

FAR FROM INFINITE JUSTICE: JUST WAR THEORY AND OPERATION ENDURING FREEDOM

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I. INTRODUCTION

On October 7, 2001, the United States and its British ally initiated Operation Enduring Freedom (OEF) and attacked Taliban and al-Qaeda targets in Afghanistan.¹ U.S. policymakers originally called their response to the terrorist attacks of September 11, 2001 (9/11) “Operation Infinite Justice,” but changed the name to “Enduring Freedom” to avoid offending Muslim sensibilities.²

The war had the backing of most just war theorists³—those who believe that wars must meet certain criteria before they can be deemed just.⁴ When one looks carefully at these criteria, however, and compares them with what is publicly known about OEF, it is hard to avoid the conclusion that just war theorists have not been true to their own principles.

There are three principles of just war theory that are particularly relevant in assessing the U.S. military strike on Afghanistan: last resort, right (or legitimate) authority, and proportionality.⁵ It will be argued here that OEF failed on all three counts. In Part II, last resort is examined and it is shown that the United States rejected options and opportunities that might have achieved just ends without the resort to war. Part III takes up right authority, examining compliance with both domestic and international law. It is argued that the domestic authorizing legislation was questionable, in terms of its legality and its

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1. Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations in Afghanistan, 2 PUB. PAPERS 1201 (Oct. 7, 2001).

2. Elizabeth Becker, *Renaming an Operation to Fit the Mood*, N.Y. TIMES, Sept. 26, 2001, at B1.

3. BRIAN OREND, *THE MORALITY OF WAR* 196 (2006) (“Most just war theorists . . . agreed with America that it was just to respond with force when the Taliban refused to hand over al-Qaeda suspects in November [sic] 2001.”). There were, to be sure, critics of the war, but most of these were not closely identified with just war theory. See, e.g., RAHUL MAHAJAN, *THE NEW CRUSADE: AMERICA’S WAR ON TERRORISM* (2002).

4. For basic expositions of just war theory, see *MORAL CONSTRAINTS ON WAR: PRINCIPLES AND CASES* (Bruno Coppieters & Nick Fotion eds., 2002) [hereinafter *MORAL CONSTRAINTS*]; OREND, *supra* note 3; JAMES TURNER JOHNSON, *MORALITY AND CONTEMPORARY WARFARE* (1999); RICHARD J. REGAN, *JUST WAR: PRINCIPLES AND CASES* (1996); MICHAEL WALZER, *JUST AND UNJUST WARS* (4th ed. 2006).

5. Another principle, right intention, might also be relevant. When there is just cause to go to war, but the war is pursued for other reasons, the just cause serves merely as a pretext. Much of the force of the right intention principle, however, may be subsumed under other just war principles and will not be separately considered here.

conformity with the general just war objective of minimizing the resort to war. International law too was flouted in that appropriate U.N. authorization was not obtained. Part IV deals with proportionality. This criterion was violated in three respects: prisoners were not treated according to applicable standards, the bombing campaign employed insufficient discrimination, and, most importantly, military operations placed millions of Afghans in grave danger of starvation. A counterargument suggesting that the war was justified by positive health outcomes for Afghans is examined and found wanting.

II. LAST RESORT

Under the principle of last resort, a war is just only if there were no other means short of war that might have achieved the same just cause. This principle requires a nation to make a good faith effort to attain its goals by non-military means before resorting to war.⁶

There are several objections to employing the last resort principle. In cases where there are on-going atrocities, say in Rwanda in 1994 where thousands were being killed every day,⁷ more time taken to explore alternative means of resolution results in more atrocities in the interim.⁸ This objection may overstate the speed with which military action can staunch mass murder, but it does not apply in the case of Afghanistan and 9/11, where there was no on-going slaughter taking place.⁹

6. OREND, *supra* note 3, at 57-58; *see also* Bruno Coppieters, Ruben Apressyan & Carl Ceulemans, *Last Resort*, in MORAL CONSTRAINTS, *supra* note 4, at 101.

7. *See* GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 261-65 (1998).

8. JEAN BETHKE ELSHTAIN, JUST WAR AGAINST TERROR: THE BURDEN OF AMERICAN POWER IN A VIOLENT WORLD 61 (2004) (citing British commentator Michael Quinlan, who states that sometimes putting military action at the end of the line allows atrocities to go on, as in Yugoslavia). Elshtain makes no effort to show that this situation applied in the case of Afghanistan. *Id.*

9. Of course, there were ongoing human rights abuses in Afghanistan. No U.S. official, however, had suggested that these rose to a level that required urgent U.S. military intervention. *See, e.g.*, Philip Reeker, Spokesman, State Dep't Regular Briefing (Sept. 10, 2001) (transcript on file with Federal News Service) (addressing Afghanistan but making no mention of any ongoing atrocities or need for military intervention). The State Department's 2001 human rights report for Afghanistan stated that the "overall human rights situation remained extremely poor, and the Taliban committed numerous serious and systemic abuses," but it noted as well that the "human rights situation in areas outside of Taliban control also remained extremely poor" and that members of the Northern Alliance—with which the United States was allied—"reportedly committed numerous, serious abuses." U.S. DEP'T OF STATE, *Afghanistan, in 2001 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES* (2002), <http://www.state.gov/g/drl/rls/hrrpt/2001/sa/8222.htm> [hereinafter *Afghanistan*, CRHRP 2001].

The last resort principle might also be challenged in situations where a delay could allow time for wrongdoers to escape capture and punishment, enabling them to harm innocent people in the future. In this case, however, any leaders of al Qaeda who wished to flee their Afghan camps had almost a month before the start of U.S. military action to escape over the porous Pakistani border. Therefore, there is no reason to think that a delay resulting from pursuing alternative means short of war would have increased the likelihood of al Qaeda leaders escaping.

Another potential objection to the last resort principle is that delaying military action might give one's adversary time to better prepare military defenses. However, cut off as the Taliban was from all sources of outside aid, additional time could not have enabled it to improve its military capabilities. The Taliban could not obtain more anti-aircraft weapons or anything else that would have been militarily consequential against the United States. Thus, here too, there was no reason to soften the principle that war needs to be a last resort.

Obviously, last resort does not mean that every conceivable alternative approach needs to be tried before resorting to war. Because there are an infinite number of possible actions, to require that they all be attempted prior to war would mean that war would be impossible.¹⁰ Nonetheless, last resort does insist that a nation pursue alternatives that have some reasonable prospect of success.

It is true, as Peter Temes has noted, that some measures "short of war"—such as blocking the shipment of food—might actually cause more harm than some military measures.¹¹ This is not, however, a compelling argument against the last resort principle, but a reminder that blockades are themselves acts of violence.¹² To be sure, some means other than military action would have been no less harmful to the innocent than war—further economic sanctions,¹³ for

10. I do not mean to suggest that, by definition, war must be permissible. Rather, this is a truism about any human undertaking. Whenever we are considering taking an action that is a last resort, there are, potentially, an infinite number of lesser resorts that could be attempted first. However, if we tried them all, we would never reach the last resort; yet sometimes last resorts are required.

11. PETER S. TEMES, *THE JUST WAR: AN AMERICAN REFLECTION ON THE MORALITY OF WAR IN OUR TIME* 168 (2003). Temes includes "propaganda campaigns" among the alternatives to war that "often create terrible harm for the weakest among an enemy nation's civilians while leaving the military and political leadership intact." *Id.* While it is possible, hypothetically, to imagine a propaganda campaign that incites more violence than would be caused by military measures, it would certainly be odd to recommend as a general rule that states resort to military force before employing propaganda campaigns.

12. Brian J. Foley, *Avoiding a Death Dance: Adding Steps to the International Law on the Use of Force to Improve the Search for Alternatives to Force and Prevent Likely Harms*, 29 *BROOK. J. INT'L L.* 129, 146 n.71 (2003) (noting that Temes ignores other alternatives that do not cause more harm than war).

13. The Taliban regime was already under U.N. economic sanctions imposed by Security Council resolutions 1267 and 1333. S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000).

example, that might have denied food to a desperate population—but the relevant question is whether the United States exhausted options that might have avoided the humanitarian consequences of both war and sanctions.¹⁴

Jean Bethke Elshain has argued that negotiations with al Qaeda were pointless: “because what they seek is our destruction, there is nothing to negotiate about.”¹⁵ Those who raise the last resort principle regarding the Afghanistan war, however, do not suggest that it was al Qaeda with whom negotiations were lacking, but the Taliban, specifically over the question of having bin Laden turned over for trial.¹⁶

Alex Bellamy tells us that British Prime Minister

Tony Blair supported the idea of military action against Afghanistan so long as the US published its evidence against Al-Qaeda and gave the Taliban government in Afghanistan an opportunity to hand over Al-Qaeda suspects for trial. The US accepted both of Blair’s suggestions and both states published detailed evidence identifying Al-Qaeda’s responsibility for the September 11 attacks Having presented its case, the US then embarked on two weeks of coercive diplomacy to persuade the Taliban to hand over Al-Qaeda suspects. Only when it became clear that the Taliban would not cooperate did the US and its allies use force, on 7 October 2001¹⁷

Bellamy’s claim, however, is not supported by the facts. It is *not* true that the United States government “published detailed evidence identifying Al-Qaeda’s responsibility for the September 11 attacks,” and it was *not* the case that the U.S. attack took place “only when it became clear that the Taliban would not cooperate,” as a review of the following facts reveals.

14. Christopher Bertram argued against delaying military action because “the crisis before the bombing started was having an adverse effect on the delivery of humanitarian aid.” *Afghanistan: A Just Intervention*, 6(2) *IMPRINTS* 134 (2002), available at <http://eis.bris.ac.uk/~plcdib/imprints/bertram.html>. He is correct, as discussed, *infra* note 282 and accompanying text, that the anticipation of U.S. bombing was causing humanitarian harm. The way to address this problem, however, was not to rush military action, but to give the Afghan population assurances against bombing.

15. ELSHTAIN, *supra* note 8, at 61.

16. Likewise, Richard Falk writes that bin Laden’s pathology “did make it seem irresponsible for peace forces to insist that a diplomatic alternative to war existed.” RICHARD FALK, *THE GREAT TERROR WAR* 49 (2003). Peace forces, however, did not call for negotiations with bin Laden but with the Taliban, so as to affect his turnover.

17. ALEX J. BELLAMY, *JUST WARS: FROM CICERO TO IRAQ* 171 (2006) (citation omitted).

President George W. Bush issued his demands on the Taliban nine days after the attacks on the World Trade Center and the Pentagon in a speech to a joint session of Congress:

And tonight the United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of Al Qaida who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats, and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.

These demands are not open to negotiation or discussion. The Taliban must act and act immediately. They will hand over the terrorists, or they will share in their fate.¹⁸

There are several points to be noted about this list of demands. First, by saying “these demands are not open to negotiation or discussion,” the United States government was not acting consistently with the last resort principle. Imagine, for example, that the Taliban had replied that they accepted all the demands except that they wanted the United Nations, not the United States, to be the one to have full access to terrorist training camps, in order to verify that they were no longer operating.¹⁹ Surely, no one would have argued that the United States would have been justified in going to war in that case. Nevertheless, by saying that U.S. demands were “not open to negotiation or discussion,” Bush was declaring his intention to go to war, unless the demands were acceded to precisely as he stated them. Thus, to say that Bush met the last resort criterion is to approve his going to war no matter how the Taliban responded, so long as its response was not full acceptance of every U.S. demand, exactly as issued.

The second point to note about Bush’s demands relates to his insistence that the Taliban release all foreign nationals, including Americans, who had been unjustly imprisoned. Eight foreign staff of the relief agency Shelter Now International, including two Americans, had indeed been arrested in August on charges of religious proselytizing. The Taliban claimed that the two Americans

18. Address Before a Joint Session of the Congress of the United States: Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001).

19. See S.C. Res. 1333, *supra* note 13, ¶ 22 (demanding that “the Taliban should act swiftly to close all camps where terrorists are trained within the territory under its control” and calling for “the confirmation of such closures by the United Nations”).

had shown a film about the life of Jesus,²⁰ a claim the Americans acknowledged to be true after they were freed.²¹ Many other foreign aid workers in Afghanistan were angry at the Shelter Now personnel for their reckless behavior, violating explicit rules and warnings from the Taliban in a way that put at risk the entire international aid effort for a desperate population.²² Of course, everyone in every society ought to have the right to convert and to proselytize (though it might still be appropriate to prohibit someone admitted into a country as an aid worker from engaging in missionary work).²³ Still, many governments prohibit proselytizing, especially by foreigners—including governments with which the United States is closely aligned, such as Saudi Arabia, Kuwait, the United Arab Emirates, and Greece²⁴—without this being considered a *casus belli*. Under the pro-U.S. Karzai government in Afghanistan in 2007,

proselytizing was not technically illegal, [but] those that actively proselytized did so in secret to avoid harassment or arrest by local officials There are no laws forbidding the practice [proselytism], even though it is viewed by authorities and society as contrary to the beliefs of Islam. There were unconfirmed reports of attempts to arrest Afghan Christians involved in proselytism. Foreigners caught proselytizing were deported Conversion from Islam is considered apostasy and is punishable by death under some interpretations of Shari'a. As in the case of blasphemy, an Afghan citizen who has converted from Islam (if a male over age 18 or a female

20. Kathy Gannon, *Hostility Toward Foreigners Rises in Afghanistan Since Aid Workers Detained*, MOBILE REGISTER, Aug. 17, 2001, at A16, available at 2001 WLNR 11153158.

21. Marcia Davis, *Former Captives Were 'Part of God's Plan,'* SAN DIEGO UNION-TRIB., Dec. 14, 2001, at E-5; Angus Donald, *Freed Aid Workers Taught Christianity to Muslims*, INDEP. (London), Nov. 17, 2001, at 10.

22. Barry Bearak, *Religious Arrests Cast a Pall Over Afghanistan Aid Efforts*, N.Y. TIMES, Aug. 23, 2001, at A1.

23. The Taliban suggested this point. "These foreigners were given visas as aid workers, not missionaries," said Abdul Ghafoor Afghani, the Taliban's chief of protocol. "In your country, if I am given a diplomat's visa and I am caught spying, I would not be spared, yes? This is the same." *Id.* For example, in India, "the Government prohibits foreign missionaries of any religious group from entering the country without prior clearance, and usually expels those who perform missionary work without the correct visa." U.S. DEP'T OF STATE, *India*, in INTERNATIONAL RELIGIOUS FREEDOM REPORT 2007 (2007) [hereinafter IRFR 2007], <http://www.state.gov/g/drl/rls/irf/2007/90228.htm>.

24. *Saudi Arabia*, in IRFR 2007, *supra* note 23, <http://www.state.gov/g/drl/rls/irf/2007/90220.htm>; *Kuwait*, in IRFR 2007, *supra* note 23, <http://www.state.gov/g/drl/rls/irf/2007/90214.htm>; *United Arab Emirates*, in IRFR 2007, *supra* note 23, <http://www.state.gov/g/drl/rls/irf/2007/90223.htm>; *Greece*, in IRFR 2007, *supra* note 23, <http://www.state.gov/g/drl/rls/irf/2007/90178.htm>.

over age 16, who is of sound mind) has three days to recant his or her conversion and is otherwise subject to death by hanging.²⁵

In 2006, an Afghan citizen, Abdul Rahman, was threatened with the death penalty for having converted to Christianity, but, following international pressure, was permitted to seek asylum in Italy.²⁶ Such international pressure is entirely appropriate, as it is for the U.S. government to offer diplomatic support to its citizens arrested in foreign countries to assure that they are well-treated and accorded a fair trial.²⁷ Demanding their release under threat of war, however, goes beyond the norm of diplomatic support.²⁸

25. *Afghanistan*, in IRFR 2007, *supra* note 23, <http://www.state.gov/g/drl/rls/irf/2007/90225.htm>.

26. Amnesty Int'l, *Afghanistan: Case of Abdul Rahman Underlines Urgent Need for Judicial Reform*, AI Index: ASA 11/008/2006, Mar. 22, 2006, available at <http://www.amnesty.org/en/library/info/ASA11/008/2006/en>; U.S. DEP'T OF STATE, *Afghanistan*, in INTERNATIONAL RELIGIOUS FREEDOM REPORT 2006 (2006), <http://www.state.gov/g/drl/rls/irf/2006/71437.htm>.

27. The day before 9/11, the State Department spokesperson stated, "Our main concern, of course, remains the welfare of the American citizens and that they be treated fairly and in accordance with international practices, and we want to see this case resolved as soon as possible." Reeker, *supra* note 9. On August 17, 2001, the U.N. Secretary General criticized the Taliban for denying the detainees consular and legal representation, as called for under international law. Press Release, Office of the Spokesman for U.N. Sec'y Gen., Secretary-General Says Taliban's Denial of Consular Access to Detainees Could Have Consequences for Humanitarian Assistance, U.N. Doc. SG/SM/7917 (Aug. 17, 2001), available at <http://www.un.org/News/Press/docs/2001/sgsm7917.doc.htm>. They were allowed visits on August 27, Kathy Gannon, *Relatives, Western Diplomats Visit Detained Foreign Aid Workers*, ASSOCIATED PRESS, Aug. 27, 2001, and permitted a lawyer a month later, Luke Harding, *Kabul: Accused Foreigners Granted Lawyer: Trial of Aid Workers to Resume in Islamabad*, GUARDIAN, Sept. 29, 2001, at 6.

28. An edict by Mullah Omar issued on July 31, 2001, specified that foreigners engaged in proselytism faced a penalty of three to ten days in prison and expulsion from the country, Bearak, *supra* note 22, but, in early September, Taliban officials raised the possibility of hanging, Peter Popham, *Taliban Provides 'Evidence' Against Aid Workers*, INDEP. (London), Sept. 7, 2001, at 15. Shortly after 9/11, U.S. diplomats were assured by Taliban authorities that the death penalty would not be applied to non-Afghans and that the case would not be linked to any possible U.S. military strikes on Afghanistan. Eli J. Lake, *Taliban Assures US on Aid Workers' Fate*, UNITED PRESS INT'L, Sept. 17, 2001. It is understandable that the U.S. government would be worried that U.S. citizens held in Afghanistan once the United States went to war would be extremely vulnerable, but note the circular logic: One of Washington's non-negotiable demands—which if not met would lead to war—was that arrested U.S. citizens be released so that they would not be harmed when the United States went to war.

On the eve of the U.S. attack, the Taliban did link the fate of the aid workers to U.S. military action: "If they stop issuing threats, we will take steps for the release of the

A third point regarding Bush's demands relates to his statement that the Taliban had to "hand over every terrorist and every person in their support structure to appropriate authorities." It is hard to imagine how the Taliban could comply with this demand without further clarification and, hence, discussion with the United States. "Every person in their support structure" was undefined—did it include, as Rahul Mahajan has suggested, "cleaners and servants and those who deliver food, in addition to drivers, bureaucrats, and many others"?²⁹ More importantly, who were the "appropriate authorities" to whom these individuals were to be turned over? Afghan officials? U.S. officials? There was no indication.³⁰

In any event, the central demand in Bush's list was the requirement that all leaders of al Qaeda be turned over to the United States.³¹ The only al Qaeda leader specifically named by Bush (earlier in his speech) was Osama bin Laden.³²

eight foreigners." Amir Shah, *Taliban Offer to Free Christian Aid Workers if U.S. Stops 'Military Propaganda,'* ASSOCIATED PRESS, Oct. 6, 2001.

Ultimately, the detainees' Taliban guards fled the oncoming Northern Alliance troops, and the detainees were freed. Molly Moore, *Former Taliban Captives Tell of Frightful Contrasts; Americans Were Protected by Guards While Afghan Women 'Were Being Beaten Until They Bled,'* WASH. POST, Nov. 18, 2001, at A13. Unlike the foreign employees of Shelter Now International, the Afghan employees who were arrested faced the death penalty as a potential punishment. *Taliban Raises Stakes in Crackdown Against Aid Groups in Afghanistan,* AGENCE FRANCE PRESSE, Aug. 31, 2001; *Afghanistan,* CRHRP 2001, *supra* note 9. They were not mentioned by Bush and I have been unable to ascertain their fate.

29. MAHAJAN, *supra* note 3, at 17. Earlier, Bush had explicitly included those who fed al Qaeda as culpable:

We're going to find those who—those evil-doers, those barbaric people who attacked our country, and we're going to hold them accountable, and we're going to hold the people who house them accountable. The people who think they can provide them safe havens will be held accountable. The people who feed them will be held accountable.

Remarks to Employees in the Pentagon and an Exchange with Reporters in Arlington, Virginia, 2 PUB. PAPERS 1117, 1119 (Sept. 17, 2001).

30. The day after Bush's speech, White House Press Secretary Ari Fleischer stated that the President had demanded that the Taliban "turn terrorists over to the United States or other authorities." Ari Fleischer, Press Sec'y for President George W. Bush, Press Briefing (Sept. 21, 2001), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/print/20010921-3.html>.

31. However, earlier in the day of Bush's speech, Ari Fleischer declared that "the President has demanded that key figures of the al Qaeda terrorist organization, including Osama bin Laden, be turned over to responsible authorities." Ari Fleischer, Press Sec'y for President George W. Bush, White House Morning Press Gaggle with Ari Fleischer, White House Spokesman (Sept. 20, 2001) (transcript on file with Federal News Service).

32. Response to the Terrorist Attacks of September 11, *supra* note 18, at 1141.

Public speculation had focused on bin Laden from the very beginning as the one responsible for the 9/11 attacks, and the president called him “a prime suspect” on September 15³³ and “the prime suspect” on September 16.³⁴ The Taliban’s Ambassador to Pakistan, Abdul Salam Zaeef—who was the regime’s main outlet to the world, given that the Taliban had diplomatic relations with only three countries—stated that his government would consider the extradition of bin Laden if the United States provided evidence of his involvement in the 9/11 terror attacks.³⁵

Two days later, the *New York Times* reported that Taliban radio said the Afghan government “has honestly asked America to give clear and substantial evidence for what it considers Osama to be responsible for” and “will hand him over to one of the Islamic courts of the world in order to be tried.”³⁶

A few days later, Zaeef indicated that bin Laden would only be extradited if his guilt were proven by an Islamic court: “If it is proved before a court convened under sharia (Islamic law) that he did this, we are prepared to hand him over to international authorities,” Zaeef said.³⁷

On September 17, Taliban officials were met by a Pakistani government delegation, said to be conveying a U.S. ultimatum (with precise terms not made public). The Afghans repeated their demand for evidence and called for a formal extradition request from the Organization of the Islamic Conference, the international organization of more than fifty Muslim nations. They also indicated that the question of what to do with bin Laden would be turned over to a council of Muslim clerics.³⁸ On September 20, the clerics rendered their decision, recommending “to the Islamic Emirate [i.e., the Taliban government] to persuade Osama bin Laden to leave Afghanistan whenever possible . . . and choose another place for himself.”³⁹ And following Bush’s September 20 speech, Taliban representatives reiterated their call for evidence.⁴⁰

33. Remarks in a Meeting with the National Security Team and an Exchange with Reporters at Camp David, Maryland, 2 PUB. PAPERS 1111, 1112 (Sept. 15, 2001).

34. Remarks on Arrival at the White House and an Exchange with Reporters, 2 PUB. PAPERS 1114, 1115 (Sept. 16, 2001).

35. Stephen Coates, *Taliban Want Proof Before Extraditing bin Laden*, AGENCE FRANCE PRESSE, Sept. 12, 2001.

36. Barry Bearak, *Relief Teams, and 3 Parents of Accused Americans, Leave Afghanistan*, N.Y. TIMES, Sept. 14, 2001, at A20.

37. *Washington Has Not Requested Handover of bin Laden: Taliban Envoy*, AGENCE FRANCE PRESSE, Sept. 17, 2001.

38. John F. Burns, *Taliban Refuse Quick Decision Over bin Laden*, N.Y. TIMES, Sept. 18, 2001, at A1.

39. Raymond Whitaker, *Council of Clerics Tells bin Laden to Leave the Country*, INDEP. (London), Sept. 21, 2001, at 8 (expressing clerics’ sadness over the deaths in the United States and threatening a holy war in the event that Washington attacked Afghanistan).

40. *Afghanistan’s Taliban Says It Won’t Hand over bin Laden Without Being Shown Evidence*, HOUSTON CHRON., Sept. 21, 2001, available at

Extradition requests typically include a presentation of “particularized information to meet a probable cause standard of guilt with regard to any individual sought.”⁴¹ There was reason to hope that Washington planned to provide such evidence, for on several occasions Secretary of State Colin Powell publicly declared that the United States would release a white paper linking bin Laden and al Qaeda to the 9/11 attacks.⁴²

Nevertheless, before going to war, the United States government never publicly released any such document. A document was prepared as a basis for private oral briefings⁴³ to various allied and other governments, but, notably, the information was neither made public nor shared with the Taliban, the government that was being asked to surrender bin Laden.⁴⁴

<http://www.chron.com/disp/story.mpl/topstory/1056820.html>; John F. Burns, *Clerics Answer ‘No, No, No!’ and Invoke Fates of Past Foes*, N.Y. TIMES, Sept. 22, 2001, at B3; John F. Burns, *Afghans Coaxing bin Laden, but U.S. Rejects Clerics’ Bid*, N.Y. TIMES, Sept. 21, 2001, at A1; Rajiv Chandrasekaran, *Taliban Vows ‘Showdown of Might’ With United States; Afghan Regime Asks for Evidence Against bin Laden*, WASH. POST, Sept. 23, 2001, at A03; Rajiv Chandrasekaran, *Taliban Rejects U.S. Demand, Vows a ‘Showdown of Might,’* WASH. POST, Sept. 22, 2001, at A01; Luke Harding & Rory McCarthy, *Extradition: Taliban Rule out Giving up bin Laden: Statement Appears to Overrule Clerics’ Decision to Ask Leader to Leave Voluntarily*, GUARDIAN, Sept. 22, 2001, at 7; *Morning Edition* (NPR radio broadcast Sept. 21, 2001), available at <http://www.npr.org/templates/story/story.php?storyId=1130036> (discussing responses of Afghanistan and Pakistan to US demands with Michael Sullivan).

