

The Just War Tradition

Applying Old Ethics to New Problems

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THE JUST WAR INDEX: COMPARING WARFIGHTING AND COUNTERINSURGENCY IN AFGHANISTAN

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Is the use of armed force by international forces in Afghanistan ethically justified? The answer is one of degree: the fighting is neither completely just nor completely unjust. To evaluate the extent of justification, a novel Just War Index (JWI) is introduced. It is a composite indicator: the average of estimated values for seven criteria from the long-standing Just War tradition – Just Cause, Right Intent, Net benefit, Legitimate Authority, Last Resort, Proportionality of Means and Right Conduct, each of which are evaluated on a 7-point scale. Because the two international missions using armed force in Afghanistan – the International Security Assistance Force (ISAF) and Operation Enduring Freedom (OEF) – have different mandates, different histories and different approaches to the use of force, they are evaluated separately. The ISAF mission is found considerably more justified than OEF though still ethically deficient.

Introduction

The Just War tradition provides an ethical framework, refined over many centuries, to assess whether war or the use of armed force is justified.¹ The framework can be contemplated in the abstract or applied to specific cases – past, present or future. It offers a set of important principles (typically five to seven) that cumulatively suggest the degree of moral justification for the application of armed force. These principles have proven so useful and meaningful that they have been largely incorporated into international law (Falk 2004: 40–4) and heads of state refer to it (Obama 2009).² Furthermore, the UN-endorsed ‘Responsibility to Protect’ criteria for humanitarian intervention were based on the Just War principles.³

One of the enduring strengths of the Just War principles is that they provide straightforward answers to some of the most basic questions concerning war and armed force:

Why use force? Just War requires

- (1) a *Just Cause*;
- (2) the *Right Intent*; and
- (3) a *Net Benefit*.

Who should authorize force?

- (4) A *Legitimate Authority*.

When can force be used?

- (5) As a *Last Resort*.

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What level of force?

(6) *Proportional Means* of force.

How and **where** to apply force?

(7) Using *Right Conduct*, including the distinction of military targets from civilian ones.

Frequently the Just War criteria have been used as a simple checklist to declare a war as either just or unjust. However, such applications carry the danger of oversimplification and can too easily be used to justify force. For example, if each criterion is somewhat satisfied (as is often the case), a proponent might declare the entire war just. Alternatively, if one criterion is not satisfied, an opponent might declare the war unjust. A more refined application takes the Just War framework beyond simple binary evaluation of yes/no or just/unjust and recognizes that the criteria are usually satisfied to a degree. To handle this, a new measure, the Just War Index (JWI), is introduced. In the JWI analysis, numerical scores are given to each Just War criterion and the JWI is the average of the scores. The JWI approach can help one to compare the pros and cons of different strategies or operations within the same conflict. Surveys of experts have also been used to estimate JWI.⁴ In this paper, the JWI is applied to the Western intervention in Afghanistan after 11 September 2001.

Afghanistan provides an excellent intellectual ‘proving ground’ for a Just War Index analysis since several international forces are in the country, struggling to achieve different ends with different means. The United States set up Operation Enduring Freedom (OEF) as the operational arm of the Global War on Terror (GWOT), with the primary objective to ‘defeat terrorists’, especially Al Qaeda and more broadly the Taliban. The North Atlantic Treaty Organization (NATO) operates the International Security Assistance Force (ISAF), whose mission is to enhance security in the country. Over time, ISAF fashioned itself as a counterinsurgency mission. Thirdly, the United Nations Assistance Mission in Afghanistan (UNAMA) has the aim of creating conditions for a long-term peace. While these missions overlap significantly, their methods differ considerably, including the degree and type of armed force applied. Broadly speaking, the three missions can be classified as warfighting (OEF), counterinsurgency (ISAF) and peacebuilding (UNAMA). OEF displays less restraint than ISAF, though since 2008 the two have been brought under a common (American) commander. UNAMA has only a small cadre of uniformed personnel and no mandate or ability to use force beyond self-protection, so it is not considered here. In the future, however, it may be given a stronger and more robust peacekeeping role.

