Institute  
810 Seventh Avenue  
New York, NY 10019  
(212) 765-5700

TBA: Tennessee Bar Association  
3622 West End Avenue  
Nashville, TN 37205  
(615) 383-7421

TLS: Tulane Law School  
Tulane University CLE  
8200 Hampson Avenue, Suite 300  
New Orleans, LA 70118  
(504) 865-5900

UMLC: University of Miami Law Center  
P.O. Box 248087  
Coral Gables, FL 33124  
(305) 284-4762

UT: The University of Texas School of Law  
Office of Continuing Legal Education  
727 East 26th Street  
Austin, TX 78705-9968

VCLE: University of Virginia School of Law  
Trial Advocacy Institute  
P.O. Box 4468  
Charlottesville, VA 22905

## **6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2010**

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) requirements is *NLT 2400, 1 November 2009*, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2010. This requirement includes submission of all writing exercises

This requirement is particularly critical for some officers. The 2010 JAOAC will be held in January 2010, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

A Judge Advocate who is required to retake any subcourse examinations or “re-do” any writing exercises must submit the examination or writing exercise to the Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2009). If the student receives notice of the need to re-do any examination or exercise after 1 October 2009, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to submit Phase I Non-Resident courses and writing exercises by 1 November 2009 will not be cleared to attend the 2010 JAOAC resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail [jeffrey.sexton@hqda.army.mil](mailto:jeffrey.sexton@hqda.army.mil)

## **7. Mandatory Continuing Legal Education**

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at [www.clereg.org](http://www.clereg.org) (formerly [www.cleusa.org](http://www.cleusa.org)) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General’s Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

## Current Materials of Interest

### 1. The Judge Advocate General's Fiscal Year 2009 On-Site Continuing Legal Education Training.

Date	Region	Location	Units	ATRRS Number	POC
15-19 Jun 09	Midwest Functional Exercise	Ft. McCoy, WI	7th LSO	TBD	TBD

### 2. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available Through the Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to Judge Advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the DTIC. An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at [www.dtic.mil/dtic/current.html](http://www.dtic.mil/dtic/current.html).

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to [bcorders@dtic.mil](mailto:bcorders@dtic.mil).

#### Contract Law

AD A301096 Government Contract Law

AD A301095 Government Contract Law Desk  
book, vol. 2, JA-501-2-95.

Deskbook, vol. 1, JA-501-1-95.

AD A265777 Fiscal Law Course Deskbook,  
JA-506-93.

### **Legal Assistance**

A384333 Servicemembers Civil Relief Act  
Guide, JA-260 (2006).

AD A333321 Real Property Guide—Legal  
Assistance, JA-261 (1997).

AD A326002 Wills Guide, JA-262 (1997).

AD A346757 Family Law Guide, JA 263 (1998).

AD A384376 Consumer Law Deskbook, JA 265  
(2004).

AD A372624 Legal Assistance Worldwide  
Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269  
(2002).

AD A350513 Uniformed Services Employment  
and Reemployment Rights Act  
(USAERRA), JA 270,  
Vol. I (2006).

AD A350514 Uniformed Services Employment  
and Reemployment Rights Act  
(USAERRA), JA 270,  
Vol. II (2006).

AD A329216 Legal Assistance Office  
Administration Guide,  
JA 271 (1997).

AD A276984 Legal Assistance Deployment  
Guide, JA-272 (1994).

AD A452505 Uniformed Services Former  
Spouses' Protection Act,  
JA 274 (2005).

AD A326316 Model Income Tax Assistance  
Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

### **Administrative and Civil Law**

AD A351829 Defensive Federal Litigation,  
JA-200 (2000).

AD A327379 Military Personnel Law, JA 215  
(1997).

AD A255346 Financial Liability Investigations  
and Line of Duty Determinations,  
JA-231 (2005).

AD A452516 Environmental Law Deskbook,  
JA-234 (2006).

AD A377491 Government Information Practices,  
JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241  
(2000).

AD A332865 AR 15-6 Investigations, JA-281  
(1998).

### **Labor Law**

AD A360707 The Law of Federal Employment,  
JA-210 (2000).

AD A360707 The Law of Federal Labor-  
Management Relations,  
JA-211 (2001).

### **Criminal Law**

AD A302672 Unauthorized Absences  
Programmed Text,  
JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook,  
JA-337 (2005).

AD A274413 United States Attorney  
Prosecutions, JA-338 (1994).

## International and Operational Law

AD A377522 Operational Law Handbook,  
JA-422 (2005).

\* Indicates new publication or revised edition.

\*\* Indicates new publication or revised edition pending inclusion in the DTIC database.

### 3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

#### b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

#### c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and

“Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

### 4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at [jagsch@hqda.army.mil](mailto:jagsch@hqda.army.mil) or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

## **5. TJAGSA Legal Technology Management Office (LTMO)**

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

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For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

## **6. The Army Law Library Service**

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at [Daniel.C.Lavering@us.army.mil](mailto:Daniel.C.Lavering@us.army.mil).