41. John Quigley, *The Afghanistan War and Self-Defense*, 37 VAL. U. L. REV. 541, 547 (2003). Of course, the United States did not have an extradition treaty with the Taliban.

42. *ABC’s This Week* (television broadcast Sept. 23, 2001) (interviewing Colin Powell) (transcript on file with State Dep’t archives), available at <http://2001-2009.state.gov/secretary/former/powell/remarks/2001/5011.htm>; *All Things Considered* (NPR radio broadcast Sept. 27, 2001) (interviewing Colin Powell) (transcript on file with State Dep’t archives), available at <http://2001-2009.state.gov/secretary/former/powell/remarks/2001/5091.htm>; *Meet the Press* (NBC television broadcast Sept. 23, 2001) (interviewing Colin Powell) (transcript on file with State Dep’t archives), available at <http://2001-2009.state.gov/secretary/former/powell/remarks/2001/5012.htm>; see also *Fox News Sunday with Tony Snow* (television broadcast Sept. 23, 2001) (interviewing Condoleezza Rice) (transcript on file with Wash. Post archives), available at <http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/foxtext092301.html>.

43. Suzanne Daley, *NATO Says U.S. Has Proof Against bin Laden Group*, N.Y. TIMES, Oct. 3, 2001, at A1 (“One Western official at NATO said the briefings . . . were oral, without slides or documents.”).

44. Karen DeYoung & Dan Eggen, *\$100 Million in Terrorists’ Assets Frozen, U.S. Says; Money from Foreign and Domestic Bank Accounts Not Directly Tied to bin Laden or al Qaeda*, WASH. POST, Oct. 3, 2001, at A09; Linda Diebel, *U.S. Set to Consult Key Muslim Allies as War Drums Beat*, TORONTO STAR, Oct. 3, 2001, at A10; Kathleen Kenna, *Taliban*

It might be argued that the evidence of bin Laden's guilt could not be revealed either publicly or to the Taliban because of the need to protect intelligence sources and to prevent al Qaeda from preparing for counterstrikes.⁴⁵ However, the same briefing that was given to NATO allies was also given to Russia and Pakistan.⁴⁶ Given the ties of the latter to the Taliban,⁴⁷ it can be assumed that the briefings revealed no valuable intelligence secrets.

NATO's Secretary General declared that the evidence presented in the classified briefing was "clear and compelling," although, privately, NATO diplomats acknowledged that most of the information related to bin Laden's prior acts (in particular, the 1998 embassy bombings in Africa) and that the evidence tying bin Laden to the 9/11 attacks was circumstantial and lacking any "smoking gun."⁴⁸

Note that in discussing whether the United States presented evidence of bin Laden's involvement in 9/11, the question is not whether there is compelling evidence *today* of his guilt. Rather, the question is whether the Bush administration had such evidence *prior* to going to war and whether this evidence was presented to the Taliban. Evidence discovered only after a war begins cannot logically be used as justification for having gone to war.

In any event, however, it is unlikely that the absence of definitive proof at the time was the reason Washington refused to present what evidence it had to the Taliban or to the public. Yes, the Taliban might well have rejected the evidence as inconclusive, but this would hardly have put them in a stronger position than being able to say they had never been shown any evidence at all. A more probable explanation for the United States' unwillingness to present its case is provided in Bob Woodward's account of the Bush administration's decision making, which shows a concern to avoid precedents that might tie U.S. hands in the future.

Says It's Prepared to Try bin Laden, TORONTO STAR, Oct. 6, 2001, at A04; *Taliban Says Will Give bin Laden 'Islamic' Trial, but Needs Proof*, AGENCE FRANCE PRESSE, Oct. 5, 2001.

45. This was the argument made, for example, by NATO Secretary General George Robertson for why he could not give reporters details of the closed briefing. See David R. Sands, *In Historic First, NATO Invokes Mutual Defense*, WASH. TIMES, Oct. 3, 2001, at A10.

46. See Richard Boucher, Dep't Spokesman, State Dep't Regular Briefing (Oct. 3, 2001) (transcript on file with Federal News Service).

47. According to CIA director George Tenet, the head of Pakistan's intelligence service was a supporter of the Taliban. BOB WOODWARD, *BUSH AT WAR* 162 (2002). Musharraf replaced him on October 8, 2001. GEORGE TENET, *AT THE CENTER OF THE STORM: MY YEARS AT THE CIA* 164 (2007). For background on Taliban-Pakistan ties, see AHMED RASHID, *TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA* 183-95 (2000).

48. Daley, *supra* note 43; William Drozdiak & Rajiv Chandrasekaran, *NATO: U.S. Evidence on bin Laden 'Compelling'; Allies Give Unconditional Support for Retaliatory Strikes; Taliban Official Asks to See Proof*, WASH. POST, Oct. 3, 2001, at A11.

Woodward reports that, in internal National Security Council (NSC) deliberations on September 25, Secretary of Defense Donald Rumsfeld demurred when Secretary of State Colin Powell argued that a public case had to be made through a white paper:

Did they want or need a white paper? Rumsfeld asked. It could set an awful precedent. Suppose they wanted to launch a preemptive military attack on terrorists or some state sponsor? They could create an expectation that some white paper would follow. That might not be possible. National security decisions about military action often had to be made on the best available evidence and that might fall far short of courtroom proof. They could be setting themselves up.

While American and allied intelligence services were beginning to unravel the trail of the September 11 attacks, the evidence was circumstantial and somewhat fragmentary, though there were some hard nuggets. The danger of issuing a white paper that presented evidence was that it could condition people to view the war on terror as a law enforcement operation, within the model of the judicial system with its evidentiary standards, burden of proof on the government and proof beyond a reasonable doubt—things that could not possibly be met.⁴⁹

The issue was discussed again on September 30:

“I think the precedent is bad of having to go out and make your case publicly,” Rumsfeld said, “because we may not have enough information to make our case next time, and it may impair our ability to preempt against the threat that may be coming at us.” . . . “It’s not much of a precedent,” Powell countered. “There’s a lot of evidence. Most of it’s factual. You can say up front it’s preliminary. We’ve been asked by some of our closest allies for some of this information. We’ve been working on it for a while, this isn’t a rush job.” . . . Rumsfeld’s real worry was that they might release a white paper and face a negative reaction—the pundits and foreign affairs experts declaring that it wasn’t a very good or convincing case. What would they do then? Not attack?⁵⁰

49. WOODWARD, *supra* note 47, at 135-36.

50. *Id.* at 176-77.

On October 4, the British government publicly released a dossier charging bin Laden and al Qaeda with responsibility for the 9/11 attacks.⁵¹ The document was similar in many respects to the U.S. briefings; that is, it focused on al Qaeda's past record, and the evidence relating to 9/11 was largely circumstantial.⁵² When asked about the U.S. role in producing the British paper, the State Department spokesperson stated, "We saw it in advance. We looked at it . . . to confirm the facts for them, that we agreed with the facts as asserted in the British paper. But it's their paper and their conclusions," adding, "[b]ut I'm not able to offer U.S. information or endorsement to specific facts."⁵³

That same day, the Pakistani Foreign Ministry, which two days earlier had said that the classified U.S. briefing it had received had not provided conclusive proof of bin Laden's guilt,⁵⁴ "stated that Pakistan's military leader, Pervez Musharraf, believes the evidence against Al Qaeda is compelling enough to warrant legal action against bin Laden, although stopped short of saying it justifies military action against Afghanistan." The Foreign Ministry "urged the United States to share the evidence it has gathered against bin Laden and Al Qaeda more widely."⁵⁵

Following Musharraf's statement that he now found the evidence compelling and the publication of the British dossier, the debate between Powell and Rumsfeld regarding whether to release a U.S. white paper had, in Woodward's words, "floated away."⁵⁶ A few days later, National Security Adviser Condoleezza Rice said there was never any doubt of bin Laden's guilt but that Washington was right not to provide the Taliban with evidence.⁵⁷

51. Press Release, 10 Downing Street Newsroom, Responsibility for the Terrorist Atrocities in the United States, 11 September 2001 (Oct. 4, 2001) (original version on file with BBC News), available at http://news.bbc.co.uk/2/hi/uk_news/politics/1579043.stm.

52. Prime Minister Tony Blair issued a revised report on November 14—more than five weeks after the bombing began—declaring that new evidence "now leaves no doubt whatever" that bin Laden was responsible, implying of course that until that point there had been doubt. Jimmy Burns, Jean Eaglesham & Andrew Parker, *Ministers Try to Shore up Support for Military Campaign*, FIN. TIMES, Nov. 15, 2001, at 2. The *Financial Times* correspondents added that "the revised document contains only limited additional claims about Mr. bin Laden's culpability, and offers no detailed evidence." For the revised report, see Press Release, 10 Downing Street Newsroom, Responsibility for the Terrorist Atrocities in the United States, 11 September 2001—An Updated Account (Nov. 14, 2001) (updated version on file with Prime Minister's website), available at <http://www.number10.gov.uk/Page3682>.

53. Richard Boucher, Dep't Spokesman, State Dep't Regular Briefing (Oct. 4, 2001) (transcript on file with Federal News Service).

54. Daley, *supra* note 43.

55. Colin Nickerson, *Pakistan Affirms US Case on bin Laden*, BOSTON GLOBE, Oct. 5, 2001, at A31.

56. WOODWARD, *supra* note 47, at 196.

57. Condoleezza Rice, National Security Advisor, & Karen Hughes, Counselor to the President, Press Briefing (Oct. 8, 2001) (transcript on file with Federal News Service).

By not issuing a public report and not presenting evidence to the Taliban, the United States government established two precedents: first, that the United States could issue an ultimatum and go to war without having to make a public case—either to the American public or to the global public—and, second, that the United States could demand that another country turn over an individual without having to present even *prima facie* evidence of guilt. For just war theorists to approve of the U.S. going to war in these circumstances is to endorse these rather dangerous precedents.

The United States' position that it could demand the turnover of someone, without the need for presenting evidence, did not mean that the United States felt a reciprocal obligation to turn over individuals charged with terrorism or mass murder, even when evidence was presented. Thus, the United States rejected extradition requests in the cases of Emmanuel Constant (the individual who set up the paramilitary death squads of FRAPH in Haiti),⁵⁸ Luis Posada Carriles (the individual implicated in the blowing up of Cubana airlines flight 455, killing 73),⁵⁹ and Warren Anderson (the CEO of Union Carbide, charged with corporate malfeasance in India that led to the deaths of thousands).⁶⁰

In the week before the start of OEF, Taliban officials repeated that they would not turn over bin Laden without evidence being presented.⁶¹ When reporters told the Taliban ambassador that the United States had provided its allies with evidence linking bin Laden to 9/11, Zaeef replied: "They haven't given it to us."⁶²

58. Noam Chomsky, *Terror and Just Response*, in *TERRORISM AND INTERNATIONAL JUSTICE* 73 (James P. Sterba ed., 2003).

59. See Tristram Korten & Kirk Nielsen, *The Coddled "Terrorists" of South Florida*, SALON, Jan. 14, 2008, <http://www.salon.com/news/feature/2008/01/14/cuba/print.html>; see also Luis Posada Carriles: *The Declassified Record; CIA and FBI Documents Detail Career in International Terrorism; Connection to U.S.*, NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 153 (2005), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB153/>.

60. MAHAJAN, *supra* note 3, at 18; Mark Hertsgaard, *Still Avoiding Justice, Two Decades Later; The Bhopal Disaster*, INT'L HERALD TRIB., Dec. 4, 2004, at 6.

61. Kathy Gannon, *Taliban: Bin Laden Under Our Control*, CHI. SUN-TIMES, Oct. 1, 2001, at 1; Laura King, *Taliban Offer Talks, but Refuse to Surrender bin Laden; Pakistan Warns They 'Don't Have Much Time.'* ASSOCIATED PRESS, Oct. 2, 2001; see also Abdul Salam Zaeef, Ambassador to Pakistan (Afg.), News Conference (Oct. 2, 2001) (transcript on file with FDCH Political Transcripts).

62. King, *supra* note 61. Asked how he responded to this Taliban complaint, the White House Press Secretary declared, "I don't address Taliban complaints." Ari Fleischer, Press Sec'y for President George W. Bush, Press Briefing (Oct. 2, 2001) (transcript on file with White House archives), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011002-11.html>.

On October 5, Zaeef stated that, if the United States provided “concrete evidence” of bin Laden’s guilt, “we would try him in Afghanistan and if America is not satisfied, we are also ready to find an Islamic way to put him on trial.”⁶³

Then, as the threat of U.S. military action grew imminent, the Taliban went a step further, and, for the first time, modified their demand for evidence. On October 7, Zaeef declared that the Taliban would “detain Osama if someone comes forward and provides us with a copy of formal charges against him” and then put him on trial in Afghanistan. “The Islamic laws allow us to start a trial against an accused once he is formally charged,” Zaeef said. “The evidence can be provided to the court later.”⁶⁴ The Bush administration quickly rejected the Taliban proposal: “‘The president’s demands are clear and nonnegotiable,’ said White House spokesman Scott McClellan.”⁶⁵

The State Department spokesperson, Richard Boucher, argued in response to a earlier Taliban offer of a trial in Afghanistan that that was “not what the U.N. resolution requires”—meaning Security Council resolution 1333 of Dec. 19, 2000, demanding that the Taliban turn bin Laden over to a country in which he was indicted or to “appropriate authorities in a country where he will be arrested and effectively brought to justice.”⁶⁶ A reporter asked whether that meant the United States.

Mr. Boucher: The president said that should be the United States.

Q: Okay. But that’s not in the U.N. resolution; right?

Mr. Boucher: No, it’s not. But the president said it should be in the United States.⁶⁷

No doubt, the United States had good reason to be skeptical of a trial held in Afghanistan. To many in the Muslim world, however, the possibility of a fair trial in the United States—where the president had spoken of wanting bin Laden “dead or alive”⁶⁸—also aroused skepticism.⁶⁹

63. *Taliban Says Will Give bin Laden ‘Islamic’ Trial, but Needs Proof*, *supra* note 44.

64. *Taliban Offer to Detain bin Laden*, UNITED PRESS INT’L, Oct. 7, 2001; *see also* Amir Zia, *Taliban Say They Are Willing to Detain Osama bin Laden and Try Him Under Muslim Law if U.S. Requests*, ASSOCIATED PRESS, Oct. 7, 2001.

65. Amir Zia, *supra* note 64.

66. S.C. Res. 1333, *supra* note 13.

67. Richard Boucher, Dep’t Spokesman, State Dep’t Regular Briefing (Oct. 5, 2001) (transcript on file with Federal News Service).

68. *See* Remarks to Employees in the Pentagon, *supra* note 29, at 1120 (responding to the question of whether he wanted bin Laden, “dead,” President Bush replied that “[t]here’s an old poster out West, as I recall, that said, ‘Wanted: Dead or Alive.’”); *see also* Ari Fleischer, Press Sec’y for President George W. Bush, Press Briefing (Sept. 17, 2001) (transcript on file with White House archives), *available at*

Beyond rebuffing specific Taliban proposals, the United States also rejected any clarifying talks. For example, on September 28, a reporter asked White House Press Secretary Ari Fleischer, “When you say that the U.S. government is not going to negotiate, does that mean that there’s . . . no room for diplomacy here?” Fleischer replied “That’s correct.”⁷⁰ Three days later, he was asked:

Q: Did the president absolutely slam the door, and can you tell us what he said in terms of the Taliban offering negotiations? Have we ever tried to seek clarification of what they’re talking about?

Mr. Fleischer: Helen, that door was never opened to be slammed. The president made clear in his speech to the country that there will be no negotiations and no discussions.⁷¹

Thus, when Alex Bellamy says that the U.S. government “embarked on two weeks of coercive diplomacy,”⁷² it is hard to see where there was any true diplomacy at all.

Elshtain argues that there was no “mad rush” to war on the part of the United States; “America waited and considered carefully what a measured response would be.”⁷³ Similarly, Carl Ceulemans states that “[d]espite the fact that there was a great deal of pressure from public opinion to retaliate without any delay, the Bush administration, together with its closest allies, showed remarkable restraint.”⁷⁴ Yet, Ceulemans goes on to acknowledge:

It is safe to assume that the restraint shown during the first days was not primarily inspired by the intention to put off military action until a variety of nonmilitary measures had been tried. Rather, the restraint had more to do with the fact that a

whitehouse.archives.gov/news/releases/2001/09/print/20010917-8.html (replying to whether the president wanted bin Laden put on trial by noting, “As the President said, dead or alive.”).

69. Kenna, *supra* note 44, at A04.

70. Ari Fleischer, Press Sec’y for President George W. Bush, Press Briefing (Sept. 28, 2001) (transcript on file with White House archives), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010928-8.html>.

71. Ari Fleischer, Press Sec’y for President George W. Bush, White House Press Gaggle (Oct. 1, 2001) (transcript on file with Federal News Service).

72. BELLAMY, *supra* note 17, at 171.

73. ELSHTAIN, *supra* note 8, at 7; see also *id.* at 77-78.

74. Carl Ceulemans, *The Military Response of the U.S.-Led Coalition to the September 11 Attacks* 265, 273-74, in MORAL CONSTRAINTS, *supra* note 4, at 265, 273-74.

successful response to the attacks required a certain amount of time to prepare militarily and diplomatically.⁷⁵

This makes Ceulemans' use of the word "restraint" puzzling. In fact, the chair of the Joint Chiefs of Staff told Bush on September 15 that it would take "a minimum of ten to twelve days just to get initial forces on the ground" because bases and overflight rights were needed for search and rescue teams to bring out downed pilots.⁷⁶ On September 18, the CIA said it would take eight days before their paramilitary forces could get to Afghanistan to work with the Northern Alliance.⁷⁷ Based on accounts from participants, Bob Woodward describes the September 26 NSC meeting this way:

For many days the war cabinet had been dancing around the basic question: How long could they wait after September 11 before the U.S. started going "kinetic," as they often termed it, against al Qaeda in a visible way? The public was patient, at least it seemed patient, but everyone wanted action. A full military operation—air and boots—would be the essential demonstration of seriousness—to bin Laden, America and the world. The president took the floor.

"Anybody doubt that we should start this Monday or Tuesday of next week [Oct. 1 or 2]?" he inquired.⁷⁸

The next day, Bush was annoyed to learn that the military was still not fully ready. He was ready to go and impatient at the delay.⁷⁹ On October 4, Bush learned that the rescue bases would be operational in Uzbekistan on the 8th.⁸⁰ On October 7, the United States began military action.⁸¹

After eight days of bombing, the Taliban repeated its offer, saying it was prepared to turn over bin Laden to a third country for trial—" [w]e could discuss which third country," said the Taliban's third highest official—if the United States would stop the bombing and present evidence.⁸² Bush replied dismissively:

75. *Id.* at 274.

76. WOODWARD, *supra* note 47, at 80.

77. *Id.* at 102. These covert teams actually arrived in Afghanistan on September 26 or 27. See TENET, *supra* note 47, at 187, 211.

78. WOODWARD, *supra* note 47, at 150.

79. *Id.* at 157-58.

80. *Id.* at 195.

81. Address to the Nation, *supra* note 1.

82. Andrew Buncombe, *Bush Rejects Taliban Offer to Surrender Bin Laden; Second Week of Bombing Begins; Media Visits Village Hit by Missile*, INDEP. (London), Oct. 15, 2001, at 1.

There's no need to negotiate. There's no discussions. I told them exactly what they need to do. And there's no need to discuss innocence or guilt. We know he's guilty. Turn him over. If they want us to stop our military operations, they've just got to meet my conditions. Now, when I said no negotiation, I meant no negotiation.⁸³

Given the consistent U.S. rejection of negotiations, it seems clear that war was not pursued as a last resort by the U.S. government.⁸⁴ It is of course

83. Exchange With Reporters on Returning From Camp David, Maryland, 2 PUB. PAPERS 1238, 1238 (Oct. 14, 2001). Bush went on:

There's no negotiation—they must have not heard—there's no negotiation. This is non-negotiable. These people, if they're interested in us stopping our military operations, we will do so if they meet the conditions that I outlined in my speech to the United States Congress. It's as simple as that. There's nothing to negotiate about. They're harboring a terrorist, and they need to turn him over—and not only turn him over, turn the Al Qaida organization over, destroy all the terrorist camps—actually, we're doing a pretty good job of that right now—and release the hostages they hold. That's all they've got to do, but there is no negotiation, period.

Id.

84. Richard Falk, in an article in which he called the Afghanistan war the “first truly just war” since World War II, has argued that:

A public prosecution would give bin Laden and associates a platform to rally further support among a large constituency of sympathizers, and conviction and punishment would certainly be viewed as a kind of legal martyrdom. It would be impossible to persuade the United States government to empower such a tribunal unless it was authorized to impose capital punishment, and it is doubtful that several of the permanent members of the Security Council could be persuaded to allow death sentences. Beyond this, the evidence linking bin Laden to the September 11 attacks and other instances of global terrorism may well be insufficient to produce an assured conviction in an impartial legal tribunal, particularly if conspiracy was not among the criminal offenses that could be charged. European and other foreign governments are unlikely to be willing to treat conspiracy as a capital crime.

Richard Falk, *Ends and Means: Defining a Just War*, NATION, Oct. 29, 2001, at 12.

It is hard to see how this argument can be reconciled with just war principles. Consider, first, the implication of the argument. If the Taliban had fully complied with the U.S. ultimatum and turned over bin Laden and his top associates, what should have been done with them? Execute them without a trial? Hold a secret trial and then execute them?

possible that Taliban offers to talk or to turn bin Laden over to a third country for trial were nothing more than stalling tactics. The last resort principle, however, does not say that countries contemplating war should pursue only those nonmilitary alternatives that are guaranteed to succeed; it is sufficient that an alternative have reasonable prospects of success. In this case, there would have been little harm in delaying or suspending the bombing in order to find out if the Taliban was sincere in its offers.

There are three arguments that could be raised in support of refusing to negotiate. One is that the United Nations had been asking the Taliban to turn over bin Laden ever since Security Council resolution 1267 of October 1999, to no avail.⁸⁵ Second, the ties between the Taliban and al Qaeda—and between Mullah Omar and bin Laden—were so strong that there was no chance that the former would turn on the latter. And third, other Taliban responses to the U.S. ultimatum showed a lack of seriousness. Each of these was, indeed, reason not to be confident that negotiations would prove fruitful. None of them, however, was so decisive as to make it unreasonable to pursue negotiations.⁸⁶

Did the Taliban refusal to turn bin Laden over for trial in response to earlier Security Council demands show that negotiations were pointless? Following the indictment of bin Laden by a U.S. court for the 1998 African embassy bombings, the U.N. Security Council called on the Taliban to turn him over for trial. Here too, the Taliban called for evidence, but in fact the indictment

To object on principle to publicly trying al Qaeda leaders is to declare that the U.S. ultimatum was not meant seriously and thus it could not possibly have satisfied the just war principle that war must be a last resort.

Moreover, under just war theory wanting to avoid tribunals that cannot impose death sentences obviously does not constitute just cause for war. It should be noted that the arguments against capital punishment are stronger in terrorism cases than otherwise. See Thomas Michael McDonnell, *The Death Penalty—An Obstacle to the 'War against Terrorism'?*, 37 VAND. J. TRANSNAT'L L. 353 (2004).

And if evidence is inadequate to convict individuals before an impartial tribunal, can it be adequate for going to war, with all the horrendous consequences?

85. S.C. Res. 1267, *supra* note 13.

86. Richard W. Miller, *Terrorism, War, and Empire*, in TERRORISM AND INTERNATIONAL JUSTICE 187 (James P. Sterba ed., 2003), makes another argument:

Admittedly, under pressure of imminent invasion, the Taliban described conditions under which they might expel bin Laden or even give him over to trial. But their long-standing, knowing provision of sanctuary for his unjust violent conspiracy made it permissible for the United States to assume a lack of good faith in the observance of duties of neutrality.

However, if past Taliban behavior justified the United States in rejecting the Taliban response, then the U.S. ultimatum was never meant seriously and could thus not meet just war theory's last resort criterion.

constituted the evidence, and it was made public, yet rejected by the Taliban.⁸⁷ It is thus reasonable to conclude that the Taliban was engaged in stonewalling. However, Taliban intransigence *then* was not proof that negotiation was doomed to failure *after 9/11* given the different circumstances. *Then* the Taliban did not face the same universal isolation. *After 9/11*, two of the only three countries with which the Taliban had diplomatic relations severed relations with them.⁸⁸ *Then* support from Pakistan could be counted on.⁸⁹ *After 9/11*, Pakistani elites chose to align with Washington,⁹⁰ providing the United States with military cooperation,⁹¹ and publicly declaring that there was sufficient evidence to indict bin Laden.

There is one other reason why the previous Taliban refusal to turn over bin Laden did not mean that negotiation was pointless after 9/11. Before 9/11, the Taliban never worried that they faced serious military consequences; the missile strikes of August 1998 following the bombing of the U.S. embassies in Africa were far from threatening the survival of the regime. After 9/11, however, a regime-changing U.S. attack looked more and more likely. Moreover, as described above, as war grew imminent, Taliban terms became more accommodating. Though the Taliban ultimately was unwilling to turn bin Laden over to the United States without any presentation of evidence, this does not show that there was no solution, short of war, upon which the parties might have agreed.

Likewise, while the ties between the Taliban and bin Laden were quite close, there was no way that U.S. policymakers or just war theorists could have been certain at the time that these ties precluded the Taliban from turning over the al Qaeda leader. It is now known that in 1998 relations between Mullah Omar and bin Laden were quite tense, and Omar was preparing to turn bin Laden over to the Saudis. Before Omar could do so, however, the U.S. missile attacks on

87. MICHAEL GRIFFIN, REAPING THE WHIRLWIND: THE TALIBAN MOVEMENT IN AFGHANISTAN 212-13 (2001).

88. Kathleen Kenna & Shamil Zhumatov, *World Shuns Afghan Rulers*, TORONTO STAR, Sept. 23, 2001, at A7; Nicholas Kralev, *Saudi Arabia Cuts Ties with Taliban*, WASH. TIMES, Sept. 26, 2001, at A15.