Evaluation Using a Just War Index

Each of the seven Just War criteria is analysed and quantified independently for the degree of ‘justness’ or ‘unjustness’ for the case at hand. A range of +3 to –3 was chosen to give the required fidelity in the scoring of each criterion. This range reflects nuance in judgement and the consideration of a number of factors. One way to look at the seven-point scale is to associate meanings to the numbers:

- +3 Strongly just
- +2 Moderately just
- +1 Slightly just
- 0 Neutral
- 1 Slightly unjust

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- 2 Moderately unjust
- 3 Strongly unjust.

The average of the seven criteria on the seven-point scale is the overall score or the JWI. This score gives a measure of the relative ethical justification among missions. The score for each criterion also helps describe the factors that need to be considered for the overall assessment.

The JWI is an analytical tool with heuristic utility to help formulate, explain and quantify evaluations of the use of force. As with any ethical assessment, the results are subjective and are strongly influenced by the assessor's world perspective and other biasing factors. In addition, the equal weighting of the criteria in calculating JWI is open to debate: some criteria might be more important than others. Nevertheless, the average over all criteria serves as a good indicator of overall merit.

The JWI's strength comes from its sliding, numerical scale. A numerical scoring system can overcome the bluntness of the simple checklist, while still producing convenient and rational portrayals of justice in war, and rendering an overall assessment. The JWI can help give a broad-brush picture, in this case of international forces in Afghanistan, as well as a quantitative sense that is often absent from philosophical reflections. It retains a level of specificity (seven components) that helps cover the important ethical factors.

However, there remain acknowledged deficiencies in the JWI approach similar to that of a checklist. Only seven criteria are considered and even these have areas of overlap.⁵ As with a checklist, the greatest value comes from the prudential questions that are asked, focusing attention on important ethical aspects of a conflict. The JWI method gives a quantitative feel to the explanations for each criterion. To assign a score one must consider both the positive and negative sides of the operations. Extreme assessments (scores of -3 or $+3$) rarely describe the real world, even for individual criteria, since all actions have some merits or drawbacks, however minor. The seven criteria are all sufficiently important to merit independent assessment. Using the basic questions and seven criteria listed above, we can now examine the two Afghan operations.

Why Fight?

This fundamental question for any conflict finds a natural answer in Just War theory: there must be a Just Cause coupled with the Right Intent to fight. In addition, there should be a Net Benefit arising from the fighting, so the damage done does not exceed the good achieved. In the case of Afghanistan, the two missions, OEF and ISAF, are deployed for quite different causes.

1. Just Cause

The Bush administration formally launched OEF in October 2001 as the operational (military) arm of its GWOT. The goal of this 'global war', in the view of President Bush, was to defeat 'the terrorists' and OEF was a direct response to the terrorist attacks of 11 September 2001. Speaking hours after the attack, Bush told the world he had ordered a search 'for those who are behind these evil acts'. He also vowed to make 'no distinction between the terrorists who committed these acts and those who harbour them' (2001a). On 20 September 2001, in a joint session of Congress, Bush (2001b) vowed, 'We will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has

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a decision to make. Either you are with us, or you are with the terrorists'. This 'Bush doctrine' became the justification for the October–November 2001 'regime change' in Afghanistan since the Taliban government was known to openly harbour Al Qaeda. From the beginning, the cause behind OEF was clearly stated (i.e. the defeat of terrorism), even if its logic and application to the Taliban government may be questioned.

After the fall of the Taliban government in November, President Bush (2001c) wanted to leave the 'nation-building mission' to the United Nations. The UN Security Council established the ISAF mission on 20 December 2001, as envisioned in the Bonn Accords two weeks earlier. The UN-mandated military mission was tasked to assist with the 'maintenance of security' in Kabul and surrounding areas in order to allow Afghan authorities and UN personnel to 'operate in a secure environment' (United Nations 2001). The Council also requested ISAF to help establish and train new Afghan security forces.