89. STEVE COLL, GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001 439, 548 (2004) (discussing Pakistani politics prior to September 11). When the U.N. Security Council unanimously adopted resolution 1214 of Dec. 8, 1998, harshly condemning the Taliban, Pakistan criticized the resolution as "one-sided." GRIFFIN, *supra* note 87, at 214.

90. Pakistan's choice was encouraged by a U.S. ultimatum, by the lifting of U.S. sanctions, and by a substantial package of U.S. aid. WOODWARD, *supra* note 47, at 58-59; Jane Perlez, *Cooperation; U.S. Sanctions on Islamabad Will Be Lifted*, N.Y. TIMES, Sept. 22, 2001, at A1; Joseph Kahn, *The Reward; U.S. Is Planning an Aid Package for Pakistan That Is Worth Billions*, N.Y. TIMES, Oct. 27, 2001, at B1; Fact Sheet, State Dep't, Sanctions on India and Pakistan (Sept. 28, 2001), available at <http://2001-2009.state.gov/r/pa/prs/ps/2001/5101.htm>.

91. Fact Sheet, Office of Pub. Affairs, Dep't of Def., International Contributions to the War Against Terrorism (May 22, 2002), available at <http://www.defenselink.mil/news/May2002/d20020523cu.pdf>.

Afghanistan made bin Laden a hero and scuttled Omar's plans—strengthening the bonds between the two men.⁹² A few months later, there were unconfirmed reports of a shoot-out between the Taliban and bin Laden's bodyguards.⁹³ There were also various rumors that either Omar or bin Laden had married the other's daughter, but these claims were denied by the Taliban⁹⁴ and bin Laden,⁹⁵ there was no evidence to confirm these rumors⁹⁶ and, in fact, some evidence to the contrary.⁹⁷ In any event, this marital tie was not cited by U.S. officials.⁹⁸ The 9/11 Commission later found some evidence that Omar had opposed the 9/11 terror attacks and that some al Qaeda leaders (though not bin Laden) thought the organization should defer to the Taliban's wishes that it not engage in operations outside Afghanistan.⁹⁹ Thus, amid this plethora of conflicting evidence, no one could have predicted with certainty whether Omar would have refused to turn over bin Laden.

92. Alan Cullison & Andrew Higgins, *Strained Alliance: Al Qaeda's Sour Days in Afghanistan—Fighters Mocked the Place; Taliban, in Turn, Nearly Booted Out bin Laden—A Fateful U.S. Missile Strike*, WALL ST. J., Aug 2, 2002, at A1.

93. Tim Weiner, *Terror Suspect Said to Anger Afghan Hosts*, N.Y. TIMES, Mar. 4, 1999, at A1. On the record, the State Department spokesperson could not confirm the reports of the fight. James B. Foley, Deputy Spokesman, State Dep't, Daily Press Briefing (Mar. 5, 1999) (transcript on file with M2 Presswire).

94. PETER L. BERGEN, *HOLY WAR, INC.* 166 (2001).

95. MESSAGES TO THE WORLD: THE STATEMENTS OF OSAMA BIN LADEN 144 (Bruce Lawrence ed., 2005) (reprinting Hamid Mir, *Osama Claims He Has Nukes: If U.S. Uses N-Arms Will Get Same Response*, DAWN (Pak.), Nov. 10, 2001, <http://www.dawn.com/2001/11/10/top1.htm>).

96. Rahimullah Yusufzai, *On the Brink of War: Face to Face with Osama*, GUARDIAN, Sept. 26, 2001, at 2.

97. Scott Johnson & Evan Thomas, *Mulla Omar Off the Record*, NEWSWEEK, Jan. 21, 2002, at 26.

98. Google searches for “bin Laden’ daughter ‘Mullah Omar’ site:www.whitehouse.gov,” “bin laden’ daughter ‘Mullah Omar’ site:www.state.gov,” and “bin laden’ daughter ‘Mullah Omar’ site:www.defenselink.mil” yielded no relevant hits. (Last searched Oct. 23, 2009). No reference is made to any marital links in WOODWARD, *BUSH AT WAR*, *supra* note 47 (discussing participant accounts). See also *American Morning With Paula Zahn: Bin Laden's Women* (CNN television broadcast Mar. 12, 2002) (transcript on file with CNN), available at <http://transcripts.cnn.com/TRANSCRIPTS/020312/lm.10.html> (making no mention of Omar in intelligence brief on bin Laden's wives).

99. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 251-52 (2004), available at <http://govinfo.library.unt.edu/911/report/911Report.pdf> [hereinafter 9/11 COMMISSION REPORT]. The Commission adds that “[t]he story of dissension within al Qaeda regarding the 9/11 attacks is probably incomplete,” and that “[t]here are also some scant indications that Omar may have been reconciled to the 9/11 attacks by the time they occurred.” *Id.* at 252.

Moreover, regardless of Omar's personal views, no outsider could be certain how internal dissension in the Taliban might play out. Under pressure, might enough Taliban leaders threaten to break with bin Laden, forcing a compromise on Omar? Indeed, the statement by the Taliban Deputy Prime Minister on the eve of war—saying that bin Laden could be put on trial even before evidence was provided—could have reflected precisely this sort of internal dynamic within the Taliban. Even CIA director George Tenet, who considered the Taliban and al Qaeda inseparable, acknowledged that the threat of U.S. action had “provoked fissures within the Taliban”¹⁰⁰—which might have led some part of the organization to favor giving up bin Laden.

Again, it is not being argued here that Taliban compliance was assured, but only that no one could have been certain of its noncompliance. Yet, the United States government refused to pursue opportunities that might have put the Taliban to the test—both before the war commenced and after it began. Nine days into the war, the White House Press Secretary squelched any possibility of a pause in the bombing to allow an opportunity for negotiations:

Q Ari, there is a dispatch from Islamabad that says that a so-called moderate Taliban member, official, has asked for a bombing pause of two days so that they can persuade—the moderates can persuade the hard-line Omar to turn over bin Laden. Now what is—is there such a thing in the works? Have they talked to Powell? Have you heard anything at the White House?

Mr. Fleischer: I think the president addressed that in its entirety when he returned from Camp David on Sunday when he has said there will be no negotiations. The military campaign remains underway, the financial campaign remains underway, the diplomatic, the political, and --

Q Why not any negotiations? Everything is negotiated eventually. And why not a cease-fire for a couple days?

Mr. Fleischer: Because that's not what the president announced to the American people in his speech to the Congress. The president is not pursuing such a course because he does not think it would be constructive.

The president has given the Taliban government ample time to respond. The president made it perfectly plain about what actions the Taliban needed to take in order to avoid the fate that they have chosen for themselves. They had plenty of time; they chose not to act.

Q It isn't a question of time. This is a possible opening.

100. WOODWARD, *supra* note 47, at 121, 149 (discussing fissures and the Taliban–al Qaeda inseparability, respectively).

Mr. Fleischer: The president does not view it as such.¹⁰¹

In short, there was to be no let up in the bombing, even if that might offer the possibility of securing bin Laden without further military action.¹⁰²

A final argument that one can make for not taking Taliban offers seriously is that the Taliban put forward a variety of often contradictory demands and deals. At different times, they demanded diplomatic recognition or economic aid or offered to release the international aid workers if there was no U.S. attack.¹⁰³ The Taliban, noted Press Secretary Fleischer, “have made so many different statements that are all over the map.”¹⁰⁴ Nevertheless, the Taliban was rather consistent in its call for evidence. All its blustering and grasping at straws does not show that it would necessarily have been unwilling to resolve the conflict short of war. Yet it is this unwillingness alone that is the test for the last resort principle.

There is one last argument against the applicability of the last resort principle. One could argue that, by its actions on 9/11, al Qaeda had initiated war against the United States. Therefore, vis-à-vis al Qaeda, last resort was irrelevant, for the war had already been joined—just as the United States was under no obligation to seek non-military means of conflict resolution with Japan once Japan had attacked Pearl Harbor. Again, however, the last resort principle is not directed at U.S. relations with al Qaeda, but with the Taliban. One could argue that, by harboring al Qaeda, the Taliban was just as guilty as bin Laden, and, thus, the last resort had already been reached. This, however, was not an argument made by Washington. Bush’s ultimatum to the Taliban on September 20¹⁰⁵ shows that he did not consider the United States already at war with the Taliban.

War is a serious undertaking and should only be initiated as a last resort. The Bush administration, however, did not make a good faith effort to pursue alternatives to war. Thus, those just war theorists who gave short shrift to the last resort criterion in justifying Operation Enduring Freedom did not uphold just war principles.

101. Ari Fleischer, Press Sec’y for President George W. Bush, Press Briefing (Oct. 16, 2001) (transcript on file with White House archives), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011016-2.html>.

102. Rumsfeld explained his rejection of a bombing pause differently. According to WOODWARD, *supra* note 47, at 187, “Rumsfeld said that as far as he was concerned there were not going to be any bombing pauses—especially for some kind of negotiations. Period. Bombing pauses smacked of Vietnam. No way.” See also John F. Burns, *Taliban Envoy Talks of a Deal Over bin Laden*, N.Y. TIMES, Oct. 16, 2001, at A1.

103. John F. Burns, *Adding Demands, Afghan Leaders Show Little Willingness to Give up bin Laden*, N.Y. TIMES, Sept. 19, 2001, at B5; Bob Deans & Mike Williams, *Bush: ‘Time Is Running out’ Taliban Offers to Free Aid Workers if Attack Called off*, PALM BEACH POST, Oct. 7, 2001, at 1A.

104. Fleischer, *supra* note 62.

105. Response to the Terrorist Attacks of September 11, *supra* note 18.

III. RIGHT AUTHORITY

The principle of right or legitimate authority requires that the decision to wage war be made by those who are legally authorized to do so.¹⁰⁶ The just war tradition, of course, as Andrew Fiala has reminded us, “developed in the context of nondemocratic government. Augustine, Suarez, Vitoria, and others defended the idea of just war from within monarchical systems of government.”¹⁰⁷ In the current democratic age, many view any nondemocratic government as inherently illegitimate, and, thus, the justness of any war declared by such governments is at least suspect.¹⁰⁸ In the case of the United States, the 2000 election—where a 5-4 partisan majority in the Supreme Court stopped the Florida recount before the results were tallied¹⁰⁹—raised serious questions about the legitimacy of the Bush presidency¹¹⁰ and, hence, of any wars declared by him.

Putting aside this concern, there are two other questions of right authority that must be determined. First, was there proper authority for going to war in terms of the U.S. political system? And second, was there proper authority for going to war in terms of international law?

A. United States Law

Just three days after the terrorists struck on 9/11, the U.S. Congress hurriedly passed a joint resolution by a vote of 98-0 in the Senate and 420-1 in the House titled “Authorization for Use of Military Force” (AUMF). Signed into law on September 18, the resolution stated that

the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the

106. Bruno Coppieters, *Legitimate Authority*, in MORAL CONSTRAINTS, *supra* note 4, at 41-58; REGAN, *supra* note 4, at 20-47.

107. ANDREW FIALA, THE JUST WAR MYTH: THE MORAL ILLUSIONS OF WAR 127 (2008).

108. One could argue, on the other hand, that “even tyrannical regimes are presumably capable of fighting a just war in defence of their peoples, as Stalin’s government did against the Nazi invaders.” C. A. J. COADY, MORALITY AND POLITICAL VIOLENCE 172 (2008).

109. *See, e.g.*, ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); JEFFREY TOOBIN, TOO CLOSE TO CALL: THE THIRTY-SIX-DAY BATTLE TO DECIDE THE 2000 ELECTION (2002); BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002).

110. *See* Nicol C. Rae, *The George W. Bush Presidency in Historical Context*, in HIGH RISK AND BIG AMBITION: THE PRESIDENCY OF GEORGE W. BUSH 17, 17 (Steven E. Schier ed., 2004).

terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹¹¹

President Bush can thus claim that he received Congressional authorization for his military actions in Afghanistan. Nevertheless, there are several points that weaken Bush's claim.

The first is the question of the legal status of legislation abnegating Congressional authority. The Constitution provides, "The Congress shall have power . . . to declare war."¹¹² That is, the decision about war—which includes the decisions about whether to go to war and against whom—is to be made by the legislative branch. The AUMF essentially gives up this Congressional power and turns it over to the President. It means that, if the President declared that he had determined that Iraq was connected in some way to al Qaeda, as members of the Bush administration repeatedly did,¹¹³ the AUMF gives him the authorization to go to war without any need for further consultation with Congress. Moreover, this would be so even though the evidence actually showed any such connections to be inconsequential.¹¹⁴ Indeed, if the President had announced that he determined that Syria, Libya, Iran, or even Venezuela were linked to the 9/11 perpetrators, the AUMF gave him the authorization to go to war without the need to convince

111. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The roll call votes are available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00281 and <http://clerk.house.gov/evs/2001/roll342.xml>.

112. U.S. CONST. art. I, § 8.

113. See quotations collected in Charles Lewis & Mark Reading-Smith, *False Pretenses*, in *IRAQ: THE WAR CARD; ORCHESTRATED DECEPTION ON THE ROAD TO WAR* (Center for Public Integrity ed., 2008), <http://www.publicintegrity.org/WarCard/Default.aspx?source=home&context=overview&id=945>.

National Security Advisor Condoleezza Rice noted that "[n]o one is trying to make an argument at this point that Saddam Hussein somehow had operational control of what happened on September 11," *Fox News Sunday* (television broadcast Sept. 15, 2002) (transcript on file with FoxNews archives), available at <http://www.foxnews.com/story/0,2933,63125,00.html>, but the Authorization to Use Military Force did not authorize war only against those who had operational control of the September 11 attacks, but against any who "aided" the attacks or who "harbored" the perpetrators.

114. See 9/11 COMMISSION REPORT, *supra* note 99, at 66; S. COMM'N ON INTELLIGENCE, 109TH CONG., REPORT ON POSTWAR FINDINGS ABOUT IRAQ'S WMD PROGRAMS AND LINKS TO TERRORISM AND HOW THEY COMPARE WITH PREWAR ASSESSMENTS, TOGETHER WITH ADDITIONAL VIEWS, S. REP. NO. 109-331, at 79, 82, 84-85, 90, 92-93 (2006), available at <http://intelligence.senate.gov/phaseiiaccuracy.pdf>; 1 KEVIN M. WOODS & JAMES LACEY, IRAQI PERSPECTIVES REPORT—SADDAM AND TERRORISM: EMERGING INSIGHTS FROM CAPTURED IRAQI DOCUMENTS ES-1 (IDA Paper P-4287) (redacted).

Congress or the American public that his determination was well-founded. However, does the Congress have the right to give up its Constitutional authority in this way?

In general, the Supreme Court has held that Congress may delegate some of its powers to the executive branch.¹¹⁵ There is scholarly debate on the permissible degree of delegation,¹¹⁶ but consider the example of air quality. Congress has delegated to the Environmental Protection Agency (EPA) the authority to issue air quality regulations. It has done so by means of the Clean Air Act,¹¹⁷ extremely detailed legislation which sets out the broad parameters of policy within which the EPA is to make technical determinations regarding specific air pollution risks. Deciding whether to go to war with other countries, however, is not the same sort of technical determination; it is not part of the President's acknowledged authority under Article II, Section 2 "to direct the movements of the naval and military forces placed by law at his command" to use against an enemy.¹¹⁸ Rather, the war decision is a highly complex judgment for which the Constitution made the legislative branch responsible when it gave it the sole authority to declare war. Where the Clean Air Act runs some 465 pages,¹¹⁹ some of them "mind-numbingly specific and detailed,"¹²⁰ the AUMF is less than 400

115. In *Mistretta v. United States*, 488 U.S. 361, 372 (1989), the Supreme Court stated that:

our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. Accordingly, this Court has deemed it "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."

(internal citations omitted).

116. See, e.g., DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003); David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947 (1999); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. CHI. L. REV. 1331 (2003); Logan Sawyer, *Grazing, Grimaud, and Gifford Pinchot: How the Forest Service Overcame the Classical Nondelegation Doctrine to Establish Administrative Crimes*, 24 J. L. & POL. 169 (2008); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

117. Clean Air Act, 42 U.S.C. §§ 7401-7671q (2000).

118. *Fleming v. Page*, 50 U.S. 603, 615 (1850).

119. 42 U.S.C. §§ 7401-7671q.

120. Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 313 (1999).

words in length.¹²¹ What is “all necessary and appropriate force?”¹²² What degree of “harboring” those who “aided” those involved in 9/11¹²³ warrants the resort to war? The AUMF provides no guidance. Hence, while a strong case can be made for Congressional delegation of authority regarding clean air, it would seem to be unconstitutional for Congress to delegate its war-declaring power as it did in the 2001 AUMF.¹²⁴

Even if one rejects the argument that the AUMF is illegal, however, a second concern remains: the Act’s wisdom. Representative Barbara Lee of California, the one member of Congress to oppose the joint resolution, explained that it

was a blank check to the president to attack anyone involved in the Sept. 11 events—anywhere, in any country, without regard to our nation’s long-term foreign policy, economic and national security interests, and without time limit. In granting these overly broad powers, the Congress failed its responsibility to understand the dimensions of its declaration.¹²⁵

Such a blank check seems particularly problematic for those concerned with just war principles, for it means authorizing war without Congress being able to ensure that the war was a last resort or that the U.S. military response was proportionate.

The Bush administration had actually wanted a more open-ended authorization to use force than Congress gave it.¹²⁶ Even so, the final authorization was, in fact, incredibly broad.¹²⁷ As Cass Sunstein has noted, under the AUMF the President “plainly” had the authority to initiate military action

121. Pub. L. No. 107-40, 115 Stat. 224 (2001).

122. *Id.*

123. *Id.*

124. The argument being made here does not hinge on whether Congress needs to use the specific language of “declaring war”—such language has been rare in recent international practice, see Robert F. Turner, *The War on Terrorism and the Modern Relevance of the Congressional Power to “Declare War,”* 25 HARV. J.L. & PUB. POL’Y 519, 531 (2002) (“[N]o sovereign state has clearly issued a declaration of war in more than half a century.”)—or whether it can simply authorize the president to use force. See Michael D. Ramsey, *Presidential Declarations of War*, 37 U.C. DAVIS L. REV. 321, 364 (2003). What is being challenged is the legality of Congress delegating to the President the very decision about whether to go to war and against whom.

125. Barbara Lee, *Why I Opposed the Resolution to Authorize Force*, S.F. CHRON., Sept. 23, 2001, at D-6, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/09/23/ED228685.DTL>.

126. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2079 (2005).

127. The AUMF “is an extraordinarily broad delegation—arguably the broadest congressional delegation of war power” in U.S. history. Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 252 (2002).

against Iraq in 2003 (if he contended that the best evidence suggested that Saddam Hussein “aided the terrorist attacks that occurred on September 11, 2001”) or against Iran in 2006 (if he contended that the CIA could show that Iran’s government had “harbored” members of al Qaeda since 1999).¹²⁸

Note that the Iran case is not so hypothetical. The National Commission on the Terrorist Attacks upon the United States (the 9/11 Commission), while finding no evidence that Tehran “was aware of the planning for what later became the 9/11 attack,” reported CIA claims that Iran had had various connections to al Qaeda before September 11.¹²⁹ Because the AUMF authorized war even against those who simply “harbored . . . organizations or persons” who carried out or aided the terrorist attacks, the AUMF permitted the President to launch military strikes on Iran if he so desired.

That, however, is not all the AUMF could have authorized. The 9/11 Commission also reported Pakistani connections to al Qaeda before September 11.¹³⁰ Thus, the AUMF also would have allowed the Bush administration to go to war against Pakistan, again without needing to obtain any further Congressional authorization. The AUMF is thus an open-ended invitation to war, hardly the sort of resolution compatible with just war thinking.

B. International Law

Any modern understanding of “right authority” has to go beyond determining whether those who declared war were legally authorized to do so by the domestic laws of their country, for international law too places legal constraints on when states may wage war. A properly authorized war today must be legal in terms of international as well as domestic law.¹³¹

Moreover, since the U.S. Constitution states in the Supremacy Clause that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land,”¹³² if the United States violates international law (or at least those aspects of international law that are codified in treaties, including in particular the United Nations Charter), it is violating U.S. law as well. Thus, a war engaged in by the United States contrary to international law arguably lacks right authority both in terms of international *and* U.S. law.

128. Cass R. Sunstein, *Administrative Law Goes To War*, 118 HARV L. REV. 2663, 2664 (2005).

129. 9/11 COMMISSION REPORT, *supra* note 99, at 61, 240-41.

130. *Id.* at 63-65, 124, 134.

131. See Coppieters, *supra* note 106, at 49-50; REGAN, *supra* note 4, at 20-47; see also Hartley S. Spatt, *Faith, Force, or Fellowship: The Future of Right Authority*, in RETHINKING THE JUST WAR TRADITION 205 (Michael W. Brough, John W. Lango & Harry van der Linden eds., 2007); Laurie Calhoun, *Legitimate Authority and “Just War” in the Modern World*, 27 PEACE & CHANGE 37 (2002).

132. U.S. CONST. art. VI, § 2.

Recent U.S. Supreme Court rulings have denied that treaties are the supreme law of the land. In 2008, in *Medellin v. Texas*,¹³³ the Supreme Court held that the state of Texas did not have to obey the ruling of the International Court of Justice (ICJ), ordering compliance with the terms of the Vienna Convention on Consular Relations, even when told to do so by the President. This holding was baffling, however, given that: (1) the United States “played a leading role in the Vienna conference and in the negotiations over the specific wording” of the relevant provisions of the Vienna Convention;¹³⁴ (2) when the Senate unanimously ratified the Vienna Convention in 1969, the State Department representative testified that “[t]he Convention is considered entirely self-executive and does not require any implementing or complementing legislation”;¹³⁵ (3) the State Department had also reported to the Senate that “[t]o the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern”;¹³⁶ and (4) the United States was the first country to bring a Vienna Convention dispute to the ICJ.¹³⁷

Even if the Supreme Court is right, however, in holding that U.S. law does not require U.S. adherence to treaties that it has signed, it is hard to see how a nation today could comply with the just war principle of right authority without acting in accord with international law. Particularly relevant in this regard is the Charter of the United Nations.¹³⁸

133. *Medellin v. Texas*, 552 U.S. 491 (2008).

134. Brief of Amici Curiae Int’l Law Experts in Support of Applicant José Ernesto Medellín, Ex parte Medellín, 206 S.W.3d 584 (Tex. Crim. App. July 29, 2005) (No. AP-75,207), available at <http://www.debevoise.com/publications/pdf/BriefAmiciCuriaeofInternationalLawExperts.pdf> [hereinafter Medellín Brief].

135. *Medellin*, 552 U.S. at 531 (2008) (Breyer, J., dissenting).

136. *Id.*

137. Medellín Brief, *supra* note 134, at 18-19.

138. A February 2002 statement, *What We’re Fighting for*, co-authored by just war theorist Jean Bethke Elshtain and signed by, among others, just war theorists James Turner Johnson, Michael Walzer, and George Weigel, has an endnote that oddly discusses the U.N. as part of the last resort, rather than the right authority, requirement of just war theory:

Some people suggest that the “last resort” requirement of just war theory—in essence, the requirement to explore all other reasonable and plausible alternatives to the use of force—is not satisfied until the resort to arms has been approved by a recognized international body, such as the United Nations.

INST. FOR AMERICAN VALUES, *WHAT WE’RE FIGHTING FOR: A LETTER FROM AMERICA* (2002), available at <http://www.americanvalues.org/html/wwff.html>.

No citation is given identifying the people who make this suggestion. However, it would be a strange argument. Just as an individual country might (unjustly) go to war without adequately exploring alternatives to the use of force, so might the U.N. U.N. authorization is logically a separate issue from last resort. If, for example, the Security

The U.N. Charter severely constrains the right of nations to use or threaten force in their international relations. The only two exceptions provided to the Article 2, section 4, prohibition on the use or threat of force are (1) enforcement actions authorized by the Security Council acting under Chapter VII¹³⁹ and (2) self-defense under Article 51. Neither of these exceptions,

Council had given in to U.S. pressure in early 2003 and voted in favor of going to war against Iraq, this would have had no bearing on the question of whether adequate time had been given to U.N. inspectors to try to confirm or achieve Iraqi disarmament without resort to force.

The endnote to *What We Are Fighting for* goes on to say that the proposition that U.N. authorization is required to meet the last resort criterion “is problematic First, it is novel; historically approval by an international body has not been viewed by just war theorists as a just cause requirement.” *Id.* This is of course true, but historically there were no international bodies. Consider an analogy. Historically, there were only monarchies, but if the British monarch today went to war over the objections of the Parliament, commentators would certainly say this violated the right authority criterion. The right authority principle changes as the legal order changes. So if today international law constrains the legal right of countries to go to war whenever they choose, right authority must reflect this constraint. The endnote continues:

Second, it is quite debatable whether an international body such as the U.N. is in a position to be the best final judge of when, and under what conditions, a particular resort to arms is justified, or whether the attempt by that body to make and enforce such judgments would inevitably compromise its primary mission of humanitarian work. According to one observer, a former U.N. Assistant Secretary-General, transforming the U.N. into “a pale imitation of a state” in order to “manage the use of force” internationally “may well be a suicidal embrace.”

Id. (citing Giandomenico Picco, *The U.N. and the Use of Force: Leave the Secretary General out of It*, 73 FOREIGN AFF. 14, 15 (1994)). Why the “primary mission” of the U.N. is presumed to be “humanitarian work,” when the preamble to the Charter begins by declaring the need “to save succeeding generations from the scourge of war” is unclear. In any event, Picco discusses why the Security Council, rather than the Secretary General, should handle questions of the use of force; it is the latter’s attempt to manage the use of force that he says “may well be a suicidal embrace.” Picco, *supra*, at 15. Picco never takes up the question of whether individual states should have the right to go to war without Security Council approval.

139. One might argue that the Security Council is an un-elected group of great powers with no moral standing to authorize war. That 192 nations have agreed to the U.N. Charter is not an entirely satisfactory reply, given the fact that the Charter undemocratically prevents 191 of these nations from altering the Charter should they so desire. U.N. Charter art. 108 (requiring ratification by the five permanent members for any amendment). In any event, however, the moral legitimacy of the Security Council can hardly be questioned by one of the permanent members of the Council, in particular the one that in the past four decades has made the greatest use of the veto power. See Global Policy Forum, *Changing*

however, was directly applicable in the case of OEF. The United States could have probably gotten Security Council authorization, but the Bush administration did not seek it and no authorization was given. And the option of going to war in self-defense is appropriate only in circumstances that did not obtain in the aftermath of 9/11.