Thus, the main purpose behind ISAF is to provide security in the country, which in turn should help prevent the spread of 'terrorism' by removing Afghanistan as a potential base for terrorist training. Furthermore, ISAF's goal under NATO continues to be to 'assist the Afghan Government in exercising and extending its authority and influence across the country, paving the way for reconstruction and effective governance' (NATO 2009b). ISAF gradually expanded its coverage from the Kabul region to the entire country. Its Provincial Reconstruction Teams support nation building, particularly by trying to secure areas for national and international development actors. ISAF also strove to create a secure environment for the 2004, 2005 and 2009 national elections (ISAF 2004a). In seeking to achieve this goal ISAF has faced a growing anti-government insurgency which has made this task more difficult and costly.

No doubt the Taliban government of Afghanistan in 2001 deserved some form of punishment well beyond the sanctions already applied by the United Nations for its 'delict' of harbouring the terrorist group Al Qaeda that attacked the US (see Brown, Proportionality, this issue). But waging war and overthrowing the government is the strongest form of punishment and one that arguably diverted the US from the primary goal of defeating Al Qaeda, though it did remove an odious rights-violating regime. While the singular focus on defeating terrorists may have received a high mark in and of itself, the inclusion of removing a regime is less just. Given the mixed nature of the OEF operation, which made no distinction between the Taliban and Al Qaeda, a score of +1 for just cause seems appropriate.

In contrast to OEF, ISAF was created after the Taliban's ouster, which the UN-mandated mission had to accept as a *fait accompli*. It was tasked to assist with the 'maintenance of security' in Kabul and surrounding areas. ISAF helped establish and train new Afghan security forces. The Council mandate did not specify an ISAF role in fighting insurgents but the growing focus on the insurgency was natural for NATO, as this constituted the greatest threat to ISAF's and Afghanistan's security. Although ISAF has not succeeded in its mandate of creating a secure and stable environment, its cause is deemed valuable and well justified. ISAF can be awarded a score of +2.

Just Cause: OEF: +1; ISAF: +2

2. *Right Intent*

Intent is one of the most difficult qualities to measure. But the Bush administration's black-and-white view of the world and its subsequent approach in OEF makes judgement easier. The US divided the world into those who are 'with us, or you are with the terrorists'

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(Bush 2001b). Such a simple worldview, though self-aggrandizing, would seem to make the question of intent clearer. This was articulated by a president who saw himself as the main representative of good in the battle with evil. But the Obama administration has dropped this Manichean language, along with the term 'Global War on Terror'. It rapidly expanded the number of US troops in Afghanistan to 100,000 in 2010, taking a more pragmatic approach rather than an ideological one. The intent is now driven by a new factor: not to lose to the Taliban. A US withdrawal from Afghanistan in the face of a resurgent Taliban would be an unacceptable victory for the insurgents. Given the range of positive and negative factors, the intent behind OEF (2001 onwards) is quite mixed. Considering the factors on both sides, a score of +1 (slightly positive) seems merited.

The intent behind ISAF has been clearly articulated by the Canadian government, which has played a major role in the mission. Canada cited humanitarian grounds as it sent forces to ISAF in 2003, when ISAF forces were mostly confined to the Kabul region. Prime Minister Jean Chrétien (2003) stated: 'We are committed to helping the Afghani people build a democratic, pluralistic society'. His successor, Prime Minister Paul Martin (2004) cited the dual purposes of 'reviving a failing state, for humanitarian reasons and at the same time ensuring that it cannot be used as a base of operations for terrorists'. Conservative Prime Minister Stephen Harper (2006) added another reason: to 'regain the trust of the allies'.

Similarly, NATO sought to prove that it could be a useful alliance at the forefront of international security and the fight against terrorism. It was also seeking to build a stronger role for itself after the end of the Cold War. Leading ISAF since 2003, however, the alliance found its mission a greater burden and of longer duration than expected. Still, with the new people-centred ISAF approach, having the goal of winning hearts and minds, ISAF has recently been showing itself to be a military alliance with adjusted priorities and with a modus operandi that goes far beyond simply killing Taliban enemies.

Right Intent: OEF: +1 ISAF: +2

3. Net Benefit

The net benefit, weighing the gain against the harm, has declined over time for both OEF and ISAF. As these missions prove unsuccessful in overcoming Taliban resistance and government progress is painstakingly slow, the outlook has become increasingly pessimistic and even the words 'likely failure' have been used by commanders.⁶

On a positive note, there has not been a successful terrorist attack since 2001 against civilian targets in Western countries from elements trained in Afghanistan. However, a few successful attacks and many attempts were made by indigenous ('home-grown') Western terrorists who found international operations in Afghanistan so offensive they vowed to retaliate against what they saw as an imperialistic and oppressive West.⁷

Thanks to the initial war waged by OEF, Al Qaeda no longer has a safe haven inside Afghanistan. It has moved its weakened base to the untamed and violent border areas of Pakistan and has been much reduced in strength, though branches have popped up in other parts of the world. Its founder and leader, Osama bin Laden, has been killed. The Taliban is no longer in control of the central government in Afghanistan, though it controls large swaths of Afghan territory using guerrilla tactics. Compared to 2001, the human rights situation has improved substantially, especially for women, though the

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current government commits many human rights violations and many Afghan regions are still under Taliban or warlord control.

The capacity of the Afghan National Army has grown considerably. It has far surpassed the original recruitment goals, having some 150,000 soldiers at the end of 2010, already surpassing the maximum number of Afghan regular forces at the time of the Soviet occupation (Nyrop & Seekins 2006). The aim is to reach 270,000 by 2014, when Afghanistan is supposed to take responsibility for its own security (NATO 2009a: 12). The economy has grown substantially, though the illegal drug trade still forms a major part of it. New markets have opened with neighbouring countries for Afghan farmers. Over one-half million hectares of land have been rehabilitated since 2004, often using new irrigation systems. Cereal production almost doubled between 2001 and 2007, and agricultural cooperatives have grown exponentially, increasing the number employed from 7,400 in 2002 to 142,600 in 2007. Electricity production tripled from 2002 to 2008. Some 20,000 km of rural access roads have been constructed or repaired and Afghanistan's main national transport artery, the 3,000 km 'ring road', is almost entirely re-paved and re-furbished (at huge international expense) (NATO 2009a: 37-8). On the education front, between 2001 and 2008, 3,500 schools were built, and 19 universities are now providing higher learning. Seven million children are enrolled in school, including two million girls (NATO 2009a: 32). Health wise, 85 per cent of Afghans have access to a 'Basic Package of Health Services'.

While some specific figures for Afghanistan are encouraging, the overall quality of life picture is discouraging. Life expectancy at birth is only 43.6 years (United Nations Development Programme 2009). The UN Human Development Index 2009 ranks Afghanistan second last (only surpassing Niger) in its list of 182 nations (Rawa News 2009). This abysmal rank comes despite almost a decade of international aid and reconstruction efforts and the immense help provided by NATO countries. The country received over US\$ 36 billion of aid for development and reconstruction from 2001–09, according to the Afghan government, although this number may be grossly underestimated (Bumiller & Landler 2009). Moreover, most of the gains are in the north and west of the country, as opposed to the Pashtun south, the heartland of the Taliban.

The costs of the military campaign have been enormous. The US spent \$223 billion for OEF from fiscal years 2001 to 2009 inclusive (Belasco 2009).⁸ Moreover, these are 'incremental' costs, which are in addition to baseline military costs that cover normal salaries and equipment purchases.

The cost in national treasure for foreign countries is exceeded only by the cost in national blood, not to mention Afghan blood. The number of foreign lives lost to mid-2011 stood at over 2,500: 1,640 Americans, 374 British and 156 Canadians and 384 from other countries (icasualties.org 2011). What makes the statistics more alarming is that the annual number of fatalities is rising steadily for coalition forces, as shown in Figure 1, indicating the growing power of the insurgents.

The dramatic increase in military fatalities has aggravated the split in the NATO alliance. Many contributors impose limitations on the use of their forces ('national caveats') and some nations such as Germany are unwilling to send forces into high-intensity combat areas. Thus, there is a growing distinction between those carrying the 'heavy burden' of combat and those limiting themselves to less lethal projects. Furthermore, the withdrawal of the Netherlands forces in 2010 and Canadian forces from combat duty in 2011 further strained relations between ISAF partners, particularly with the United States.