I. Security Council Authorization

Several legal commentators have claimed that the Security Council did authorize the United States to go to war against al Qaeda and the Taliban, pointing to two resolutions unanimously adopted by the Council in the aftermath of 9/11: Resolution 1368 of September 12, 2001, and Resolution 1373 of September 28, 2001.¹⁴⁰ A close reading of the resolutions, however, and a comparison of these resolutions with an earlier resolution, shows that they did not authorize war.

In Resolution 1368, the Security Council condemned the “terrorist attacks,” which were regarded, “like any act of international terrorism,” as “a threat to international peace and security.”¹⁴¹ The Council expressed its determination “to combat by all means threats to international peace and security caused by terrorist acts.” A Council determination to combat terrorism by all means, however, is very different from what the Council did in Resolution 678 of November 29, 1990.¹⁴² In that resolution, the Council “[a]uthorize[d] Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements . . . the above-mentioned resolutions, to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.”¹⁴³ Where Resolution 1368 states what the Council intends to do, Resolution 678 authorizes member states to act on their own if certain conditions are met.¹⁴⁴ Moreover, where the authorization for force in 678 appears in the

Patterns in the Use of the Veto in the Security Council, <http://www.globalpolicy.org/security/data/vetotab.htm> (last visited Sept. 9, 2009).

140. See, e.g., George K. Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VAL. U.L. REV. 489, 531 (2003).

141. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 28, 2001).

142. S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990); MICHAEL MANDEL, HOW AMERICA GETS AWAY WITH MURDER 35 (2004) (suggesting comparison of Resolutions 678 and 1368).

143. S.C. Res. 678, *supra* note 142, ¶ 2.

144. Despite its explicit language, Resolution 678 still represented an abdication of Council responsibility, for it left the determination as to whether Iraq had complied or not with Council demands up to the judgment of individual states. *Id.* (“Authorizes Member States . . . , unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means”). If, for example, Saddam Hussein had begun on January 1, 1991, to withdraw his forces from

operative clauses of the resolution, the determination to combat terrorism in 1368 appears in the preambular clauses, the section of a resolution providing background rather than taking any new action.¹⁴⁵

Resolution 1368 also stated in its preambular clauses that the Council recognized the inherent right of self-defense, as provided in the Charter.¹⁴⁶ It did not, however, in its operative clauses authorize any nation to go to war.

The third operative clause stated that the Council

[c]alls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable[.]¹⁴⁷

Kuwait, but a few still remained on January 15, would going to war have been appropriate? In particular, should each Member state have been able to decide on its own whether to go to war in these circumstances? It does not suffice to say that the Council could always pass another resolution ruling out or delaying war if it felt circumstances so warranted. Given the veto power, if the United States alone believed that war was still appropriate, it could have blocked any such further resolution and then justified its unilateral launching of war as authorized by the still-in-force Resolution 678.

Less hypothetically, when France proposed, just before the war deadline, that the Security Council President issue a statement that if Iraq withdrew promptly from Kuwait, Council members would “at the appropriate time” hold a conference on Palestine, it was opposed by the United States, as well as Britain and the Soviet Union—which defeated the proposal since presidential statements require unanimous agreement. Apparently, most other Council members supported the proposal. Paul Lewis, *Confrontation in the Gulf: The U.N.; France and 3 Arab States Issue an Appeal to Hussein*, N.Y. TIMES, Jan. 15, 1991, at A12; J. T. Nguyen, *Security Council Fails to Issue Last Peace Appeal to Iraq*, UNITED PRESS INT’L, Jan. 15, 1991; *On the Brink; Rumbings of War Drown out Bids for Peace*, SAN DIEGO UNION-TRIB., Jan. 15, 1991, at A-1; Peter James Spielmann, *Security Council Discusses Final Peace Offer*, ASSOCIATED PRESS, Jan. 15, 1991. The Council had approved a presidential statement a month earlier calling for a conference on Palestine “at an appropriate time.” Paul Lewis, *Standoff in the Gulf: U.S. Joins U.N. Vote in Rebuking Israel Over Palestinians*, N.Y. TIMES, Dec. 21, 1990, at A1; see S.C. Res. 681, U.N. Doc. S/RES/681 (Dec. 20, 1990). Thus, a minority of states was able to block what might have been an alternative to war that offered Hussein no more than what the Council was already on record as favoring.

For further discussion of the U.S. rejection of the diplomatic track, see NOAM CHOMSKY, *DETERRING DEMOCRACY* 203-10 (1992).

145. Michael C. Wood, *The Interpretation of Security Council Resolutions*, in 2 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 73, 86-87 (Armin von Bogdandy & Rüdiger Wolfrum eds., 1998).

146. S.C. Res. 1368, *supra* note 141.

147. *Id.*

This clause cannot be read as an authorization to go to war. “Work[ing] together . . . to bring to justice” is not an endorsement of war. Likewise, “[holding] accountable” those who aid, support, or harbor does not authorize war against them. To read this clause as an authorization for war would lead to the absurd conclusion that the Security Council was calling on “all states” to go to war against unnamed perpetrators and their supporters and, thus, directing all states to go to war against whomever they considered to be perpetrators or supporters. Hence, India would be authorized to attack Pakistan (for its ties to the Taliban and al Qaeda¹⁴⁸), Iraq to attack Saudi Arabia (from where most of the 9/11 hijackers came), Iran to attack the United Arab Emirates (through which the financing for the plot was directed¹⁴⁹), and Russia to attack Germany (from where most of the actual plotting was done¹⁵⁰). To be sure, one might disagree with any of these attributions of responsibility, but, if resolution 1368 is read as a self-sufficient authorization for war, it leaves the determination of who the target should be to individual states. It is inconceivable that a body whose purpose is the promotion of international peace and security would unleash such a military free-for-all.

Operative clause 4 of resolution 1368, likewise, cannot be seen as authorizing war. That clause

[c]alls also on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999[.]¹⁵¹

Again, if calling for “efforts to prevent and suppress” terrorism is taken as *carte blanche* for any nation to go to war when, in its own judgment, its actions prevent or suppress terrorism, then the Council is authorizing Israel to attack Palestinians, Palestinians and any number of Arab states to attack Israel, the United States to attack any nation on its list of terrorist states, and Cubans, Nicaraguans, and many others to attack the United States.

In clause 5 of resolution 1368, the Council

[e]xpresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all

148. See 9/11 COMMISSION REPORT, *supra* note 99, at 63-65, 124, 134.

149. Walter Pincus, *Mueller Outlines Origin, Funding of Sept. 11 Plot*, WASH. POST, June 6, 2002, at A01.

150. *Id.*

151. S.C. Res. 1368, *supra* note 141.

forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations[.]¹⁵²

This clearly is not authorization for individual states to act, but a statement of the Council's willingness to act as appropriate.

Two weeks after the adoption of resolution 1368, the Council adopted a second resolution, 1373.¹⁵³ In its preambular clauses, the resolution reaffirmed again the inherent right of self-defense, as recognized by the Charter. It repeated as well the "combat by all means" preambular clause, with two modifications. Instead of expressing it as something the Council was determined to do, the clause "reaffirm[ed] the need," leaving vague the identity of who was to do the combating, but it added the words "in accordance with the Charter of the United Nations," thus restricting individual actions.

In any event, the operative clauses of resolution 1373 all dealt with measures to clamp down on terrorist finances, restrict terrorist movement, and cooperate in law enforcement measures to suppress terrorism. Nothing in the resolution even suggested authorizing acts of war.¹⁵⁴

In short, neither resolution 1368 nor 1373 provided explicit authorization for the United States to go to war against Afghanistan.¹⁵⁵ Nevertheless, some have argued that there was an implicit authorization. This is said to follow from the references to the inherent right of self-defense and the lack of notable opposition from any government to United States actions in Afghanistan.¹⁵⁶

This lack of opposition is shown not simply by the Council's failure to pass a resolution condemning OEF. (Given the existence of the veto power,

152. *Id.*

153. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

154. Another preambular clause recognized "the need for States to complement international cooperation by taking additional measures to prevent and suppress, *in their territories* through all lawful means, the financing and preparation of any acts of terrorism," *id.* (emphasis added), which clarifies that the measures specified in the operative clauses were to be taken "in their territories," and thus perforce not acts of wars. (Note that preambular clauses, while not taking any action, can help in interpreting the intent of a resolution.) Wood, *supra* note 145, at 86-87, 90.

155. See, e.g., Ceulemans, *supra* note 74, at 281; Mark A. Drumbl, *Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 18 (2002); Foley, *supra* note 12, at 154 n.105; Gilbert Guillaume, *Terrorism and International Law*, 53 INT'L & COMP. L.Q. 537 (2004); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 237, 244 (2002); Frederik Naert, *The Impact of the Fight Against Terrorism on the Ius ad Bellum*, 11 ETHICAL PERSP. 144, 148 (2004); Mary Ellen O'Connell, *American Exceptionalism and the International Law of Self-Defense*, 31 DENV. J. INT'L L. & POL'Y 43, 49-50 (2002); Quigley, *supra* note 41, at 549; Achilles Skordas, *Hegemonic Intervention as Legitimate Use of Force*, 16 MINN. J. INT'L L. 407, 430-31 (2007).

156. See, e.g., Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT'L & COMP. L.Q. 401 (2002).

failure to adopt a resolution opposing the improper use of force by one of the permanent members of the Council may reflect no more than the fact that the aggressor has vetoed a condemnatory resolution. Surely, however, it would not be right to say that the Council “authorized” the Soviet invasion of Hungary in 1956 or Afghanistan in 1979, or the Anglo-French invasion of Egypt in 1956, simply because condemnatory resolutions were vetoed.¹⁵⁷) In the case of OEF, however, no resolution was vetoed because no draft resolution was introduced in the Council condemning the U.S. resort to force.¹⁵⁸ On the contrary, there were various indications of worldwide governmental¹⁵⁹ support for the United States.¹⁶⁰

157. See Global Policy Forum, Subjects of UN Security Council Vetoes, <http://www.globalpolicy.org/security/membership/veto/vetosubj.htm> (last visited Sept. 9, 2009).

158. Unlike the situation in 1986 when the United States claimed its air strikes on Libya were self defense. In that case, a resolution condemning the U.S. raids was put before the Council and rejected because of vetoes from the United States, Britain, and France. See *id.* The General Assembly subsequently passed a resolution condemning the raids by a vote of 79-28, with 33 abstentions. G.A. Res. 41/38, U.N. Doc. A/RES/41/38 (Nov. 20, 1986).

159. While governments were supportive, public opinion was less so. David Miller has written:

The biggest poll of world opinion was carried out by Gallup International in 37 countries in late September (Gallup International 2001). It found that apart from the US, Israel and India a majority of people in every country surveyed preferred extradition and trial of suspects to a US attack.

David Miller, *World Opinion Opposes the Attack on Afghanistan* (Nov. 21, 2001), http://www.dmillr.info/David.Miller/index.php?option=com_content&task=view&id=74. Of course, the response options here leave many ambiguities. One does not know, for example, whether respondents to this late September 2001 poll would have still sought extradition a week later, on the eve of war. See also Press Release, Ipsos News Center, G-7 Countries Find Their Public Supportive of U.S. Military Action in Afghanistan, but Serious Opposition Appears in Other Countries, New Global Poll Finds (Dec. 21, 2001), available at <http://www.ipsos-na.com/news/pressrelease.cfm?id=1385>.

160. See, e.g., Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001), available at <http://www.nato.int/docu/pr/2001/p01-124e.htm>; George Robertson, NATO Sec’y Gen., Statement by NATO Secretary General, Lord Robertson (Oct. 2, 2001), available at <http://www.nato.int/docu/speech/2001/s011002a.htm>; Comm. for Follow-up to the Twenty-fourth Meeting of Consultation of Ministers of Foreign Aff. (Rio Treaty), *Support for the Measures of Individual and Collective Self-Defense Established in Resolution RC.24/RES.1/01*, OEA/Ser.F/II.24, CS/TIAR/RES.1/01 (Oct. 16, 2001), available at http://www.oas.org/oaspage/crisis/follow_e.htm; Murphy, *supra* note 155, at 248; Steven R. Ratner, *Jus ad Bellum and Jus in Bello after September 11*, 96 AM. J. INT’L L. 905, 909-910 (2002); Jaume Saura, *Some Remarks on the Use of Force Against Terrorism in Contemporary International Law and the Role of the Security Council*, 26 LOY. L.A. INT’L & COMP. L. REV. 7, 23 n.82 (2003); Daniel Williams, *Islamic Group Offers*

However, this broad governmental support raises a question. Given the wide support and the general sympathy for the United States after 9/11,¹⁶¹ it seems clear that Washington could have obtained from the Security Council explicit authorization to go to war.¹⁶² So why didn't it do so?

There seem to have been two reasons. One was the U.S. reluctance to share control of any military operations with the U.N. or any other country.¹⁶³ In the words of a senior administration official, "The fewer people you have to rely on, the fewer permissions you have to get."¹⁶⁴ Second, and probably more importantly, was the United States' disinclination to establish the precedent that it needed U.N. approval before going to war. Administration officials told the *New York Times* that the U.S. rejection of calls from U.N. Secretary General Kofi Annan that U.S. military action be subject to Security Council approval reflected "Washington's insistence that its hands not be tied."¹⁶⁵

However, for precisely the same reason that the United States government rejected the need for express Security Council authorization, just war theorists ought to insist on such authorization. For countries to be able to go to war without the need for explicit Security Council authorization sets an awful precedent that would allow any number of states to attack their neighbors. Furthermore, this precedent may have made it easier for the Bush administration

U.S. Mild Rebuke; Nations at Conference Avoid Criticizing Strikes on Taliban, WASH. POST, Oct. 11, 2001, at A21.

161. Reflected in *Le Monde's* headline on September 13, 2001: "*Nous sommes tous Américains*" ("We are all Americans"). Jean-Marie Colombani, *Nous sommes tous Américains*, LE MONDE (Fr.), Sept. 13, 2001.

162. Mandel argues that after seeing what happened in March 2003, when the Council refused to endorse Washington's call for war in Iraq, it is not clear that the United States could have gotten anything it wanted through the Council in September 2001. See MANDEL, *supra* note 142, at 36. But, in 2003 many governments were publicly opposed to war. See, e.g., Declaration between Russia, Germany and France On Iraq, Feb. 10, 2003, <https://pastel.diplomatie.gouv.fr/editorial/actual/ael2/bulletin.gb.asp?liste=20030211.gb.html>. By contrast, in 2001 no influential government took a public position against war. See *supra* note 160 and *infra* note 193.

For other analysts who agree that the United States could have gotten explicit Security Council endorsement if it wished, see MAHAJAN, *supra* note 3, at 25-26; Saura, *supra* note 160, at 28; Drumbl, *supra* note 155, at 22; Naert, *supra* note 155, at 148.

163. See Bill Sammon, *Pentagon Loses Track of Spy Plane*, WASH. TIMES, Sept. 24, 2001, at A1. Even Washington's closest ally, Britain, was kept in a subordinate role. See David Wastell, Robert Fox, & Sean Rayment, *Army Set for Cold War in the Absence of a Quick Fix in Afghanistan, the Allied Military is Bracing Itself for a Long and Freezing Winter Campaign*, SUNDAY TELEGRAPH, Nov. 4, 2001, at 22.

164. Elaine Sciolino & Steven Lee Myers, *Bush Says 'Time Is Running Out'; U.S. Plans To Act Largely Alone*, N.Y. TIMES, Oct. 7, 2001, at A1.

165. *Id.*

to go to war with Iraq in 2003 after being unable to obtain Security Council consent.¹⁶⁶

Once U.S. and British forces began their air strikes in Afghanistan, the two governments presented letters to the Security Council informing the Council that they were acting under their right of individual and collective self-defense.¹⁶⁷ The Council discussed the matter and adjourned without taking any action.¹⁶⁸ One sentence in the U.S. letter read: “We may find that our self-defence requires further actions with respect to other organizations and other States.”¹⁶⁹ Nothing was said publicly at the time, but two days later the U.N. Secretary General said in an interview that this sentence “disturbed some of us” and “had caused some ‘anxiety’ among other Member States.”¹⁷⁰ The sentence, however, and the whole letter, should have raised concerns as well with just war theorists, for it essentially declared Washington’s right to decide on its own whom it had the right to attack as part of its “war on terror.” One might note that at this time there were seven

166. See, e.g., Drumbl, *supra* note 155, at 22-24, 32-33.

167. Elshtain states: “The Bush administration honored the charter’s requirements by giving advance notice to the U.N. Security Council of its intention to use armed force to punish aggression—for the first time in anyone’s living memory, as this notification requirement had become a dead letter.” ELSHTAIN, *supra* note 8, at 61. This statement is doubly incorrect.

Letter from the Permanent Representative of the U.S. to the United Nations to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001), available at <http://www.un.org/terrorism/letters.shtml> (stating “the United States of America, together with other States, has initiated actions,” indicating that the letter to the Council was sent *after* military operations were already under way); Letter from the Chargé d’affaires a.i. of the Permanent Mission of the U.K. to the United Nations to the President of the Security Council, U.N. Doc. S/2001/947 (Oct. 7, 2001), available at <http://www.un.org/terrorism/letters.shtml> (stating “the United Kingdom of Great Britain and Northern Ireland has military assets engaged in operations,” indicating that, as with the United States, the letter to the Council was sent following the commencement of military operations). See also Letter from the Permanent Representative of the U.S. to the United Nations to the President of the Security Council, U.N. Doc. S/1998/788 (Aug. 20, 1998) (letter sent by the Clinton administration supporting the idea that notifying the Security Council was hardly a new practice); *U.S. Response to Libyan Attack*, DEP’T. ST. BULL., May 1986, available at http://findarticles.com/p/articles/mi_m1079/is_v86/ai_4223481/ (letter sent in support of previous U.S. self-defense claim); Dino Kritsiotis, *The Legality of the 1993 U.S. Missile Strike on Iraq and the Right of Self-Defence in International Law*, 45 INT’L & COMP. L.Q. 162, 163 (1996) (referencing U.N. Doc. S/26003 (June 26, 1993), the author notes that in the case of the first Iraq war, Madeleine Albright, U.S. Ambassador to the United Nations, presented “a portfolio of forensic and photographic evidence”).

168. Press Release, Security Council President, Statement on Terrorist Threats, U.N. Doc AFG/152, SC/7167 (Oct. 9, 2001), available at <http://www.un.org/News/Press/docs/2001/afg152.doc.htm>.

169. U.N. Doc. S/2001/946, *supra* note 167.

170. Skordas, *supra* note 155, at 432 (citing his interview with Kofi Annan on Oct. 9, 2001).

countries listed by the United States government as “state sponsors of terrorism”¹⁷¹—and thus potential targets of U.S. military operations if the Bush administration decided, without any third party determination, that “further actions” were required. Indeed, Undersecretary of Defense Douglas Feith had secretly proposed two and a half weeks earlier that, as part of the worldwide war on terrorism, “[s]ince U.S. attacks were expected in Afghanistan, an American attack in South America or Southeast Asia might be a surprise to the terrorists.”¹⁷²

2. Self-Defense

Yet, one might question why Security Council authorization is needed at all, given that the U.N. Charter recognizes the “inherent right of individual or collective self-defense” (Article 51). Indeed, Thomas Franck argues that the Council “legally cannot” authorize the exercise of self-defense, “since that right is ‘inherent’ in the victim. Under Article 51, self-defense is a right exercisable at the sole discretion of an attacked state, not a license to be granted by decision of the Security Council.”¹⁷³

On one level, this is surely true. The leader of a state that has been invaded by another does not have to wait until the Security Council has met and acted before ordering his or her troops to fire back at the invading forces. If such were the case, all an attacker would have to do is launch an aggression in the middle of the night and, by the time a meeting of the Security Council could be arranged, all the troops of the victim state, prohibited from firing their weapons, could have been captured or slaughtered.

Consider, however, another example. Say there is a minor border incident, with a few soldiers from country *A* crossing the border into country *B*, which has a much stronger military. *A*'s soldiers quickly retreat, but then *B*, invoking its right of self-defense, launches an all-out assault on its weaker neighbor. Should *B* be able to act in this way “at its sole discretion”? *B*'s response seems clearly disproportionate, and *B* seems to be using self-defense as a pretext for aggression.

Franck says he's not worried about such “bogus self-defenders,” because

were a state to attack another while falsely claiming to be acting in self-defense, that would constitute an “armed attack” under Article 51 or “aggression” under Article 39, giving both the

171. U.S. DEPARTMENT OF STATE, PATTERNS OF GLOBAL TERRORISM 2001 63 (2002), available at <http://2001-2009.state.gov/s/ct/rls/crt/2001/pdf/>.

172. 9/11 COMMISSION REPORT, *supra* note 99, at 559-60 n.75; see generally Douglas J. Feith, *A War Plan That Cast a Wide Net*, WASH. POST, Aug. 7, 2004, at A21.

173. Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 840 (2001).

victim and the United Nations the right to respond with appropriate levels of individual or collective force.¹⁷⁴

However, giving the victim the right to respond is not particularly useful if the victim is much weaker than the attacker. In addition, having the U.N. respond—assuming the attacker is not a veto-wielding permanent member, or allied to one—still means that the victim will have suffered the serious harm of a military assault. Moreover, wars once started are not so easy to end.

Franck rejects attempts to restrict the right of self-defense: “Were states prohibited from defending themselves until after the Council had agreed, assuredly there would not now be many states left in the United Nations Organization.”¹⁷⁵ Yes, any state will insist on having the right to defend itself while waiting for the Security Council to meet or if the Council’s efforts to maintain peace and international security have been blocked by a veto. No state will put its U.N. obligations above its survival. That, however, is not what is at stake in the hypothetical example here. The attackers have withdrawn. There is no imminent threat to survival. There is time for the Council to meet and to take appropriate action.

Article 51 does not provide an unlimited right of self defense: “[n]othing 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.*”¹⁷⁶ The Charter is silent as to what happens if the Council meets and fails to take action because of the veto. The clear implication of the text, however, is that self-defense is a stop-gap measure until the Council can act. On September 11, the United States certainly had the right to use force to stop terrorists who were attacking or about to attack U.S. targets. The attack, however, was over on that day. It was not a situation like that of an invading army driving towards the capital city. It was a completed attack.

To be sure, those behind the 9/11 attacks could attack again. Indeed, it might be suggested that the main reason the United States has not been attacked again—apart from some minor or inept efforts—is precisely because of OEF. There are several problems with this claim, however.

First, if the war on Afghanistan was designed to minimize the chance of another terrorist attack on the United States, the military strategy employed seemed odd. As counter-terrorism czar Richard A. Clarke noted, “we treated the war as a regime change rather than a search-and-destroy against terrorists.”¹⁷⁷ No

174. *Id.* Franck is addressing a somewhat different circumstance than the given hypothetical.

175. *Id.*

176. U.N. Charter, art. 51 (emphasis added).

177. RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR* 274 (2004).

U.S. forces were deployed to try to grab bin Laden and his chief lieutenants or to cut off their escape routes.¹⁷⁸

Second, while Afghanistan was a convenient sanctuary for al Qaeda leaders, it played no essential role in the 9/11 attacks. Khalid Sheikh Mohammad, the operational chief of the plot, spent much of his time in Pakistan,¹⁷⁹ and considered the military training given in Afghanistan to be “impractical.”¹⁸⁰ The funds for the plot were transferred from the United Arab Emirates.¹⁸¹ The flight training was done in the United States.¹⁸²

The Bush administration claims that a follow-up terrorist attack was planned, involving the crashing of a plane into the Library Tower in Los Angeles, but that arrests broke up the plot in Southeast Asia.¹⁸³ Khalid Sheikh Mohammed has stated, however, that the second-wave attack was “only in its most preliminary stages,” and that the arrest of Zacarias Moussaoui in August 2001 and “the security measures implemented in the U.S. in the immediate aftermath of the attacks” made the prospects for further hijacking attacks in the United States “dismal.”¹⁸⁴ Whether the Bush administration or Khalid Sheikh Mohammed is correct, OEF was not the determining factor in thwarting this attack.

More generally, if al Qaeda had already put in motion plans for additional attacks in the months immediately following 9/11, then OEF came too late, for the key operatives would have left Afghanistan long before. By way of comparison, in the case of 9/11, Mohammad Atta, the operational leader, had last been in Afghanistan in early 2000, more than a year before the attack; his second in command, Nawaf al-Hazmi, had last been there in December 1999; and none of the other 9/11 pilots had been in Afghanistan after June 2000.¹⁸⁵

178. *Id.* at 275.

179. 9/11 COMMISSION REPORT, *supra* note 99, at 149, 151, 157-58, 167, 226, 242.

180. Defendant’s Exhibit 941, Substitution for the Testimony of Khalid Sheikh Mohammed, ¶ 14, at 10, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003), available at <http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/defense/941.pdf> [hereinafter KSM Testimony].

181. Pincus, *supra* note 149, at A1.

182. 9/11 COMMISSION REPORT, *supra* note 99, at 223-26.

183. Frances Fragos Townsend, Assistant to the President for Homeland Sec. & Counterterrorism, Press Briefing on the West Coast Terrorist Plot, Feb. 9, 2006, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/02/print/20060209-4.html>. The plotters are alleged to have traveled to Afghanistan to swear allegiance to bin Laden in October 2001, though the U.S. counter-terrorism chief said U.S. intelligence didn’t know if this was before or after the U.S. invasion. This seems unlikely given the evident danger of entering Afghanistan in October, but in any event it doesn’t show an essential operational role for Afghanistan in the plot.

184. KSM Testimony, *supra* note 180, ¶¶ 88-89, 98. This testimony is somewhat contradictory, stating that post-9/11 security measures and scrutiny of foreigners doomed the second-wave plans, but he specifically references the arrest of Zacarias Moussaoui, who was arrested before 9/11.

185. 9/11 COMMISSION REPORT, *supra* note 99, at 157, 167, 226, 242.

On the other hand, if al Qaeda was not that far along in developing further plots,¹⁸⁶ then it faced the problem of getting its agents into the United States and getting funds to them, given the post-9/11 border controls, crackdown on terrorist financial networks, and international anti-terrorist law enforcement activity. Hence, either way, OEF was not responsible for the absence of a follow-up terrorist attack on the United States.

It is not that terrorism dissipated after 9/11. Globally, there were many serious terrorist incidents, but these occurred outside the United States: in New Delhi, Tunisia, Bali, Riyadh, Jakarta, Istanbul, Casablanca, Madrid, and London.¹⁸⁷ These attacks did not need al Qaeda bases in Afghanistan in order to succeed. In the Madrid attack, where 191 people died, al Qaeda inspired, but neither organized nor funded, the bombings. None of the perpetrators had ever been to al Qaeda camps in Afghanistan, and only one had any sort of terrorist training.¹⁸⁸

No one can say with any confidence why there has not been another terrorist attack in the United States.¹⁸⁹ However, the explanation cannot simply be that the Taliban was overthrown, for then why were there terrorist attacks elsewhere? Perhaps al Qaeda only wants to strike the United States again when it can do so in a massive way. Perhaps the Muslim population in the United States is not as alienated as those in Spain or Britain. Whatever the answer, it has to be something that distinguishes the United States from other countries that were struck by terrorism, not just events in Afghanistan.

This argument cannot rule out the possibility that defeating the Taliban may have been a necessary, but insufficient, condition for preventing anti-U.S. terrorist strikes. However, the opposite is also possible: that is, that the attack on Afghanistan increased, rather than decreased, the terrorist threat. In a classified briefing to Congress shortly before the launching of OEF “one intelligence official said there is a ‘100 percent’ chance of an attack should the United States strike

186. Documents recovered in Afghanistan indicated al Qaeda interest in exploring further attacks, but no plans. See Hamza Hendawi, *Al-Qaida's Terror Manual Foretells Attacks on Nuclear Plants, Skyscrapers, Football Stadiums*, ASSOCIATED PRESS, Feb. 2, 2002; David Johnston & James Risen, *Seized Afghan Files Show Intent, Not Plans*, N.Y. TIMES, Feb. 1, 2002, at A13.

187. DANIEL BENJAMIN & STEVEN SIMON, *THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT* 19-20 (2005).

188. *Id.* at 4, 6.

189. See TENET, *supra* note 47, at 257 (“It would be easy for al-Qa’ida or another terrorist group to send suicide bombers to cause chaos in a half-dozen American shopping malls on any given day. Why haven’t they? The real answer is that we do not know.”). But see John Mueller, *Is There Still a Terrorist Threat?: The Myth of the Omnipresent Enemy*, FOREIGN AFF., Sept./Oct. 2006, at 2 (arguing that the terrorist threat has been blown out of proportion).

Afghanistan.”¹⁹⁰ Obviously, this prediction was incorrect, but it is possible that enflaming global Muslim opinion was a necessary, but insufficient, condition for explaining the terrorist attacks in other countries. As Benjamin and Simon note, “for bin Laden, American retaliation was something to look forward to, for it would inevitably kill innocents and demonstrate to Muslims the ineffable hatred that World Infidelity bore for them”¹⁹¹

Beyond these speculations, however, one point is clear: the United States’ resort to the use of force in self-defense was neither a result of there being no time to go to the Security Council nor of the Council’s unwillingness to take adequate steps to deal with the problem. In its Resolution 1368, the Security Council expressed its readiness to take appropriate action.¹⁹² As noted above, given the statements of Security Council members,¹⁹³ there is no reason to doubt that Washington could have secured authorization for its attack on Afghanistan. Moreover, there has been no hint that U.S. officials felt thwarted in their efforts in the Security Council. Thus, this was not a case of a country whose survival was at risk because of Security Council refusal to meet its responsibilities.

There is disagreement among legal experts whether individual self-defense measures are precluded once the Security Council has taken action to address an armed attack.¹⁹⁴ As noted above, Article 51 permits self-defense “until the Security Council has taken measures necessary to maintain international peace and security,”¹⁹⁵ but it is unclear whether this means that *any* Council action bars further unilateral use of force, or whether such use of force is barred only by Council action that effectively restores peace and security. Thomas Franck has argued that:

190. Susan Schmidt & Bob Woodward, *FBI, CIA Warn Congress of More Attacks as Blair Details Case Against bin Laden; Retaliation Feared If U.S. Strikes Afghanistan*, WASH. POST, Oct. 5, 2001, at A1.

191. BENJAMIN & SIMON, *supra* note 187, at 21. Benjamin and Simon argue, however, that bin Laden did not expect the Taliban to be defeated so easily, which had a demoralizing impact on jihadists. *Id.* at 22-23. The 9/11 COMMISSION REPORT, *supra* note 99, at 191, notes that bin Laden was actually disappointed following the al Qaeda attack on the U.S.S. Cole that there was no U.S. retaliatory strike.

192. S.C. Res. 1368, *supra* note 141, operative clause 5 (noting that the Security Council “[e]xpresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001”).

193. In addition to the support from NATO members, see Erik Eckholm, *China’s About-Face: Support for U.S. on Terror*, N.Y. TIMES, Sept. 30, 2001, at A6; Sharon LaFraniere, *Putin Gives U.S. Attacks a Strong Endorsement; Moves Toward West Seen as ‘Bold’ Shift*, WASH. POST, Oct. 9, 2001, at A16.

194. For discussion of some contrasting views, see Malvina Halberstam, *The Right to Self-Defense Once the Security Council Takes Action*, 17 MICH. J. INT’L L. 229, 231-38 (1996).

195. U.N. Charter art. 51.

[i]t is a *reductio ad absurdum* of the Charter to construe it to require an attacked state automatically to cease taking whatever armed measures are lawfully available to it whenever the Security Council passes a resolution invoking economic and legal steps in support of those measures.¹⁹⁶

This makes sense, just as the domestic law analog does. For example, imagine that an individual is attacked while in a remote location deep in the woods. There are no police around, and the individual is obviously entitled to defend himself. If law enforcement authorities cannot immediately get to the scene but can provide some long-distance assistance (say, offering advice by phone), then, of course, the individual's right to defend himself continues, and it lasts until the police can arrive and get the situation under control.

Now, instead, imagine that the police are just around the corner, and all that is needed to bring them to the scene is a phone call. Though the individual has ample opportunity to do so, he chooses not to call them because he knows that their response will be constrained in certain ways (for example, they may take greater care to capture the attackers alive or to avoid harming innocent bystanders). Surely self-defense is not appropriate in this case. It is the second, rather than the first hypothetical situation, that seems to be the proper analogy to U.S. behavior following 9/11.

In short, self-defense is appropriate in situations where there is no time for the Security Council to act or where the Council is unable or unwilling to act, a situation that did not apply following 9/11. Nevertheless, some have argued that the United States was right not to seek U.N. authorization. For example, Richard Falk argued in October 2001:

[A]t this stage it is unreasonable to expect the US government to rely on the UN to fulfill its defensive needs. The UN lacks the capability, authority and will to respond to the kind of threat to global security posed by this new form of terrorist world war.¹⁹⁷

This argument seems unconvincing.

In terms of *authority*, the Security Council has more legal authority to address terrorism than does the United States government. In acting in self-defense under Article 51, the United States (or any country) is legally constrained: it must be responding to "an armed attack," and it may act only until the Security Council has acted. The Council, on the other hand, can respond not just to armed attacks, but to "any threat to the peace, breach of the peace, or act of aggression;"¹⁹⁸ and the Council's right to respond is not limited in time.

196. Franck, *supra* note 173, at 842.

197. Falk, *supra* note 84, at 12.

198. U.N. Charter art. 39.

In terms of *capability*, the Security Council has access to all the military resources of the United States, if the latter chooses to offer them.¹⁹⁹ Obviously it would make no sense for the United States government to argue that it had to act alone, bypassing the U.N., because the United States itself declined to provide military forces to the Security Council.²⁰⁰ Furthermore, there is no reason that any of the nations that offered to support the United States militarily in such an effort would be less likely to do so if it were under U.N. control.

As for *will*, it was argued above that the Security Council probably would have authorized whatever Washington wanted. However, if the Council did try to restrict U.S. actions in some limited way, it is likely that these restrictions would have been desirable from a just war point of view. The U.N. might have insisted that the evidence of bin Laden's guilt be made public, that the Taliban offer of putting bin Laden on trial be explored, that the use of cluster bombs be prohibited,²⁰¹ that more sensitivity be shown to the humanitarian crisis in Afghanistan,²⁰² or that a little more attention be paid to the consequences of OEF for the stability of the region. Falk himself has noted:

At minimum, it seems that the unsettling developments associated with the response to September 11 pushed India and Pakistan closer in the spring of 2002 to unleashing nuclear war than any two countries have been since the high drama of the Cuban Missile Crisis in 1962.²⁰³

Now obviously there was no war, but was the judgment that this was a risk worth taking—with its incalculable human consequences—something better left to the Bush administration alone, or might the Security Council have done at least as well?

Despite the possibility of the U.N. diverging from U.S. policy in some of these ways, the most likely outcome—as argued earlier—is that the Security Council would have simply given the United States a blank check in October 2001. By not seeking Security Council authorization, the United States

199. This need not wait for the agreements called for in Article 43 of the Charter, though never concluded. It would be sufficient for the Council to request forces for a one-time operation. This could be done under Council control, or, less desirably, under the control of a state designated by the Council, or even, as in the 1991 Gulf War, leaving it under U.S. control without any explicit statement.

Ceulemans is another just war theorist who notes that the U.N. has “rather limited operational capability” and that “[c]onsequently, it would not have been advisable to wait for the United Nations to step in and take over the lead of the military operations.” See Ceulemans, *supra* note 74, at 282. He offers no argument, however, for his assumption that when the U.N. steps in it cannot avail itself of U.S. military assets.

201. See *infra* nn. 242-45 and accompanying text.

202. See *infra* nn. 259-60 and accompanying text.

203. FALK, *supra* note 16, at 106.

strengthened the precedent that nations are entitled to wage war on their own, further weakening the restraint on unilateral war-making upon which world order depends.

IV. PROPORTIONALITY

In just war theory there are two proportionality principles. One, relating to the overall justness of the war, *jus ad bellum*, holds that it is just to fight a war only if its costs taken as a whole—to innocent civilians on both sides, to global society, and, even, to combatants—do not exceed the benefits. The second, relating to the conduct of the war, *jus in bello*, holds that in fighting that war, at every point, a tactic is permissible only if its overall costs do not exceed its benefits.²⁰⁴

Much of the discussion of proportionality in relation to OEF has concentrated on two *jus in bello* issues: the civilians killed and injured by U.S. bombs and the treatment of Taliban prisoners by the United States and by the Northern Alliance, the Afghan forces allied to Washington. Both of these are serious matters, but neither approaches in significance the question of the potential impact of OEF on the humanitarian crisis in Afghanistan. The latter question is not just a tactical detail of the war, but is in many ways an essential characteristic of it.

Just war theorists disagree on the relation between *jus ad bellum* and *jus in bello* norms. The predominant view is that the norms are “logically independent,”²⁰⁵ so that a war can have just cause but be fought unjustly. When this is the case, *in principle* the means can be altered, and the overall justness of the war can be maintained. World War II, for example, could have been fought by the allies without the intentional and large-scale bombing of civilians.²⁰⁶ Likewise, OEF could have been fought without mistreating prisoners of war. However, the risk that OEF posed to the humanitarian situation in Afghanistan was part and parcel of the war; had this risk not been present, it would have been an entirely different war. For instance, some opponents of OEF did not object to an operation designed to capture those responsible for 9/11 without engulfing all of Afghanistan in war.²⁰⁷ Yet, it would be hard to see this approach as simply a

204. See, Nick Fotion, *Proportionality*, in MORAL CONSTRAINTS, *supra* note 4, at 91-99; OREND, *supra* note 3, at 59-61; Guy Van Damme & Nick Fotion, *Proportionality*, in MORAL CONSTRAINTS, *supra* note 4, at 129-39; see generally Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34 (2005).

205. WALZER, *supra* note 4, at 21.

206. See generally MICHAEL S. SHERRY, *THE RISE OF AMERICAN AIR POWER: THE CREATION OF ARMAGEDDON* (1987).

207. See, e.g., Carl Conetta, *Beyond bin Laden: The Temptations of a Wider War*, Project on Defense Alternatives, Sept. 28, 2001, <http://www.comw.org/pda/>

differently-fought version of OEF, given its profoundly different impact on the people of Afghanistan.

The treatment of prisoners and the bombing will be discussed here briefly before turning to the far more significant proportionality question of the potential humanitarian consequences of OEF.

A. Prisoners

Prisoners of war suffered two sorts of abuses during OEF. Many prisoners of war held by the United States were subjected to torture as a matter of policy.²⁰⁸ Detainees in U.S. custody were designated by the Bush administration as “enemy combatants,” a status that the administration claimed denied them the protection of both the Geneva Conventions and the U.S. Constitution, and thereby made it permissible to deny them the right of habeas corpus and to subject them to torture.²⁰⁹ In a series of rulings, the U.S. Supreme Court rejected these claims.²¹⁰

0109bm22.html; Daniele Archibugi & Iris Young, *Toward a Global Rule of Law*, 49 DISSENT 27, 27 (2002).

208. See Human Rights Watch, *U.S.: Systemic Abuse of Afghan Prisoners; Open Files on Detainee Deaths*, May 13, 2004, http://hrw.org/english/docs/2004/05/13/afghan8577_txt.htm; Human Rights Watch, *Afghanistan: Killing and Torture by U.S. Predate Abu Ghraib; After Two Years, U.S. Forces Still Not Prosecuted for Homicides*, May 20, 2005, http://hrw.org/english/docs/2005/05/20/afghan10992_txt.htm; Human Rights Watch, *U.S. Operated Secret “Dark Prison” in Kabul*, Dec. 19, 2005, http://hrw.org/english/docs/2005/12/19/afghan12319_txt.htm; see generally HUMAN RIGHTS WATCH, *BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT* (2006), available at <http://hrw.org/reports/2006/ct0406/ct0406web.pdf>. The Senate Armed Services Committee concluded that the abuse at Abu Ghraib in 2003 was not the result of individual soldiers acting of their own accord: “Interrogation techniques such as stripping detainees of their clothes, placing them in stress positions, and using military working dogs to intimidate them appeared in Iraq only after they had been approved for use in Afghanistan and at GTMO.” S. COMM. ON ARMED SERVICES, 110TH CONG., *INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY* xxix (2008), available at http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf.

209. See generally HUMAN RIGHTS WATCH, *BACKGROUND PAPER ON GENEVA CONVENTIONS AND PERSONS HELD BY U.S. FORCES* (2002), available at <http://hrw.org/backgrounder/usa/pow-bck.pdf>.

210. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (upholding detainees’ right to habeas corpus and criticizing the executive and legislative branches for trying to block this right); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (upholding detainees’ rights under the Geneva Conventions); *Rasul v. Bush*, 542 U.S. 466 (2004) (upholding detainees’ statutory right to habeas corpus).

Other Taliban prisoners were captured by the Northern Alliance, and many of them—hundreds and perhaps thousands—were summarily executed.²¹¹ There is reason to believe that U.S. intelligence and/or military officers were in a supervisory role with the Northern Alliance, or, at a minimum, that U.S. officials—who were well aware of the Northern Alliance’s previous record of human rights violations²¹²—failed to exert their leverage to prevent atrocities.²¹³ Moreover, there is now strong evidence that U.S. policymakers did what they could to prevent these crimes from being investigated.²¹⁴

B. Bombing Victims

No one has suggested that the United States intentionally tried to kill as many civilians as possible. There is no doubt that the U.S. bombing campaign was very different from the area bombardment of World War II that directly targeted civilians. Nevertheless, even though unintended, the killing of civilians in OEF was foreseen—not in the sense that it was known that any particular Afghan civilian would be killed, but in the sense that the likelihood of different U.S. munitions missing their targets was known, as was the unreliability of real-time intelligence. As Igor Primoratz explains, “any mainstream version of just war theory” prohibits harming civilians intentionally,

211. See James Risen, *U.S. Inaction Seen After Taliban P.O.W.'s Died*, N.Y. TIMES, July 11, 2009, at I:1; Frank Donaghue, Chief Executive Officer, Physicians for Human Rights, to Barack Obama, U.S. President (July 13, 2009), available at <http://afghanistan.phrblog.org/download/31/>.

212. See, e.g., HUMAN RIGHTS WATCH, MILITARY ASSISTANCE TO THE AFGHAN OPPOSITION: HUMAN RIGHTS WATCH BACKGROUNDER (2001), <http://www.hrw.org/backgrounder/asia/afghan-bck1005.htm>; Letter from Tom Malinowski, Wash. Advocacy Dir., Human Rights Watch, & Joost Hiltermann, Arms Div. Executive Dir., Human Rights Watch, to Colin Powell, U.S. Sec’y of State (Oct. 18, 2001), available at <http://www.hrw.org/press/2001/10/powell1019-ltr.htm>; CRHRP 2001, *supra* note 9.

213. See Jennifer Lane, *The Mass Graves at Dasht-e Leili: Assessing U.S. Liability for Human Rights Violations During the War in Afghanistan*, 34 CAL. W. INT’L L.J. 145, 164-67 (2003); Ahmed S. Younis, *Imputing War Crimes in the War on Terrorism: The U.S., Northern Alliance, and ‘Container Crimes’*, 9 WASH. & LEE RACE & ETHNIC AN. L. J. 109, 119-22 (2003); Scott Horton, *The Ghosts of Dasht-i-Leili*, HARPER’S MAG., July 14, 2009, available at <http://www.harpers.org/archive/2009/07/hbc-90005342>.

214. Tom Lasseter, *As Possible Afghan War-Crimes Evidence Removed, U.S. Silent*, MCCLATCHY NEWSPAPERS, Dec. 11, 2008, <http://www.mcclatchydc.com/227/v-print/story/57649.html>; Risen, *supra* note 211, at I:1; Video: War Crimes and the White House: The Bush Administration’s Cover-Up of the Dasht-e-Leili Massacre (Jared Voss, Physicians for Human Rights July 11, 2009), available at <http://afghanistan.phrblog.org/tag/jared-voss/>.

while leaving room for deliberate attacks on military targets that also have the foreseen but unintended effect of harming the innocent. But it does not leave room for unintentionally harming *any number* of civilians. Acts of war that unintentionally harm civilians must also satisfy another requirement of the doctrine: the harm must be proportionate to the importance and urgency of the military objective that cannot be attained in any other way. It will not do, say, to shell a village in order to take out a handful of enemy soldiers who have taken up position in it if that also involves the unintended, but foreseen killing of scores of innocent villagers.²¹⁵

Thus, the numbers matter.

Michael Walzer has criticized opponents of OEF for failing “to ask what degree of risk” to Afghan civilians “might be permissible.”²¹⁶ This criticism, however, might be more appropriately addressed to supporters of the war. Should not the burden of asking how many innocent Afghans it would be permissible to kill be on those who advocate going to war? Yet neither Walzer nor any other supporter of OEF has publicly indicated what would be an acceptable number of innocent Afghan deaths and what human cost would be too high for the proposed course of action.

Walzer’s further comment on the question of numbers was also problematic:

A few left academics have tried to figure out how many civilians actually died in Afghanistan, aiming at as high a figure as possible, on the assumption, apparently, that if the number is greater than the number of people killed in the attacks on the Twin Towers, the war is unjust. At the moment, most of the numbers are propaganda; there is no reliable accounting. But the claim that the numbers matter in just this way—that the 3,120th death determines the injustice of the war—is wrong.²¹⁷

215. Igor Primoratz, *State Terrorism and Counter-Terrorism*, in *ETHICS OF TERRORISM & COUNTER-TERRORISM* 79-80 (Georg Meggle ed., Ontos Verlag 2004).

216. Michael Walzer, *Can There Be a Decent Left?* 49 *DISSENT* 19, 19 (2002). Walzer notes that “among last fall’s antiwar demonstrators, ‘Stop the bombing’ wasn’t a slogan that summarized a coherent view of the bombing—or of the alternatives to it”—as if any slogan can be expected to capture a complex argument. *Id.* Walzer goes on: “The truth is that most leftists were not committed to having a coherent view about things like that; they were committed to opposing the war, and they were prepared to oppose it without regard to its causes or character and without any visible concern about preventing future terrorist attacks.” *Id.* This serious accusation is made without any reference to actual writings of critics of the war.

217. *Id.*

No one, however, made the ludicrous claim that the 3,120th death was the crucial one. Instead, the reasonable claim was that, if the number of innocent lives lost in Afghanistan was of the same order of magnitude as the number of lives lost on 9/11, then a morally significant toll was inflicted. Notably, when six people died in the 1993 attack on the World Trade Center attack, no one said “this changes everything;” condolences did not pour in from around the world, new commissions were not established, government reorganizations were not undertaken, nor was legislation passed. It is not that these six lives did not matter, but small numbers of lives are lost everyday in tragic circumstances. What made 9/11 so significant to Americans was the scale of innocent deaths, reaching the thousands. Hence, if deaths from a U.S. war in Afghanistan took a comparable number of innocent lives, that too would seem to warrant special moral consideration.²¹⁸

Elshtain argues that at least the U.S. military gave this matter adequate attention. In Afghanistan, “[e]very incident in which civilian lives are lost is investigated and invokes a reevaluation of tactics in an attempt to prevent such incidents in the future.”²¹⁹ However, she provides no evidence for her claim. Presumably, if every incident in which civilian lives were lost were being investigated, the Pentagon would have a fairly accurate count on the number of civilian deaths—and Elshtain claims they did.²²⁰ In fact, however, the U.S. military has released no such count and has indicated that it has not attempted any such count.²²¹

218. “The fact that the United States killed more than the number killed in the United States is not dispositive on the issue of proportionality, although it does show that the United States caused substantial harm in pursuing its aim of self-protection.” Quigley, *supra* note 41, at 552-53.

219. ELSHTAIN, *supra* note 8, at 66.

220. *Id.* at 67-68 (stating that “attempts to come up with an accurate estimate of civilian deaths in Afghanistan have been made by human rights groups, the U.S. military, and the *Los Angeles Times*,” but giving no citation for the human rights groups or the military); *id.* at 76 (wondering whether critics are “aware of the ongoing assessments made by the U.S. military itself, as well as by international observers and analysts attempting to get as accurate a reading as possible of the material damage in Afghanistan,” but giving no citation); *id.* at 120 (stating “[m]any agencies and groups, as well as the U.S. military, are continually trying to get an accurate count,” but providing no citation).

221. John Donnelly & Anthony Shadid, *Civilian Toll in U.S. Raids Put at 1,000*, BOSTON GLOBE, Feb. 17, 2002, at A1; Dexter Filkins, John F. Burns, & Carlotta Gall, *Flaws in U.S. Air War Left Hundreds of Civilians Dead*, N.Y. TIMES, July 21, 2002, at I:1; Laura King, *Review: Afghan Civilian Deaths Lower*, ASSOCIATED PRESS, Feb. 11, 2002; Craig Nelson, *U.S. Silence and Power of Weaponry Conceal Scale of Civilian Toll*, SYDNEY MORNING HERALD, Jan. 26, 2002, at 15; Ian Traynor, *The Unfinished War: Afghans are Still Dying as Air Strikes Go On. But No One is Counting*, GUARDIAN (London), Feb. 12, 2002, at 4; David Zucchino, *The Americans . . . They Just Drop Their Bombs and Leave*, L.A. TIMES, June 2, 2002, at A1; *World News Tonight Sunday: Human*

The number of Afghan civilians directly killed by U.S. and allied bombs remains unknown. There have been various estimates, none conclusive. Marc W. Herold tabulated press reports and came to a total of 3,000-3,600 as of May 2003, with the great majority of them between October 2001 and July 2002.²²² Herold's data has been challenged for including unverified Taliban claims, which were commonly reported uncritically in the South Asian press, and imprecise refugee accounts.²²³ Herold's, however, is one of the few counts that has actually provided the raw data that would allow others to assess his judgments for themselves.

Another analysis based on press reports was carried out by Carl Conetta of the Project for Defense Analysis.²²⁴ Using just Western news sources, and applying a sharp discount to refugee claims about deaths outside their own families in order to correct for presumed reporting bias, he estimated 1,000 to 1,300 direct bombing deaths through January 1, 2002.

Global Exchange compiled a list of names of 824 civilians killed in ten of thirty-two provinces that it was able to visit, representing, in its view, "only a portion of all civilian casualties."²²⁵ No other NGO has offered a systematic count, though several made very rough estimates at the time, ranging from 1,000 to 8,000.²²⁶

Rights Group Global Exchange Claims Hundreds of Civilians Have Been Killed in the U.S. Campaign in Afghanistan (ABC television broadcast July 21, 2002). See also Fiala, *supra* note 107, at 151 (noting that "the burden of proof rests on the military: they must show us that the war has been fought justly"); Sarah Sewall, *An Empty Pledge to Civilians?*, N.Y. TIMES, Mar. 21, 2003, at A19; *Talk of the Nation: Use of Air Power in War* (NPR broadcast July 24, 2002) (focusing on the comments of William M. Arkin).

222. MARC W. HEROLD, APPENDIX 4. DAILY CASUALTY COUNT OF AFGHAN CIVILIANS KILLED BY U.S BOMBING AND SPECIAL FORCES ATTACKS, OCTOBER 7 UNTIL PRESENT DAY 2 (2003), <http://pubpages.unh.edu/%7Emwherold/AfghanDailyCount.xls>.

223. See CARL CONETTA, OPERATION ENDURING FREEDOM: WHY A HIGHER RATE OF CIVILIAN BOMBING CASUALTIES (Project on Defense Alternatives 2002) <http://www.comw.org/pda/0201oef.html>; Jeffrey C. Isaac, *Civilian Casualties in Afghanistan: The Limits of Marc Herold's 'Comprehensive Accounting'*, openDemocracy, Mar. 14, 2002, http://www.opendemocracy.net/conflict-war_on_terror/article_182.jsp. See also Joshua Muravchik, *The Prof Who Can't Count Straight, and the Journalists Who Cite Him*, WKLY. STANDARD, Aug. 26, 2002, http://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=1565&R=13A75164D3 (making a polemical argument against Herold's methodology).

224. CONETTA, *supra* note 223.

225. GLOBAL EXCHANGE & PEACEFUL TOMORROWS, AFGHAN PORTRAITS OF GRIEF: THE CIVILIAN/INNOCENT VICTIMS OF U.S. BOMBING IN AFGHANISTAN 6 (2002), available at <http://www.globalexchange.org/tours/apogreport.pdf>. Detailed claims forms were obtained from families in all cases except in Kandahar, where families only provided names of the deceased, and in Herat, where data came from the NGO Organization Mine Action and Reconstruction (OMAR). *Id.* at 5.

226. Traynor, *supra* note 221, at 4; Zucchini, *supra* note 221, at A1.

Several months after the fact, various journalists attempted on-the-scene investigations.²²⁷ Their counts ranged from 400 to 1,200, but all these reports were extremely incomplete. For example, the Associated Press excluded from its count (because conditions were too dangerous for an on-site investigation) the November 9 attack on the village of Shah Aga. The Taliban claimed 190 were killed; a refugee reached by telephone by AP said that 128 bodies had been dug from the rubble by the time he left the area.²²⁸ Another type of civilian death not included in most of the counts is those who were killed while in cars or trucks. According to U.N. officials, in just two days in November 2001, 160 fuel tankers and trucks and 210 cars were destroyed by U.S. forces—with civilian casualties in some, though not all, cases.²²⁹

The civilian deaths generally came about in one of three ways: (1) a weapon struck an unintended target due to technical failure; (2) a weapon struck a target that was not what it was thought to be due to faulty intelligence; and (3) a lack of concern for the civilians that might be harmed in a strike on a military target.

Although specific instances of technical failure cannot be predicted in advance, it was certainly foreseeable—given the statistical properties of the weapons employed—that civilian deaths would result.²³⁰ More problematically, the frequent practice of basing lethal targeting on intelligence coming from unproven Afghan informants involved subjecting civilians to substantial risk. Certainly, given the previous brutal record of Afghan warlords and their callousness regarding civilian casualties,²³¹ entrusting them to provide targeting intelligence seemed particularly reckless.²³² Nevertheless, as the *New York Times*'

227. See Filkins, Burns, & Gall, *supra* note 221, at I:1; Donnelly & Shadid, *supra* note 221, at A1; Zucchini, *supra* note 221, at A1; King, *supra* note 221.

228. Kathy Gannon, *Bombing Raids Hit Factory near Kabul, Village in Kandahar: Taliban, Witnesses Say*, ASSOCIATED PRESS, Nov. 11, 2001.

229. John Donnelly, *U.S. Targeting of Vehicles is Detailed; Airstrikes Hit Some Civilians on Roadways; Civilian Vehicles Hit in Airstrikes*, BOSTON GLOBE, Feb. 19, 2002, at A1.

230. See CONETTA, *supra* note 223, at section 3.

231. See *supra* note 212.

232. In some cases, informants simply identified their non-Taliban rivals as Taliban to bring down U.S. bombs on them. See e.g., Kim Sengupta, *Americans 'Duped' into Attack on Convoy*, INDEP. (London), Dec. 24, 2001, at 8. Rumsfeld denied that there were any instances of intentionally falsified intelligence, Donald H. Rumsfeld, U.S. Sec'y of Def., & Gen. Richard Myers, Chairman, Joint Chief of Staff, Dep't of Def. News Briefing (July 22, 2002), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3598>, but Afghan leader Hamid Karzai, who was generally extremely deferential to the United States, confirmed this, see Marc Kaufman & Peter Baker, *U.S. Mistakes Cost Innocent Lives, Afghan Leader Says; Karzai Notes Apology, Blames One Raid on Misleading Information*, WASH. POST, Feb. 6, 2002, at A1.

Even when those targeted were not anti-Taliban, informants could not always be trusted to maintain the just war distinction between combatants and non-combatants:

Dexter Filkins and his colleagues noted in their review of bombing incidents, “the Americans’ preference for airstrikes instead of riskier ground operations has cut off a way of checking the accuracy of the intelligence.”²³³

In many cases of civilian deaths, the United States government insisted that the targets that were struck were the intended targets that should indeed have been struck, given the presence of Taliban or al Qaeda leaders or other assets.²³⁴ Sometimes the Pentagon denied that civilians were killed, “despite evidence on the ground.”²³⁵ Other times they argued that “responsibility for every single casualty” rests with the Taliban and al Qaeda since they hid in mosques and placed their military assets in close proximity to civilian objects.²³⁶

There are three points undercutting these Pentagon arguments. First, in several instances, reporters investigating scenes of significant civilian death were unable to confirm the Pentagon’s claim of Taliban or al Qaeda forces having been present.²³⁷ Second, the fact that the Taliban may have violated international humanitarian law by intermixing its forces with civilians does not remove the

“General Basir Salangi, a former Northern Alliance commander who is now Kabul’s security chief, says the Americans should carry on bombing the Pashtun south: ‘If they’re not al-Qaida, they’re the people who supported al-Qaida. They should be bombed just to frighten them.’” Traynor, *supra* note 221, at 4. An informant who called in targets to U.S. forces properly wanted to avoid an attack on a hospital where women and children were present, Justin Huggler & Tasgola Karla Bruner, *US Bombers Guided By Spy with a Phone; Our Man Behind the Lines*, INDEP. ON SUNDAY, Dec. 16, 2001, at 15, but—in violation of international humanitarian law—he wanted to hit a “clinic where the Arab fighters of al-Qaida were taken for treatment,” Tasgola Karla Bruner, *Spy: I helped pick targets for U.S.; Satellite Phone Was Hidden Under Burqas*, ATLANTA JOURNAL-CONSTITUTION, Dec. 20, 2001, at 17A.

233. Filkins, Burns, & Gall, *supra* note 221, at I:1.

234. *Id.* (“[T]he evidence suggests that many civilians have been killed by airstrikes hitting precisely the target they were aimed at. The civilians died, the evidence suggests, because they were made targets by mistake, or because in eagerness to kill Qaeda and Taliban fighters, Americans did not carefully differentiate between civilians and military targets.”).

235. *Id.* See also Richard Lloyd Parry, *A Village Is Destroyed. And America Says Nothing Happened*, INDEP. (London), Dec. 4, 2001, at 1. Parry later commented: “The mullahs might have exaggerated the effects of the bombing, but they were never caught out in lies as big as as [sic] those of the Pentagon.” Richard Lloyd Parry, *War in Afghanistan: Has This Murky and Confusing War Solved Anything?*, INDEP. (London), Dec. 28, 2001, at 7.

236. Donald H. Rumsfeld, U.S. Sec’y of Def., & Gen. Richard Myers, Chairman, Joint Chiefs of Staff, Dep’t of Def. News Briefing (Oct. 29, 2001), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2226> (statement of Secretary Rumsfeld).

237. See, e.g., Parry, *Murky and Confusing War*, *supra* note 235, at 7; Human Rights Watch, *Afghanistan: New Civilian Deaths due to U.S. Bombing*, Oct. 30, 2001, http://hrw.org/english/docs/2001/10/30/afghan3125_txt.htm; Parry, *A Village Is Destroyed*, *supra* note 235, at 1.

obligation on the United States to take due care to avoid harm to non-combatants.²³⁸ And third, there is a considerable difference between situations where an enemy is *firing* from amidst civilians and where the enemy is simply *hiding* amidst civilians. In the first case, failing to attack the enemy may result in considerable risk; in the second case, the risk is far less. On October 23, for example, a Pentagon spokesperson stated that, though the Taliban had moved its forces into residential areas, “I’ve not seen any reports that any of our aircraft have been taking fire from within the residential areas.”²³⁹ Thus, this situation would not warrant military strikes on these Taliban forces.

In addition, even when there is enemy fire, there is no justification for returning fire and killing large numbers of civilians when it is possible to withdraw safely. Hence, for example, if it were true that hostile fire against a U.S. aircraft emanated from a village in Uruzgan Province in July 2002, rather than from wedding celebrants shooting into the air as the villagers claimed, this still would not justify firing into the village, killing 48 civilians and wounding 117 more.²⁴⁰

Herold notes that his figures for civilian deaths are conservative because they include only those who died immediately in bombing incidents, and not those

238. HUMAN RIGHTS WATCH, LEGAL ISSUES ARISING FROM THE WAR IN AFGHANISTAN AND RELATED ANTI-TERRORISM EFFORTS 7-8 (2001), available at <http://www.hrw.org/campaigns/september11/ihlqna.pdf>. See also Nicholas J. Wheeler, *Dying for ‘Enduring Freedom’: Accepting Responsibility for Civilian Casualties in the War Against Terrorism*, 16 INT’L REL. 205, 218 (2002).

239. Victoria Clarke, Asst. Sec’y of Def. for Pub. Aff., & Rear Admiral John D. Stufflebeem, Asst. Sec’y of Def. for Pub. Aff., Dep’t of Def. News Briefing (Oct. 23, 2001), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2155> (statement of Rear Admiral Stufflebeem).

240. For the Pentagon’s version, see Press Release, U.S. Central Command, Unclassified Executive Summary: Investigation of Civilian Casualties, Oruzgan Province, Operation FULL THROTTLE (Sept. 3, 2002), available at http://italy.usembassy.gov/viewer/article.asp?article=/file2002_09/alia/A2090904.htm. Lambeth, who accepts the U.S. claim regarding the hostile fire, acknowledges that U.S. actions here and in another instance “arguably entailed unnecessary overreactions to threats that were trivial even if they had been real.” BENJAMIN S. LAMBETH, AIR POWER AGAINST TERROR: AMERICA’S CONDUCT OF OPERATION ENDURING FREEDOM 160 (RAND 2005). The wedding case

raised a valid question as to whether the military value to have been gained by having had the AC-130 in a position where it could create a major collateral-damage incident in the first place was worth the inherent associated risk of causing the near-calamity for U.S. policy that it ultimately occasioned, however unintentionally, at a time when the major combat phase of Enduring Freedom had long been successfully concluded.

Id.

who succumbed later to their wounds.²⁴¹ None of the tallies from U.S. bombing include such deaths or those killed later by cluster munitions that had failed to detonate on initial impact. In Afghanistan, the International Committee of the Red Cross said incomplete figures indicated that twenty-nine people had died up to November 2002 from the delayed effects of cluster munitions.²⁴² Prominent human rights organizations have called for the banning of such weapons,²⁴³ and in February 2008, eighty-two nations (but not the United States, Israel, or Russia) committed themselves to concluding a treaty banning their use.²⁴⁴ Regardless of their legal status, however, it is clear that any consideration of the just war criterion of proportionality must take into account not just immediate deaths, but the delayed deaths caused by cluster munitions as well.²⁴⁵

241. Marc W. Herold, *U.S. Bombing & Afghan Civilian Deaths: Official Neglect of 'Unworthy' Bodies*, 26 INT'L J. URBAN & REGIONAL RES. 626 (2002), available at <http://www.khyber.org/publications/006-010/usbombing.shtml>.

242. HUMAN RIGHTS WATCH, *FATALLY FLAWED: CLUSTER BOMBS AND THEIR USE BY THE UNITED STATES IN AFGHANISTAN* 25 (2002), <http://www.hrw.org/reports/2002/us-afghanistan/Afghan1202.pdf>.

243. See Cluster Munition Coalition, <http://www.stopclustermunitions.org/> (last visited Sept. 9, 2009). Deputy Defense Secretary Paul Wolfowitz was asked his reaction to the fact that many organizations "have been complaining already about things like these cluster bombs and the sense that there will be critiques of some of the methods used by the United States," to which he replied:

I guess my main reaction is we lost somewhere between 5,000 and 7,000 people in a single day. We're now being threatened with weapons that could kill tens of thousands of people. We're trying to avoid killing innocent people, but we have to win this war and we'll use the weapons we need to win this war.

Interview by David Wastell with Paul Wolfowitz, U.S. Sec'y of Def., in D.C. (Oct. 26, 2007), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2202>.

One analyst has approvingly written: "With respect to complaints voiced by some alleging an indiscriminate use of cluster bomb units (CBUs), General Myers countered that CBUs had been employed only when they were deemed to have been the most effective munition for a given target." LAMBETH, *supra* note 240, at 102. The proper question, however, is not which munition is *most effective*, but which best meets the standard of proportionality.

244. Human Rights Watch, *82 Countries Endorse Strong Ban on Cluster Munitions, Final Treaty Negotiations Set for Dublin in May 2008*, Feb. 22, 2008, <http://www.hrw.org/en/news/2008/02/22/82-countries-endorse-strong-ban-cluster-munitions>.

245. For a legal analysis of cluster munitions and proportionality, see Memorandum from Human Rights Watch & Int'l Human Rights Clinic, Human Rights Program, Harvard Law Sch., to Delegates of the convention on Conventional Weapons (Apr. 2008), available at <http://hrw.org/backgrounder/arms/arms0408/arms0408web.pdf>.

The number of deaths from cluster bombs is not large relative to the direct impact bombing deaths. Another consequence of the bombing, however, dwarfs the direct impact deaths: those who died from starvation, disease, and exposure as a consequence of the bombing, either because they were forced to flee in unsafe conditions or because of the disruption of humanitarian aid caused by the bombing. Very few have attempted to count these deaths. Conetta estimates 3,200-7,200 excess deaths due to the war. He first calculated 8,000-18,000 humanitarian deaths by extrapolating from “the reported experience of several village clusters and large camps for Internally Displaced Persons.”²⁴⁶ He then attributed forty percent of these deaths to the war (since some would have died anyway).²⁴⁷ Journalist Jonathan Steele did another calculation in May 2002 and estimated that there were 10,000-20,000 indirect deaths due to OEF.²⁴⁸

Both of these estimates depend on several assumptions that can be challenged. Strikingly, however, none of the just war theorists who deem the Afghan war just have discussed these estimates or offered estimates of their own.²⁴⁹

246. CARL CONETTA, *STRANGE VICTORY: A CRITICAL APPRAISAL OF OPERATION ENDURING FREEDOM AND THE AFGHANISTAN WAR 36* (Project on Defense Alternatives 2002), available at <http://www.comw.org/pda/0201strangevic.pdf>.

247. *Id.* at 36-43. The period covered is from mid-September 2001 to mid-January 2002. The end point is extremely conservative given that malnutrition and disease incurred during this period surely resulted in subsequent mortality. See, e.g., U.N. Offices for Pak. & Afg., Press Briefing (Jan. 2, 2002), available at <http://www.un.org/apps/news/infocusnews.asp?NewsID=114&sID=4>; U.N. Offices for Pak. & Afg., Press Briefing (Jan. 18, 2002), available at <http://www.un.org/apps/news/infocusnews.asp?NewsID=140&sID=4>; Médecins Sans Frontières, *Detailed Results from MSF's Nutritional Assessment in Northern Afghanistan*, Feb. 22, 2002, <http://www.doctorswithoutborders.org/news/2002/02-22-2002.htm>; *Afghanistan: Further Developments: Hearing Before U.K. House of Commons, Int'l Dev. Comm.*, Sess. 2001-02 ¶ 10 (2002), available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmintdev/653/2022601.htm> (statement of Elizabeth Winter, Special Adviser to the British Agencies Afg. Group); Philip Smucker, *A Fight to Feed Hungry Afghanistan*, CHRISTIAN SCI. MONITOR, June 3, 2002, at 1.

248. Jonathan Steele, *Forgotten Victims*, GUARDIAN (London), May 20, 2002, <http://www.guardian.co.uk/world/2002/may/20/afghanistan.comment>. Steele too extrapolates from death rates in IDP camps; he assumes twenty to forty percent of deaths were due to the war.

249. Bellamy concludes that “the U.S. conducted the air war with a high degree of respect for discrimination and proportionality but tended to transfer risk . . . from U.S. forces to Afghan non-combatants,” which he calls “morally problematic.” BELLAMY, *supra* note 17, at 198. However, though he is critical of the use of cluster bombs and failure to adequately verify intelligence, he makes no mention of the indirect deaths attributable to the bombing. Nor is there any discussion of these deaths in ELSHTAIN, *supra* note 8; OREND, *supra* note 3; Bertram, *supra* note 14; or Walzer, *supra* note 216.

During the 1991 Gulf War, U.S. forces intentionally targeted civilian infrastructure, including power stations and water facilities.²⁵⁰ Although various pundits, such as Bill O'Reilly, recommended major attacks on Afghanistan's infrastructure in the aftermath of 9/11,²⁵¹ it seems that the United States did not in fact target major power stations during OEF.²⁵² It did, however, hit power lines.²⁵³

250. See Barton Gellman, *Allied Air War Struck Broadly in Iraq; Officials Acknowledge Strategy Went Beyond Purely Military Targets*, WASH. POST, June 23, 1991, at A1; Thomas J. Nagy, *The Secret Behind the Sanctions: How the U.S. Intentionally Destroyed Iraq's Water Supply*, PROGRESSIVE, Sept. 2001, at 22.

251. See quotes from O'Reilly and A. M. Rosenthal in MAHAJAN, *supra* note 3, at 79-80.

252. After the first day of bombing, there were some reports of power plants being struck. See, e.g., Howard Schneider & Lee Hockstader, *Regional Response: Ambivalence; Major Capitals Are Calm; Some Arab States Remain Silent*, WASH. POST, Oct. 8, 2001, at A12. However, those reports seem to have been erroneous based on the fact that lights went out—not because of the bombing, but because the Taliban ordered the lights off. Edward Cody, *Life Inside Afghanistan: Chaos, Fear and Refugees*, WASH. POST, Oct. 14, 2001, at A1; Rowan Scarborough, *U.S. Gunship Attacks Taliban Troops*, WASH. TIMES, Oct. 16, 2001, at A1.

There was a tentative contemporaneous press report of a strike on the hydroelectric power station at the Kajaki Dam. Richard Lloyd Parry, *U.N. Fears 'Disaster' over Strikes near Huge Dam*, INDEP. (London), Nov. 8, 2001, at 4. This report was incorrect. E-mail from Carlotta Gall, Reporter, N.Y. Times (Sept. 20, 2007, 09:38:24 - 0400 EDT) (on file with author) (saying it was “[n]ot true at all” that the hydroelectric plant was damaged by U.S. bombing; Gall reported from the power plant, see Carlotta Gall, *Building a Dam in a Bid To End Afghan Instability*, N.Y. TIMES, Sept. 18, 2007, at A11); E-mail from Richard Lloyd Parry, Asia Editor, Times (Sept. 22, 2007 05:59:49 +0100) (on file with author) (saying that he is “sure that Carlotta Gall is right”).

Marc Herold states that “[d]uring the last two weeks of October, U.S. warplanes made a concerted effort to hit Afghanistan’s meager electricity generating capacity.” See Herold, *supra* note 241. His citations, however, do not adequately support his claim, and, in any event, it is hard to believe that a “concerted effort,” *id.*, by the Pentagon to destroy Afghanistan’s electric system would only have been able to cut Kabul’s power for several hours, Said Mohammad Azam, *Red Cross Warehouse Bombed, U.S. Switches to Low-Level Raids*, AGENCE FRANCE PRESSE, Oct. 16, 2001.

On the other hand, the following claim by Elshtain is logically flawed: “It is fair to say that in Afghanistan the U.S. military is doing its best to respond proportionately. If it were not, the infrastructure of civilian life in that country would have been devastated completely, and it is not.” ELSHTAIN, *supra* note 8, at 70. There are, of course, many possibilities in between responding proportionately and completely devastating the infrastructure. A bombing campaign whose results were just short of totally obliterating the civilian infrastructure would not thereby be proportionate.

253. See U.S. ENERGY INFORMATION ADMINISTRATION, COUNTRY ANALYSIS BRIEFS: AFGHANISTAN 3 (2002), available at <http://afghanic.de/images/Whatiswhat/afghanenergy.pdf>. That at least some power-line attacks were intentional is suggested by the fact that CNN reported from the Pentagon that power lines were targeted without conveying any U.S. apology or acknowledgment of an accident. Sheila Kast, *CNN Sunday*

These are more quickly repaired at war's end. However, even their temporary destruction interfered with water supply and other civilian needs, which likely led to additional deaths among a population living on the edge of survival, and increased the refugee flow,²⁵⁴ which also probably led to further deaths.²⁵⁵ In addition, the United States did acknowledge intentionally targeting telecommunications²⁵⁶ and media facilities.²⁵⁷

Thus, the bombing campaign was problematic in several respects: U.S. forces did not adequately discriminate between civilian and military targets and did not take adequate care to avoid collateral damage to civilians. The number of civilians harmed was by no means inconsequential and, when one includes indirect deaths attributable to the bombing, the number was quite substantial.

C. Putting Civilians at Risk

In making a moral assessment of behavior, it is not sufficient to look at the actual results of that behavior. One must also examine the likely and anticipated consequences of the behavior. For example, Richard Reid, who tried

Morning: U.S. Strikes Kandahar Heavily (CNN television broadcast Oct. 14, 2001), available at <http://transcripts.cnn.com/TRANSCRIPTS/0110/14/sm.30.html> (“[O]ther targets seem to have been . . . the high-tension power lines going in and out of Kandahar.”).

254. See, e.g., *America's Assistance to the Afghan People: Hearing Before the H. Comm. on Int'l Relations*, 107th Cong. 17 (2001), available at <http://www.foreignaffairs.house.gov/archives/107/75926.pdf> (testimony of Andrew Wilder, Field Office Director Afghanistan/Pakistan, Save the Children).

255. E.g., *U.S. Efforts to Deliver Aid to Afghanistan, Panel I: J. Hearing Before the Subcomms. on Int'l Operations & Terrorism and on Near Eastern & South Asian Affairs of the Sen. Foreign Relations Comm.*, 105th Cong. (Nov. 15, 2001) (testimony and prepared statement of Mark Bartolini, Vice President of Government Relations, International Rescue Committee).

256. See, e.g., *Afghanistan's Humanitarian Crisis: Is Enough Aid Reaching Afghanistan?: Hearing Before the Subcomms. on Int'l Operations & Terrorism and on Near Eastern & South Asian Affairs of the S. Foreign Relations Comm.*, 107th Cong. 86-88 (2001) (testimony and prepared statement of Mark Bartolini, Vice President of Government Relations, International Rescue Committee).

257. Interview by Al Jazeera with Donald H. Rumsfeld, U.S. Sec'y of Def., (Oct. 16, 2001), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2120>.

Amnesty International “considers civilian radio and television stations to be civilian objects even when they are ‘propaganda vehicles.’” Amnesty International, *Afghanistan: Accountability for Civilian Deaths*, Oct. 26, 2001, http://www.amnesty.org.uk/news_details.asp?NewsID=12676.

On November 13, 2001, a U.S. missile destroyed al Jazeera's office in Kabul in what Pulitzer-prize-winning journalist Ron Suskind reports was an intentional attack. RON SUSKIND, *THE ONE PERCENT DOCTRINE* 137-38 (2006).

to detonate a shoe-bomb on a trans-Atlantic air flight, harmed no one, but had his bomb gone off, he would have killed a plane-load of people; thus, his actions were judged very harshly.²⁵⁸ Nor is intent essential to warrant our condemnation. Someone who drives drunk may intend to harm no one, and may in fact harm no one, but society finds this behavior morally unacceptable. Reckless endangerment is a crime whether or not people are actually harmed.²⁵⁹

In the case of OEF, thousands of innocent civilians died as a consequence—direct and indirect—of the U.S. bombing. However, in order to assess whether the United States abided by the principle of proportionality, one must consider not just the actual death toll, but the number of people who were put at risk of death as well.

The U.N.'s High Commissioner for Human Rights,²⁶⁰ the Special Rapporteur on the Right to Food,²⁶¹ and numerous humanitarian aid organizations²⁶² all called for at least a pause in the bombing campaign so that urgently needed food could be delivered to a desperate population before winter set in. U.S. and British officials rejected these pleas and ordered no let up in the

258. Pamela Ferdinand, *Would-Be Shoe Bomber Gets Life Term; Al Qaeda Member Shouts at Judge*, WASH. POST, Jan. 31, 2003, at A1.

259. See, e.g., N.Y. PENAL LAW, §§ 120.20, 120.25 (McKinney 2009).

260. Kim Sengupta & Cahal Milmo, *U.N. Demands Pause in Bombing to Let Aid Reach Starving Afghans*, INDEP. (London), Oct. 13, 2001, at 1 (“Mary Robinson, the United Nations commissioner for human rights, called on Friday for a halt to Allied air strikes to allow aid to reach up to two million ‘desperate’ civilians trapped in Afghanistan. . . . ‘There is a desperate situation for hundreds of thousands—perhaps up to two million—of the Afghan civilian population who desperately need food,’ she said. ‘We must have a pause in order to enable huge humanitarian access and to allow a number of Afghans to come across the borders.’”). But see *U.N. Investigator Condemns Bombing of Afghanistan*, REUTERS, Oct. 15, 2001 (“Robinson said that she hoped that there could be a halt to the bombing to help the aid agencies with their work, although she denied having issued an outright call for a pause.”).

261. Reuters, *supra* note 260.

262. Memorandum from Christian Aid & Islamic Relief to the U.K. House of Commons Int'l Dev. Comm. ¶ 13 (Oct. 24, 2001), in INTERNATIONAL DEVELOPMENT COMMITTEE, THE HUMANITARIAN CRISIS IN AFGHANISTAN AND THE SURROUNDING REGION, 2001-2, H.C. 300-II, Minutes of Evidence and Appendices, available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmintdev/300/1103002.htm> [this volume hereinafter IDC, MINUTES]; Nick Meo, “If They Stop the Bombing, We Can Get the Food Aid in. It's as Simple as That”—*Christian Aid*, HERALD (Glasgow), Oct. 18, 2001, at 6; Letter from Save the Children U.K. to the Prime Minister (Oct. 11, 2001), cited in Memorandum from Save the Children U.K. to U.K. House of Commons Int'l Dev. Comm. ¶ 22 (Nov. 6, 2001), in IDC, MINUTES, *supra* note 262, available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmintdev/300/1103007.htm>; Kim Sengupta & Cahal Milmo, *Aid Agencies Warn Extra Pounds £15M Will Not Avert Looming Winter Disaster*, INDEP. ON SUNDAY (London), Oct. 13, 2001, at 2.

bombing.²⁶³ Public opinion in many countries backed the idea of a bombing pause,²⁶⁴ and Abdul Haq, a leading anti-Taliban Afghan much favored by Washington, expressed his opposition to the bombing.²⁶⁵ OEF supporters, however, did not waiver in their support.²⁶⁶ If they gave these calls any attention at all,²⁶⁷ supporters were generally content to note that mass starvation did not occur.²⁶⁸ Logically, however, such a response is wholly inadequate. In order to justify the bombing, one had to show that the warnings that the bombing put huge numbers of lives at risk were known to be false in October 2001, at the time the warnings were issued.

To do so, one needed to make one or more of the following arguments: (1) the claim that millions of people were dependent on outside aid was an exaggeration; (2) the Taliban, not the bombing, was the predominant impediment to the delivery of food to the needy;²⁶⁹ (3) alternative means of getting food to the

263. See *supra* note 101 and accompanying text; Patrick Wintour, *Raids Go On, Blair Tells Musharraf: Pakistan's Plea for Bombing Pause Rejected*, *GUARDIAN* (London), Nov. 9, 2001, at 7.

264. See, e.g., Warren Hoge, *Public Apprehension Felt in Europe over the Goals of Afghanistan Bombings*, *N.Y. TIMES*, Nov. 1, 2001, at B2; Sarah Karush, *Russian People Ambivalent About U.S. Strikes, Despite Putin's Gung-Ho Support*, *ASSOCIATED PRESS*, Oct. 17, 2001; Kevin Sullivan, *War Support Ebbs Worldwide; Sept. 11 Doesn't Justify Bombing, Many Say*, *WASH. POST*, Nov. 7, 2001, at A1; Alan Travis, *Majority Want Bombing Pause*, *GUARDIAN* (London), Oct. 30 2001, at 1.

265. Anatol Lieven, *On the Road: Interview with Commander Abdul Haq*, *CARNEGIE ENDOWMENT FOR INT'L PEACE*, Oct. 15, 2001, <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=818>. Haq was killed by the Taliban in late October 2001.

266. Christopher Hitchens claimed that the advice, inter alia, “don’t bomb, don’t bomb during Ramadan, beware of the winter,” was the “pro-Taliban propaganda” of the “Pakistani right wing,” repeated by “ultraleftists and soft liberals”—“in presumable ignorance of its real source and intention.” Christopher Hitchens, *The Ends of War*, *NATION*, Dec. 17, 2001, at 9.

267. Noam Chomsky was one of the first analysts to raise the issue of the potential humanitarian consequences of OEF. See NOAM CHOMSKY, 9-11 94-101 (Seven Stories Press 2001). Just war theorist Jean Bethke Elshtain never addresses the argument, saying only, “I have not put Chomsky’s outrageous and wholly irresponsible tirade in the body of this text because analyzing it is like shooting fish in a barrel—it just isn’t very interesting.” *ELSHTAIN, supra* note 8, at 215 n.17.

268. See, e.g., Ronald Radosh, *The Last Word on the Afghan “Genocide”*, *FrontPageMagazine.com*, Jan. 4, 2002, <http://97.74.65.51/Printable.aspx?ArtId=24019> (considering the “last word” in answer to Chomsky’s charge that U.S. policy had subjected millions of Afghans to the risk of starvation to be an article headlined “Massive Food Delivery Averts Afghan Famine”).

269. See, e.g., *Afghanistan’s Humanitarian Crisis: Hearing, supra* note 255, at 18-19 (statement of Christina Rocca, Assistant Secretary of State for South Asia); Ari Fleischer, White House Press Sec’y, Press Briefing (Oct. 16, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011016-2.html>; Ari Fleischer, White

needy existed that did not depend on halting the bombing; and (4) the Taliban was expected to be militarily defeated before winter set in and, thus, food aid could be restored before some of the roads became impassible. For the reasons discussed below, however, none of these arguments is credible.

1. Was the claimed number of Afghans dependent on outside aid an exaggeration?

The claim that millions of Afghans were dependent on outside aid was not simply an assertion by NGOs trying to justify their existence; it was the official view of the U.N. and its various agencies²⁷⁰ and of the U.S. government.²⁷¹

House Press Sec'y, Press Briefing (Oct. 31, 2001), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011031-4.html>; Victoria Clark, Asst. Sec'y of Def. for Pub. Affairs, & Rear Admiral John D. Stufflebeem, Deputy Dir. of Operations, Joint Staff, Dep't of Def. News Briefing (Oct. 17, 2001), *available at* <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2115>; Rear Admiral Craig R. Quigley, Deputy Asst. Sec'y of Def. for Pub. Affairs, & Rear Admiral John D. Stufflebeem, Deputy Dir. of Operations, Joint Staff, Dep't of Def. News Briefing (Oct. 19, 2001), *available at* <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2135>.

270. See U.N. News Service, *Millions of Afghan Women and Children in Dire Need of Assistance*, U.N. NEWS CENTRE, Sept. 14, 2001, <http://www.un.org/apps/news/story.asp?NewsID=1486>; Press Release, U.N. News Centre, Transcript of Press Conference of Secretary-General Kofi Annan at Headquarters, U.N. Doc. SG/SM/7972 (Sept. 27, 2001), *available at* <http://www.un.org/News/Press/docs/2001/sgsm7972.doc.htm>; U.N. Offices for Pak. & Afg., Press Briefing (Sept. 28, 2001), *available at* <http://www.un.org/apps/news/infocusnews.asp?NewsID=69&sID=4>; Rajiv Chandrasekaran, *United Nations Scrambles to Keep Up in Afghanistan; Hundreds of Thousands of People Running Out of Food*, WASH. POST, Sept. 30, 2001, at A24; U.N. Offices for Pak. & Afg., Press Briefing (Oct. 1, 2001), *available at* <http://www.un.org/apps/news/infocusnews.asp?NewsID=67&sID=4>; WORLD FOOD PROGRAM, REGIONAL EMERGENCY OPERATION: EMERGENCY FOOD ASSISTANCE TO REFUGEES AND VULNERABLE POPULATIONS IN AFGHANISTAN 1-2 (2001), *available at* [http://www.reliefweb.int/rw/RWFiles2001.nsf/FilesByRWDocUNIDFileName/ACOS-64BJXE-wfp_afg_01oct.pdf/\\$File/wfp_afg_01oct.pdf](http://www.reliefweb.int/rw/RWFiles2001.nsf/FilesByRWDocUNIDFileName/ACOS-64BJXE-wfp_afg_01oct.pdf/$File/wfp_afg_01oct.pdf); Karen DeYoung, *U.S. Considers Food Drops; Afghan Aid Plan Aimed at Undermining Taliban*, WASH. POST, Oct. 4, 2001, at A1; Elisabeth Bumiller & Elizabeth Becker, *Bush Voices Pride in Aid, but Groups List Hurdles*, N.Y. TIMES, Oct. 17, 2001, at B3; Press Release, U.N., Humanitarian Situation in Afghanistan (Nov. 16, 2001), *available at* <http://www.un.org/News/briefings/docs/2001/kennedybrf.doc.htm>.

271. See *America's Assistance to the Afghan People: Hearing*, *supra* note 254, at 12 (statement of Andrew Natsios, Administrator, U.S. Agency for International Development); Press Release, White House, Office of the Press Sec'y, U.S. Commitment to the Afghan People (Nov. 19, 2001), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011119-4.html>.

2. Was the Taliban the predominant impediment to delivering food aid?

The Taliban did make delivery of food aid more difficult, but there is no doubt that the threat of U.S. bombing, the bombing itself, and the breakdown in security that ensued all contributed significantly to the food crisis.

Immediately following 9/11, U.S. bombing was anticipated. This had several consequences. First, the Taliban informed international aid organizations that it could not guarantee the safety of their foreign staff.²⁷² Thereupon, the U.N. and other aid organizations withdrew their foreign staff,²⁷³ leaving their operations in the hands of their local Afghan employees. Second, the Taliban prohibited satellite telephone communication between the local aid staff and their agencies outside Afghanistan, suspecting that intelligence and targeting information might be transmitted.²⁷⁴ This made the relief organizations' task much more difficult. In fact, Taliban fears were not simply paranoia: U.S. forces had distributed cell phones to Afghan agents inside the country for the purpose of calling in targets.²⁷⁵

272. Barry Bearak, *Edgy Afghans Pouring Toward Pakistan Border*, N.Y. TIMES, Sept. 17, 2001, at A3; Amir Shah, *All Foreign Aid Workers Leave Afghanistan Except for the Jailed Eight*, ASSOCIATED PRESS, Sept. 16, 2001; IDC, MINUTES, *supra* note 262, ¶ 69, available at <http://www.parliament.the-stationery-office.com/pa/cm200102/cmselect/cmintdev/300/1103003.htm> (testimony of Sakandar Ali, Islamic Relief). The evidence is somewhat unclear as to whether the Taliban ordered foreigners out or merely indicated its inability to guarantee their safety. Note that when the U.S. launched missile strikes on Afghanistan in 1998, an Italian employee of the U.N. was killed by violence in Kabul. Reuters, *U.N. Officer Shot in Kabul After Bombing Dies; 4 Held*, N.Y. TIMES, Aug. 23, 1998, at I:11.

273. Some U.S. officials suggested that the withdrawal of foreign staff preceded 9/11 as a result of Taliban harassment. See, e.g., Philip T. Reeker, Deputy Spokesman, State Dep't, Daily Briefing (Oct. 18, 2001), available at http://avalon.law.yale.edu/sept11/state_003.asp. But see U.N. News Service, *supra* note 270 ("Due to concerns about possible retaliation against Afghanistan after the 11 September terrorist attacks in the United States, the UN evacuated all of its 75 international staff from the country as a security precaution. Several hundred staff of non-governmental organizations have also left Afghanistan."); Kathy Gannon, *U.N. Workers Leave Afghanistan*, ASSOCIATED PRESS ONLINE, Sept. 12, 2001 ("On [September 12], most international aid workers, including all but four of the [eighty] U.N. staff in Afghanistan, left the country. The United Nations sent in three emergency flights, and more flights will arrive Thursday to take the four remaining U.N. employees to neighboring Pakistan."); INTERNATIONAL DEVELOPMENT COMMITTEE, THE HUMANITARIAN CRISIS IN AFGHANISTAN AND THE SURROUNDING REGION, 2001-2, H.C. 300-I ¶ 11, at xii, available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmintdev/300/300.pdf> [hereinafter IDC, REPORT] ("The events of September 11 led directly to the withdrawal of international and expatriate staff by the U.N. agencies and international NGOs operating in Afghanistan.").

274. Barry Bearak, *Misery Hangs Over Afghanistan After Years of War and Drought*, N.Y. TIMES, Sept. 24, 2001, at B3.

275. See Bruner, *supra* note 232, at 17A; Huggler & Bruner, *supra* note 232, at 15.

U.S. officials and aid agencies agreed that there was no systematic Taliban policy of blocking food shipments²⁷⁶—and it was certainly not the case that, as the *New York Times* claimed, the Taliban had “halted virtually all relief work by the United Nations and other organizations.”²⁷⁷ Taliban forces did seize two large warehouses from the World Food Program, one in Kabul and one in Kandahar. The former was returned the next day, with nothing stolen, the latter about ten days later.²⁷⁸ There was some looting by Taliban elements of vehicles and supplies, harassment of aid workers, and taxes imposed on food shipments.²⁷⁹ Some of this was the predictable result of U.S. strategy. As one news report noted:

Pentagon strategists plan to take advantage of the harsh Afghan winter U.S. airstrikes against barracks, fuel bunkers, vehicle depots and supply stores are steadily depriving Taliban and Al Qaeda forces of the shelter, warmth, food, fuel and ammunition they will need in the coming months, defense officials said.²⁸⁰

In general, however, the environment for food distribution was better when the Taliban was firmly in control than when they were in retreat, when no one was in control, or sometimes even when the Northern Alliance took control.²⁸¹

276. See *America's Assistance to the Afghan People: Hearing*, *supra* note 254, at 24; Guy Dinmore, Mark Nicholson & Michela Wrong, *U.N. Warns of Threat to Relief Effort in Hostile Border Areas: Humanitarian Operations: Refugee Aid Hit by Anger over Air Raids*, *FIN. TIMES*, Oct. 11, 2001, at 2; Bear McConnell, Dir., Central Asian Task Force, U.S. Agency for Int'l Dev., Foreign Press Center Briefing: U.S. Humanitarian Assistance to the People of Afghanistan (Oct. 26, 2001) (transcript on file with Federal News Service); Andrew Natsios, Adm'r, U.S. Agency for Int'l Dev., Foreign Press Center Briefing: Humanitarian Assistance to Afghanistan (Oct. 11, 2001) (transcript on file with Federal News Service) (“No one has interfered with any relief shipments this year by anybody. So we haven't had any trouble with security.”); Eric Schwartz, Senior Fellow, U.S. Inst. of Peace, et al., U.S. Institute of Peace Issues Briefing: Afghanistan, The Humanitarian Response (Nov. 30, 2001) (transcript on file with Federal News Service).

277. John F. Burns, *U.N. Official Urges Restraint in Bombings to Avoid Casualties*, *N.Y. TIMES*, Oct. 31, 2001, at B3.

278. See Bear McConnell, Dir., Central Asian Task Force, U.S. Agency for Int'l Dev., On-the-Record Briefing Regarding Afghanistan (Oct. 26, 2001), available at <http://2001-2009.state.gov/p/sca/rls/rm/5776.htm>.

279. See, e.g., Memorandum from CARE Int'l U.K. to House of Commons Int'l Dev. Comm. (Oct. 19, 2001), in IDC, *MINUTES*, *supra* note 262, available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmintdev/300/1102302.htm>.

280. Jonathan S. Landay, *U.S. Aims to Freeze Out Taliban This Winter; Hitting Food, Fuel Depots Sets the Stage, Officials Say*, *SAN JOSE MERCURY NEWS*, Oct. 24, 2001, at 1A.

281. IDC, *REPORT*, *supra* note 273 (p. xxviii, ¶ 55: “[T]he security situation deteriorated in the face of the Taliban collapse and the advance of the Northern Alliance.”);

The U.S. bombing campaign, on the other hand, interfered with the humanitarian relief effort in several ways (apart from contributing to the withdrawal of international aid workers and to Taliban restrictions on communications, discussed above). First, the bombing—and even the threat of bombing—caused many people to flee the urban areas, making it much more difficult to get food to those who needed it, and subjecting the refugees to the risks of exposure and landmines.²⁸² (“[Fifty] percent of the people who move in a famine,” warned Andrew Natsios, the U.S.A.I.D. administrator, “who are already weakened from hunger and severe malnutrition, will not survive; they will die along the way.”²⁸³) Second, when errant bombs or missiles hit a Red Cross warehouse complex,²⁸⁴ or a demining office, killing four,²⁸⁵ or struck near a group

U.S. Institute of Peace, *supra* note 276 (Ken Bacon, Refugees International: “The security situation seems to have gotten worse in many respects since the Northern Alliance took over the northern-most famine-afflicted part of the country.”); Ken Bacon and Representatives of Other Aid Agencies Holds News Conference on Afghanistan (Nov. 21, 2001), FDCH Political Transcripts (Mark Bartolini, International Rescue Committee: “In the north around Mazar . . . other agencies have suffered even more in terms of lootings, both by the Taliban as they were fleeing, and also by Northern Alliance forces, and by criminal elements.”); CRHRP 2001, *supra* note 9 (“Areas outside of Taliban control suffered from brigandage.” “After the fall of the Taliban, looting by armed groups and individuals, [and] general insecurity . . . at times hampered humanitarian assistance efforts.”).

282. See IDC, MINUTES, *supra* note 262, ¶ 4, available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmintdev/300/1102304.htm>. See also OLGA OLIKER, ET AL., AID DURING CONFLICT: INTERACTION BETWEEN MILITARY AND CIVILIAN ASSISTANCE PROVIDERS IN AFGHANISTAN, SEPTEMBER 2001-JUNE 2002 54 (RAND 2004), available at http://www.rand.org/pubs/monographs/2004/RAND_MG212.sum.pdf; Andrew Natsios, Adm’r, U.S. Agency for Int’l Dev., Foreign Press Center Briefing: His Visit to Central Asia and the State of Humanitarian Assistance to the Afghan People (Nov. 20, 2001) (transcript on file with Federal News Service).

283. Paula Dobriansky, Undersecretary of State for Global Affairs, Andrew Natsios, Adm’r, U.S. Agency for Int’l Dev., & Allen Kreczko, Acting Assistant Sec’y for Population, Refugees & Migration Issues, State Department Briefing: U.S. Humanitarian Assistance to Afghan Refugees Announced Today (Oct. 4, 2001) (transcript on file with Federal News Service). See also Memorandum from CARE Int’l U.K., *supra* note 279; *Afghanistan’s Humanitarian Crisis: Hearing*, *supra* note 255, at 17 (prepared statement of Natsios).

284. It is possible that the Red Cross warehouse attacks were not actually accidental. The well-marked warehouse was attacked on October 16 and several times on October 26. After the first strike, the Pentagon “insisted that ‘U.S. forces did not know that the ICRC was using one or more of the warehouses.’” LAMBETH, *supra* note 240, at 101 (internal citation omitted). The second attack was attributed to “human error in the targeting process.” *Id.* (internal citation omitted). Unnamed Pentagon sources, however, claimed both attacks were deliberate and justified. See William M. Arkin, *Bombing the Red Cross*, WASH. POST, Nov. 4, 2001, <http://www.washingtonpost.com/ac2/wp-dyn/A39407->

of aid workers unloading food,²⁸⁶ naturally such events interfered with and discouraged relief operations. Third, truck drivers frequently considered it too dangerous to bring food into Afghanistan while the war was going on.²⁸⁷ And, fourth, the increased insecurity that resulted from the U.S.-led war made it harder to distribute food within the country, especially to more remote areas.²⁸⁸

3. Were there alternative means of getting food to the needy?

While the bombing campaign was going on, the U.S. Air Force dropped food supplies in Afghanistan.²⁸⁹ The amount of food provided by these airdrops was negligible compared to the need—some two and a half million daily rations were provided over ten weeks,²⁹⁰ which comes to less than one percent of the food requirements of the five to seven million people dependent on outside aid—and many saw it as nothing more than a public relations gimmick.²⁹¹ Numerous critics, however, went further and argued that the airdrops were actually harmful, in part because they brought people out into areas where there might be landmines or unexploded cluster munitions that were the same color as the food packets, but

2001Nov4; *The News with Brian Williams* (MSNBC broadcast Oct. 29, 2001) (commentary of Jim Miklaszewski).

285. See Barry Bearak, *U.S. Raids Kill 4 U.N. Aides Outside Kabul*, N.Y. TIMES, Oct. 10, 2001, at B1; Edward Cody & Molly Moore, *Bomb Kills Four Afghan Civilians; Aid Officials Urge Greater Care After Accidental Hit at Land-Mine Office*, WASH. POST, Oct. 10, 2001, at A14; Martin Merzer & Jonathan S. Landay, *U.S. Says It Rules Afghan Air; Al-Qaeda Vows More Attacks; Ground Campaign Could Start Within Days*, PHILA. INQUIRER, Oct. 10, 2001, at A1. The intended target may have been a radio transmission tower, which itself might be a violation of international humanitarian law. See *supra* note 257.

286. Karen DeYoung & Marc Kaufman, *Bombs, Lawlessness Threaten Aid Efforts; Red Cross Warehouses in Kabul Are Struck*, WASH. POST, Oct. 17, 2001, at A1.

287. Memorandum from CARE Int'l U.K., *supra* note 279; IDC, MINUTES, *supra* note 262, ¶ 3, available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmintdev/300/1102304.htm>; Meo, *supra* note 262, at 6.

288. IDC, REPORT, *supra* note 273, ¶ 65, at xxxiii (“Security needs to extend to the secondary distribution network as well as to the supply route into Afghanistan. Delivering food into the country is not enough—it must be distributed as well.”) (emphasis in original); *id.* ¶ 115, at 1 (“The collapse of the Taliban did not bring the safe humanitarian space which had been hoped for, it often substituted one security concern for another. Banditry and lawlessness replaced military conflict.”).

289. Donald H. Rumsfeld, U.S. Sec’y of Def., & Gen. Richard Myers, Chairman, Joint Chiefs of Staff, Dep’t of Def. News Briefing (Oct. 8, 2001), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2032>.

290. See Rear Admiral John D. Stufflebeem, Asst. Sec’y of Def. for Pub. Affairs, Dep’t of Def. News Briefing (Dec. 17, 2001), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2657>.

291. Robert Salladay & Nanette Asimov, *U.S. Waging Battle of Words on Two Very Different Fronts*, S.F. CHRON., Oct. 9, 2001, at A1.

for two more important reasons as well. First, by having the U.S. Air Force provide food, the clear line between military forces and humanitarian workers was blurred, compromising the neutrality, and hence the safety and effectiveness, of the aid personnel.²⁹² Second, locations for the food drops were, at least in part, selected on the basis of political criteria, not need, so that Washington was essentially using food as a weapon.²⁹³

NGOs and aid organizations were sharply critical of the U.S. airdrops.²⁹⁴ A British parliamentary committee called them “at best . . . a waste of resources and at worst . . . dangerous.”²⁹⁵ Even U.S.A.I.D., the State Department, and the Pentagon’s own civil military operations staff privately opposed the airdrops at the time.²⁹⁶

Had it become necessary, the scale of the airdrops could have been increased significantly. Nevertheless, aid officials knew that airdrops were “less successful” than land delivery in getting food to desperate populations.²⁹⁷ Thus,

292. U.N. *Special Rapporteurs Tell Third Committee That Events of 11 September Severely Affected Efforts to Promote and Protect the Rights to Food and Religious Freedom* (pt. 2), M2PRESSWIRE, Nov. 12, 2001 (statement by Jean Ziegler); IDC, MINUTES, *supra* note 262, ¶ 8, available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmintdev/300/1102304.htm> (testimony of Raja Jarrah, CARE International); *id.* ¶ 41, available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmintdev/300/1102306.htm> (testimony of Justin Forsyth, Oxfam).

293. OLIKER, *supra* note 282, at 44-45. Bob Woodward notes that George Tenet, the head of the CIA, and other CIA briefers recommended using humanitarian aid to “incentivize” some Pashtuns to cooperate with the Northern Alliance. WOODWARD, *supra* note 47, at 223. He quotes one briefer as saying: “Withdraw and get fed. If you don’t withdraw, you don’t get fed.” *Id.* at 227. He then comments: “It was a highly questionable proposition. If the situation in the south turned dire, the U.S. could be accused of abetting famine—the use of organized starvation as a political tool, compromising the American moral high ground.” *Id.*

Woodward also reports that a briefing for the President by a special forces general included a call for “Poisoning Food Supply,” but Rice and Rumsfeld had it removed minutes before the presentation. *Id.* at 100.

294. Jonathan Steele & Felicity Lawrence, *Main Aid Agencies Reject U.S. Air Drops*, GUARDIAN (London), Oct. 8, 2001, <http://www.guardian.co.uk/world/2001/oct/08/afghanistan.terrorism9>.

295. IDC, REPORT, *supra* note 273, ¶ 64, at xxxii (explaining that the British government agreed with the Committee’s comment that “the money spent on dropping humanitarian daily rations would have been better spent through the co-ordinated donor response”).

296. OLIKER, *supra* note 282, at 44-46. See also Elizabeth A. Neuffer, *Afghan Food Drops Found to Do Little Good*, BOSTON GLOBE, Mar. 26, 2002, at A1; U.S. GENERAL ACCOUNTING OFFICE, FOREIGN ASSISTANCE: LACK OF STRATEGIC FOCUS AND OBSTACLES TO AGRICULTURAL RECOVERY THREATEN AFGHANISTAN’S STABILITY 28 (2003), available at <http://www.gao.gov/new.items/d03607.pdf> (claiming the airdrop program “was a largely ineffective and expensive component of the U.S. food assistance effort”).

297. IDC, REPORT, *supra* note 273, at xxix-xxx.

had the Taliban not collapsed when they did, so that the war lasted past the point when the roads became impassable due to snow, there would have been a massive catastrophe.

4. Was the timing of the Taliban collapse expected, so that one could be confident that food would be able to get in on time?

Of course, if the fall of the Taliban could have been well-predicted, the danger of catastrophe would have been small. In fact, however, the U.S. and British policymakers who rejected the calls for a pause in the bombing to let food in did not expect an early end to Taliban resistance. This can be seen by reviewing the statements of U.S. and British officials.

On October 11, Bush declared that “[t]his particular battlefield will last as long as it takes to bring Al Qaida to justice. It may happen tomorrow; it may happen a month from now; it may take a year or two.”²⁹⁸ That same day, Admiral Sir Michael Boyce, Britain’s most senior defense official, said he expected the war to last at least a year.²⁹⁹

On October 21, General Richard Myers, the chair of the Joint Chiefs of Staff, stated in a television interview, “It may take till next spring. It may take till next summer. It may take longer than that in Afghanistan.”³⁰⁰ Two days later, the Pentagon’s Deputy Director for Global Operations told reporters that “if it was a perfect world, we’d like to wrap this up before the bad weather moved in. We don’t think that that’s realistic.”³⁰¹

On October 26, Deputy Defense Secretary Paul Wolfowitz was asked if it was conceivable that the Northern Alliance could take Kabul before winter. He responded that “the right way for us to think is to plan on what could be a long time table.”³⁰² Warning against “unrealistic expectations,” Wolfowitz pointed out that “people are looking, in my view, for results, dramatic results, much too

298. President George W. Bush, Press Conference: The State of Our War Against Terror (Oct. 11, 2001), *available at* <http://www.independent.co.uk/news/world/americas/bushs-press-conference-the-state-of-our-war-against-terror-748474.html>.

299. Kim Sengupta, *Land War ‘Expected to Last Through the Winter,’* INDEP. (London), Oct. 12, 2001, at 7.

300. Interview by George Stephanopoulos, This Week, ABC News, with Gen. Richard Myers, Chairman, Joint Chiefs of Staff (Oct. 21, 2001), *available at* <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2148>.

301. Clarke & Stufflebeem: News Briefing, *supra* note 239.

302. Interview by Wastell, *supra* note 243.

early.”³⁰³ No one should be surprised, Wolfowitz told the BBC on October 31, at the tenacity of the Taliban.³⁰⁴

In late October, Rumsfeld noted that the administration had not ruled out the possibility of sending hundreds of thousands of ground troops to Afghanistan.³⁰⁵ On November 5, he said he did not expect OEF to go on for two years,³⁰⁶ but the next day he explained that this meant it might go on for twenty-three months.³⁰⁷

It is now known that policy makers were no more optimistic about the timetable in private than they were in public. According to Woodward’s account, on October 9, Cheney was asking “[w]here will we be in December and January” when bin Laden “has not been hit, the weather has gotten bad and the operations have slowed?”³⁰⁸ The next day, Tenet said it was possible that Kabul could fall before winter,³⁰⁹ but two weeks later, Rice asked the president, “I want to know if you’re concerned about the fact that things are not moving?”³¹⁰ To which Bush replied, “Of course I’m concerned about the fact that things aren’t moving!”³¹¹ On October 25, the Defense Intelligence Agency prepared a highly classified report stating that “[t]he Northern Alliance will not capture the capital of Kabul before winter arrives Barring widespread defections, the Northern Alliance will not secure any major gains before winter.”³¹² Over the next several days, Colin Powell was calling for the training of the Northern Alliance over the winter, so that it could later make progress against the Taliban.³¹³ On November 9, the day before the strategic city of Mazar-i-Sharif fell, the CIA finally turned optimistic, but the Pentagon still thought things were not going well,³¹⁴ and Bush asked his

303. *Id.*

304. Interview by Jeremy Vine, BBC, with Paul Wolfowitz, U.S. Deputy Sec’y of Def., (Oct. 31, 2001), *available at* <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2294>.

305. Donald H. Rumsfeld, U.S. Sec’y of Def., & Geoffrey Hoon, U.K. Sec’y of State for Def., Media Availability (Oct. 30, 2001), *available at* <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2230>.

306. Donald H. Rumsfeld, U.S. Sec’y of Def., & George Fernandes, India Minister of Def., Media Availability in New Delhi, India (Nov. 5, 2001), *available at* <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2304>.

307. Donald H. Rumsfeld, U.S. Sec’y of Def., & Gen. Peter Pace, Vice Chairman, Joint Chiefs of Staff, Dep’t of Def. News Briefing (Nov. 6, 2001), *available at* <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2311>.

308. WOODWARD, *supra* note 47, at 217.

309. *Id.* at 223.

310. *Id.* at 257.

311. *Id.*

312. TENET, *supra* note 47, at 216-17. *See also* WOODWARD, *supra* note 47, at 268.

313. WOODWARD, *supra* note 47, at 276, 287.

314. TENET, *supra* note 47, at 217.

advisers to prepare talking points to explain why the coming of winter did not mean that Washington had failed.³¹⁵

When Mazar-i-Sharif did fall, Bush told his advisers, “It’s amazing how fast the situation has changed. It is a stunner, isn’t it?”³¹⁶ Woodward commented: “Everyone agreed. It was almost too good to be true.”³¹⁷

The unexpected defeat of the Taliban meant that food arrived in Afghanistan before the winter snows made internal transportation much more difficult. The data on food deliveries into the country shows that the target goal of 52,000 metric tons per month was not met in September (when following September 11, no food entered the country until the last day of the month), was only half met in October, and was slightly exceeded in November, the month the Taliban fell.³¹⁸ If December had matched October or November, there clearly would not have been enough food in the country to make up for the previous shortfall and to distribute to many internal communities that needed food before they were cut off by snow. A major famine was only averted because, after the Taliban’s unanticipated collapse, December deliveries more than doubled the target figure.³¹⁹ The World Food Programme, in its words, “beat the odds by doubling its food deliveries in the course of a few weeks, thereby assisting vulnerable people before the winter snows isolated them from supply lines.”³²⁰

Clare Short, the British Secretary of State for International Development, argued against the idea of a bombing pause to let in humanitarian aid, saying that she wanted the earliest possible end to the conflict, not a pause which would just prolong it.³²¹ Her argument, however, did not adequately address the problem of the winter. Consider two plausible scenarios, under the assumption that the Taliban was not expected to fall when it did. First, *without a bombing pause*, the

315. WOODWARD, *supra* note 47, at 300.

316. *Id.* at 306.

317. *Id.* See also James M. Lindsay et al., Briefing: Countering Terrorism: The Fall of Kabul and Its Aftermath (Nov. 14, 2001) (transcript on file with Federal News Service) (Stephen Philip Cohen: “[I]t’s going much better than I think any—even the wildest optimist would have predicted.”).

318. *America’s Assistance to the Afghan People: Hearing*, *supra* note 2543, at 9.

319. See WORLD FOOD PROGRAMME, ANNUAL REPORT 2001 23-24 (2002), available at http://www.wfp.org/sites/default/files/2001_wfp_annual_report.pdf (describing amount of October, November, and December deliveries). See also Bear McConnell, Dir., Central Asian Task Force, U.S. Agency for Int’l Dev., Special State Department Briefing: U.S. Aid to Afghanistan (Nov. 14, 2001) (transcript on file with Federal News Service) (describing the goal of 52,00 metric tons of food).

320. WORLD FOOD PROGRAMME, *supra* note 319, at 3. This quote refutes the claim that the problem of the winter “came mostly from spokespersons for the relief agencies, who spent the brutal Afghan autumn noisily scaremongering to the gullible media.” Mark Steyn, *Whatever Happened to Kabul’s Bleak Midwinter?*, TELEGRAPH, Jan. 12, 2002, <http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2002/01/12/do1202.xml>.

321. IDC, MINUTES, *supra* note 262, ¶ 190, available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmintdev/300/1112012.htm>.

Taliban might have been expected to be defeated in early spring 2002, but food deliveries through December would have been inadequate to enable many in the vulnerable population to survive the winter. Second, *with a bombing pause*, the defeat of the Taliban would have taken longer, say until the late spring of 2002, but enough food could have been distributed before winter to save many lives. Granting that the demise of the Taliban had substantial humanitarian benefit to the people of Afghanistan, it is still the case that the second scenario would have been far preferable from a humanitarian point of view.³²²

Michael Walzer makes a similar error to Short's. He writes that "it was suddenly clear, even to many opponents of the war, that the Taliban regime had been the biggest obstacle to any serious effort to address the looming humanitarian crisis, and it was the American war that removed the obstacle."³²³ However, the defeat of the Taliban in time to deliver enough food to avert famine was unanticipated. The question is not whether the U.S. war *in fact* helped deal with the humanitarian crisis, but whether it was morally acceptable to subject the Afghan population to a severe risk that was averted only by an unexpected outcome. An unanticipated positive outcome should not change the moral assessment of an act of reckless disregard.

D. A Merciful War?

Even if the speed of the Taliban collapse was not anticipated, it was not unreasonable to expect humanitarian benefit from the overthrow of that regime. Might this benefit represent a justification for Operation Enduring Freedom?

In a column titled "A Merciful War," Nicholas D. Kristof wrote in the *New York Times* that by his calculations, "our invasion of Afghanistan may end up saving one million lives over the next decade."³²⁴

In each of the last few years, without anyone paying much attention, 225,000 children died in Afghanistan before the age of 5, along with 15,000 women who died during pregnancy or childbirth. There was no way to save those lives under the Taliban; indeed, international organizations were retreating from Afghanistan even before 9/11 because of the arrests of Christian aid workers.

322. Cf. DAVID RIEFF, *A BED FOR THE NIGHT* 255 (Simon & Schuster 2002) ("What if a hundred thousand people die this winter?" Stephanie Bunker, spokesperson for U.N.'s Afghan programs, asked. "Will it matter to those who died if you finally get to do postconflict reconstruction?").

323. Walzer, *supra* note 216, at 19.

324. Nicholas D. Kristof, *A Merciful War*, N.Y. TIMES, Feb. 1, 2002, at A25.

But now aid is pouring in and lives are being saved on an enormous scale. Unicef, for example, has vaccinated 734,000 children against measles over the last two months, in a country where virtually no one had been vaccinated against the disease in the previous 10 years. Because measles often led to death in Afghanistan, the vaccination campaign will save at least 35,000 children's lives each year.³²⁵

Insofar as this argument offers a humanitarian case for OEF, it suffers from three defects: it overstates Taliban interference with vaccinations, it exaggerates the benefits of the replacement regime, and it dangerously presumes an ability to predict long-term consequences.

First, Kristof overstates Taliban obstruction of vaccinations. UNICEF and the World Health Organization estimated that 42 percent of infants were immunized against measles in 1996, 48 percent in 1997 (with the Taliban firmly in power), 40 percent in 1998 and 1999, and 35 percent in 2000.³²⁶ Both the Taliban and the Northern Alliance agreed to ceasefires in their fighting to enable polio immunization campaigns to be conducted in 2000, and again in March and April 2001.³²⁷ Following September 11, but before the defeat of the Taliban, two rounds of National Immunization Days were organized in Afghanistan: the first at the end of September, when more than five million children were vaccinated against polio and received a dose of Vitamin A, and the second from November 6 to 8.³²⁸ The Taliban mobilized 32,000 volunteers for this second campaign, which "ran fairly smoothly" despite the war.³²⁹ An official with the NGO Save the Children told a U.S. Congressional committee shortly before the fall of the Taliban that he anticipated completing a similar measles campaign in the coming weeks.³³⁰

325. *Id.*

326. WORLD HEALTH ORGANIZATION & UNICEF, REVIEW OF NATIONAL IMMUNIZATION COVERAGE 1980-2006: AFGHANISTAN 6 (2007), available at http://www.childinfo.org/files/afghanistan_2006_final.pdf. The estimate for 2001 was forty-six percent. *Id.*

327. Press Release, UNICEF, Cease-Fire Needed for Polio Campaign in Afghanistan (May 18, 2001), available at <http://www.unicef.org/newsline/01pr46.htm>.

328. Memorandum from UNICEF to House of Commons Int'l Dev. Comm. ¶ 17 (Nov. 13, 2001), in IDC, MINUTES, *supra* note 262, available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmintdev/300/1111502.htm>.

329. Clare Kapp, *Immunisation Goes Ahead in Afghanistan Despite Military Action*, 358 LANCET 1701, 1701 (2001). The Taliban called in vain for a halt to the bombing during the campaign; U.N. agencies declined to transmit the Taliban's plea to the United States. Clare Nullis, *Afghan Polio Immunization a Success*, ASSOCIATED PRESS ONLINE, Nov. 9, 2001.

330. *America's Assistance to the Afghan People: Hearing*, *supra* note 254, at 16 (testimony of Andrew Wilder, Field Office Director Afghanistan/Pakistan, Save the Children).

The second problem with Kristof's argument is that the defeat of the Taliban did not mean that vaccinations could take place unhindered. Indeed, just as Kristof was writing his column, fighting broke out between two anti-Taliban warlords in the city of Gardez, interfering with the measles campaign in two underserved provinces.³³¹ In any event, measles immunization coverage did increase from 2001 to 2006 (46 percent to 68 percent),³³² but it was hardly the increase from zero to 100 percent that Kristof implied.³³³

Of course, measles was not the only health problem exacerbated by Taliban rule. The most serious problems related to Taliban restrictions on the rights of women and girls. Prohibitions on most girls' secondary education meant lower female literacy rates, which lead to higher infant and child mortality rates. Restrictions on women's travel meant less medical care for women and especially mothers. In addition, various other edicts and policies gave females inferior health care.³³⁴ Gender disparities in education and health services did improve following the fall of the Taliban, but they remain significant.³³⁵ When Kristof quoted an enthusiastic UNICEF staffer saying "that if all goes well, child and maternal mortality rates will drop in half in Afghanistan over the next five years,"³³⁶ this was an overly sanguine projection.

331. See U.N. Offices for Pak. & Afg., Press Briefing (Feb. 7, 2002), available at <http://www.un.org/apps/news/infocusnews.asp?NewsID=147&sID=4>. For a discussion of what happened in Gardez, see John F. Burns, *Warlord Fends off Warlord, Echoing Afghans' Bitter Past*, N.Y. TIMES, Feb. 1, 2002, at A1.

332. WORLD HEALTH ORGANIZATION & UNICEF, *supra* note 326, at 6 ("Increases in coverage beginning in 2000 are the result of increased donor support.").

333. Kristof said "virtually no one" had been vaccinated in the previous ten years, and that "at least 35,000" lives would be saved per year, which is the total number of estimated measles deaths each year. Kristof, *supra* note 324, at A25. See also U.N. News Service, *Anti-Measles Drive in Afghanistan Launched by U.N. Children's Fund*, U.N. NEWS CENTRE, Dec. 31, 2001, <http://www.un.org/apps/news/printnewsAr.asp?nid=2516>. This implies 100% immunization coverage.

334. See U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, ¶ 26, U.N. Doc. E/CN.4/2000/68/Add.4, (Mar. 13, 2000) (submitted by Radhika Coomaraswamy), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/10d49a98d398bd52802568be0051fd45/\\$FILE/G0011581.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/10d49a98d398bd52802568be0051fd45/$FILE/G0011581.pdf).

335. See, e.g., WOMANKIND WORLDWIDE, TAKING STOCK UPDATE: AFGHAN WOMEN AND GIRLS SEVEN YEARS ON 41-43, 45-47 (2008), available at <http://www.womankind.org.uk/upload/Taking%20Stock%20Report%202008p.pdf>; WOMANKIND WORLDWIDE, TAKING STOCK UPDATE: AFGHAN WOMEN AND GIRLS FIVE YEARS ON 24-26, 28 (2006), available at http://www.womankind.org.uk/upload/Taking_Stock_5_Years_On_Oct2006_english.pdf.

336. Kristof, *supra* note 324, at A25. This prediction apparently assumed that international aid deliveries would match pledges. This has not occurred. See MATT WALDMAN, FALLING SHORT: AID EFFECTIVENESS IN AFGHANISTAN 2 (Agency Coordinating Body for Afghan Relief [ACBAR] 2008), available at http://www.oxfamamerica.org/files/ACBARAidEffectivenessPaper.pdf/at_download/file.

In April 2008, UNICEF reported that a survey done for the Afghan Health Ministry showed “remarkable” progress in lowering infant and child mortality between 2001 and 2004.³³⁷ The survey, though carried out by well-respected experts from the Bloomberg School of Public Health at Johns Hopkins University and the Indian Institute of Health Management Research, had serious limitations.³³⁸ Interestingly, websites of UNICEF and the CIA—updated well

337. See U.N. Econ. & Soc. Council [ECOSCO], Children’s Fund, *Short-Duration Country Programme Document: Islamic Republic of Afghanistan*, ¶ 3, at 2, U.N. Doc. E/ICEF/2008/P/L.10 (Apr. 4, 2008), available at <http://www.un.org/Docs/journal/asp/ws.asp?m=E/ICEF/2008/P/L.10>.

338. For survey, see AFGHANISTAN MINISTRY OF PUBLIC HEALTH, AFGHANISTAN HEALTH SURVEY 2006: ESTIMATES OF PRIORITY HEALTH INDICATORS FOR RURAL AFGHANISTAN (2008), available at <http://www.moph.gov.af/en/reports/Afghanistan-Health-Survey-2006-Report-English.pdf> [hereinafter AHS 2006]. The survey excluded urban areas, which tend to have lower infant mortality rates, and insecure areas, which probably have higher rates. *Id.* at 23. The following problems are evident:

(1) The AHS survey found fourteen percent of children to be aged zero to four and eighteen percent to be five to nine; since the zero-to-four group is typically larger, this discrepancy was attributed primarily to misreporting of children’s ages. This is a common problem when studying poor countries where birth registration records are lacking, but the misreporting was evidently greater in this survey than in a 2003 survey. (The 2003 survey is: THE VULNERABILITY ANALYSIS AND MAPPING (VAM) UNIT OF THE WORLD FOOD PROGRAMME & THE VULNERABILITY ANALYSIS UNIT (VAU) OF THE [AFGHAN] MINISTRY OF RURAL REHABILITATION AND DEVELOPMENT, REPORT ON FINDINGS FROM THE 2003 NATIONAL RISK AND VULNERABILITY ASSESSMENT (NRVA) IN RURAL AFGHANISTAN (2004), available at <http://documents.wfp.org/stellent/groups/public/documents/vam/wfp048582.pdf>.) In the latter survey, the zero-to-four group was 97.8% of the five-to-nine group, compared to 77.8% for the AHS survey. See AHS 2006, *supra* note 338, at 11-12.

(2) The reported number of boy infants is substantially higher than the number of girls. It is not thought that this is due to selective abortion or female infanticide, but to either underreporting girls or misreporting them as boys because of the social stigma of having many female children. The authors of the AHS survey note: “Caution needs to be maintained while interpreting the mortality estimates from AHS 2006. The confidence intervals for the estimates are wide, and the possible underreporting of deaths among girls may lead to an underestimate of the true level of mortality.” AHS 2006, *supra* note 338, at 31. The underreporting of girl deaths, they find, might cause the actual under-five mortality rate, instead of being 191 per 1,000, to range from 184 to 234. See *id.* at 25-31.

(3) The method used for estimating mortality, the Brass method, makes assumptions that are likely false for Afghanistan, as suggested by a study finding that in Bangladesh a Brass-method infant mortality rate of 138 was probably closer to 157 when appropriate adjustments were made. D. C. Ewbank, *The Sources of Error in Brass’s Method for Estimating Child Survival: The Case of Bangladesh*, 36 POPULATION STUD. 459, 461 (1982). In addition, “the mortality estimates are derived from model life tables that reflect experiences of European countries, which do not always apply to the mortality experiences of developing countries—especially developing countries in conflict.” AHS 2006, *supra* note 338, at 24.

after April 2008—do not incorporate these figures.³³⁹ More problematic, however, was that the figures for the comparison year, 2001, were never better than rough guesses,³⁴⁰ and that 2001 was a war year and the third year of a catastrophic four-year drought.³⁴¹ Moreover, it is not known what the Taliban might have done in power subsequent to 2001. In any event, even taking the AHS survey and the 2001 figure at face value, the reported decrease in infant and child mortality rates was about 25 percent, not Kristof's 50 percent.³⁴² This, if true, is

339. See UNICEF, Statistics on Infant Mortality Rate (IMR), http://www.childinfo.org/mortality_infantmortality.php (last visited Sept. 9, 2009) (2005 and 2007 IMR = 165); UNICEF, Statistics on Under-Five Mortality Rate (U5MR), http://www.childinfo.org/mortality_underfive.php (last visited Sept. 9, 2009) (2005 and 2007 U5MR = 257); UNICEF, THE STATE OF THE WORLD'S CHILDREN 2009 118 (2008), available at http://www.unicef.org/publications/files/SOWC_2009_Main_Report_03112009.pdf (2007 IMR = 165; 2007 U5MR = 257); Central Intelligence Agency, World Factbook: Afghanistan, <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html> (last visited Sept. 9, 2009) (est. 2009 IMR = 152). Cf. AHS 2006, *supra* note 338, at 30 (showing the 2004 IMR as 129 and the 2004 U5MR as 191 in table 4.9).

340. See the discussion in INDICATORS, DATA & BEST ESTIMATES: UNICEF'S BEST ESTIMATES 2005 (IN DRAFT) 6, http://www.ands.gov.af/src/src/Goal%204-5-6-Reduce%20Child%20mortality_Improve%20Maternal%20Health_Combat%20HIV_%20Malaria_other%20diseases/PDFs/6-PW%20data%20collection%20I.pdf (“The most recent national coverage mortality data for Afghanistan came from the Demographic & Family Guidance Survey, 1972-1974 Mortality levels for Afghanistan over the last 30 years are unknown and any projection over the period is extremely uncertain.”).

341. See ISLAMIC REPUBLIC OF AFGHANISTAN, MILLENNIUM DEVELOPMENT GOALS: ISLAMIC REPUBLIC OF AFGHANISTAN, COUNTRY REPORT 2005; VISION 2020 15 (2005), available at http://www.ands.gov.af/src/src/MDGs_Reps/MDGR%202005.pdf (describing the drought).

342. The U.S. State Department, U.S. Agency for International Development, and the Afghan Ministry of Public Health do claim an approximate twenty-five percent improvement in one or both of the infant mortality statistics, but the inconsistencies do not inspire confidence. Where AHS 2006 survey claimed an approximate twenty-five percent improvement in IMR and U5MR between 2001 and 2004, *supra* note 338, at 25-31, the State Department claimed in 2008 that “[s]ince 2006, Afghanistan has reduced child mortality (five years and under) by [twenty-five percent],” U.S. Dept. of State, Background Note: Afghanistan, <http://www.state.gov/r/pa/ei/bgn/5380.htm> (last visited Sept. 9, 2009). The U.S. Agency for International Development claimed in 2009 a “[twenty-six percent] drop in child mortality since 2002.” U.S.A.I.D. Afghanistan, Health, <http://afghanistan.usaid.gov/en/Program.28.aspx> (last visited Sept. 9, 2009). In addition, Afghanistan's Health Minister said that the “under-five mortality rate dropped by approximately [twenty-five] percent between 2002 and 2007.” Press Release, U.S.A.I.D. Afghanistan, Minister Fatamie Presents Afghan Health Challenges to U.S. Officials (Aug. 14, 2008), available at <http://afghanistan.usaid.gov/en/Article.362.aspx>. Note that the AHS study used 2001, not 2002, as its comparison year, the year given in UNICEF, THE STATE OF THE WORLD'S CHILDREN 2003 84 (2002), available at <http://www.unicef.org/sowc/archive/ENGLISH/The%20State%20of%20the%20World%27s%20Children%202003.pdf>.

not insignificant and would be an extremely welcome development. However, this brings us to the third problem with Kristof's humanitarian argument for OEF.

Humanitarian benefit can be used—and has been used—to attempt to justify colonial and imperial interventions throughout history.³⁴³ Imagine, for example, if someone tried to justify the Soviet invasion of Afghanistan in 1979 by pointing to the atrocious living conditions in the country and the many lives that would be saved over the long term if Afghan vital statistics could be brought up to the level of, say, Uzbekistan, which was then part of the USSR.³⁴⁴ Now, of course, the Soviet invasion may have cost the lives of a million Afghans,³⁴⁵ but this is far fewer than the number of Afghan lives that might have been saved over several decades had Moscow succeeded in forcibly imposing an Uzbekistan-level of modernity on Afghanistan. This, however, is a very treacherous moral calculus in which to engage. Can those going to or urging war be so certain of the long-term consequences of their actions that the immediate harms and risks are justified? Moreover, can they be so certain that absent war there was no other way that the beneficial results could be obtained?³⁴⁶

This is not to argue that humanitarian intervention must always be opposed. Surely, however, the burden is on anyone who would argue in favor of large-scale violence to prove that no alternative course of action could be expected to yield as positive a long-term outcome. Just war defenders of Operation Enduring Freedom have not met this burden. Indeed, they have not even attempted to meet it.

V. CONCLUSION

Despite widespread endorsement of Operation Enduring Freedom by just war theorists, OEF ran afoul of at least three important just war principles.

The last resort principle requires a nation to make a good faith effort to attain its goals by non-military means before going to war. OEF did not meet this criterion. U.S. policymakers did not seriously pursue alternative courses of

343. See, e.g., Dinesh D'Souza, *Two Cheers for Colonialism*, CHRON. OF HIGHER EDUC., May 10, 2002, at B7.

344. See UNICEF, Uzbekistan: Statistics, http://www.unicef.org/infobycountry/uzbekistan_statistics.html (last visited Sept. 9, 2009).

345. See Death Tolls for the Major Wars and Atrocities of the Twentieth Century, <http://users.erols.com/mwhite28/warstat2.htm#Afghanistan> (last visited Sept. 9, 2009).

346. It might be argued that in the absence of Operation Enduring Freedom the United States and the international community more generally would not have increased their aid levels to Afghanistan in late 2001 and thus many would have starved. This may be so, but this is hardly a defense of the war. Rather, it is an admission that absent political advantage aid donors would have ignored a humanitarian catastrophe. War may have motivated Washington and others to provide aid, but there is no moral reason why aid should or could only be provided in the context of a war.

action. They rejected opportunities to see whether it was possible to get the Taliban to turn over bin Laden without war. Thus, they did not comply with the principle of last resort.

The right authority principle requires that the decision to go to war be made by those who are legally authorized to do so. Any modern understanding of this principle has to consider compliance with both domestic and international law. On both counts, OEF failed to meet this criterion. In terms of U.S. domestic law, there is a strong case to be made that the U.S. Congress did not have the right to abnegate its authority to declare war, as it did by passing the AUMF. Even if it had this right, however, this is an abnegation just war theorists ought to reject. In terms of international law, the United States did not receive—though it probably could have—U.N. authorization to go to war, thus failing to meet the right authority criterion, as well as undermining principles of world order about which just war theorists ought to care.

Finally, the principle of proportionality requires that the costs of a war or of a military tactic, broadly construed, not exceed the benefits. OEF violated this principle in three ways. Prisoners were not properly treated. Civilians were excessively harmed by the direct and indirect effects of the bombing. And, most significantly, the principle of proportionality was violated by putting at extreme risk the well-being of large numbers of Afghans dependent on outside food aid. Violations of these three principles are mutually reinforcing. Going to war when it is not the last resort is wrong; it is even worse when it is done without proper authority. Putting people disproportionately at risk is wrong; it is even worse when the war was perhaps unnecessary. According to just war theory, a state goes to war justly only if *all* the just war conditions are met.³⁴⁷ Even if this view is rejected, however, when a state violates three of the fundamental just war principles, as the United States did in the case of Operation Enduring Freedom, then the war is surely unjust.

If just war theory is to be taken seriously and be more than a rationalization for the military actions of favored governments, then a war that contravenes three of its important principles cannot be deemed just.



347. OREND, *supra* note 3, at 32.