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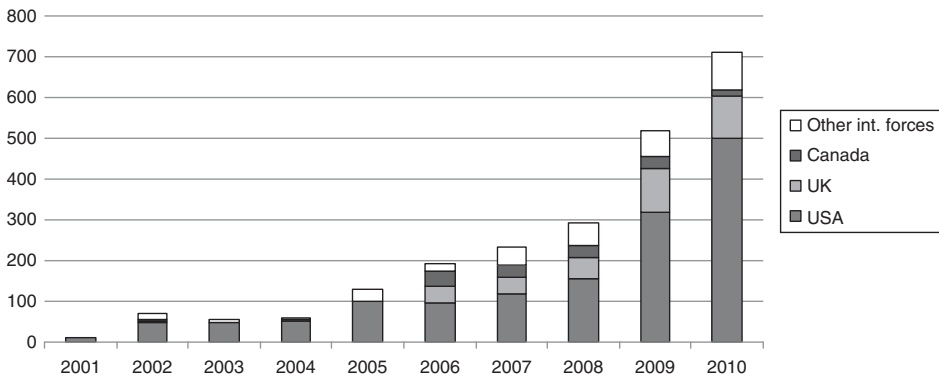


FIGURE 1

Coalition fatalities by year since 2001 (OEF and ISAF). Data source: icasualties.org. Figure by author.

Within Afghanistan, the corruption of the Karzai government, the spectre of increased warlordism, widening banditry and opium production remains alarming. Human rights abuses by government forces as well as insurgents persist, especially in the South. The Afghan National Police, in particular, remains notoriously corrupt.⁹

The negative effects of the Afghanistan war are not confined to that country but have swept with a vengeance into neighbouring Pakistan. The anti-American movement coalesced with the December 2007 creation of Tehrik-i-Taliban Pakistan (literally, 'Students' Movement of Pakistan'). The Pakistani movement not only destabilizes Afghanistan by providing fighters and refuge, but also threatens the stability of the Pakistani state. Furthermore, it may be a source of future terrorism against the West. A series of bombings have resulted in fighting between government forces and insurgent/Taliban fighters in the tribal areas on the Afghan border. This conflict is spreading from northern areas of Pakistan to its major cities, including its capital.

While the net effect of the overthrow of the Taliban by OEF is only slightly positive, the disruption of Al Qaeda and the killing of Osama bin Laden in Pakistan on 2 May 2011, pushes the score to +1. ISAF is similar since it has experienced modest success in its humanitarian and reconstruction projects, giving it score of +1. But both missions have mixed results to show after immense efforts for almost a decade.

Net Benefit: OEF: +1; ISAF: +1

Who Authorized Force?

4. *Legitimate Authority*

For an intervention to be just, it must be approved by a legitimate authority.¹⁰ Under international law, only the Security Council can authorize the use of force across borders.¹¹ The UN Charter (Article 51) also recognizes 'the inherent right of individual or collective self-defence 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'. But Article 51 does not give nations the unlimited right to act anywhere in the world for any length of time with any amount of force in the name of self-defence.

The Security Council authorized neither the US invasion of Afghanistan nor the establishment of OEF, contrary to common belief. Some people, scholars included

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(Pugh 2007), erroneously believe that OEF gained approval from the Security Council through its Resolution 1368, passed unanimously the day after 9/11. On September 12, the Council did reaffirm the inherent right of self-defence 'in accordance with the Charter', but the resolution made no mention of Afghanistan or of US military action. It certainly did not authorize an invasion of Afghanistan or the establishment of a US military operation (OEF) to wage a global war on terror.¹² In the few weeks after 9/11, it became apparent that the Bush administration did not want to be limited by any international body, including the Security Council or the North Atlantic Council. The US fought the Taliban directly as well as indirectly by aiding indigenous anti-Taliban forces (the 'Northern Alliance') without explicit Security Council approval. In fact, the Council did not pass a resolution on Afghanistan until 14 November 2001, the day after the Taliban government fled Kabul under heavy US bombardment. Resolution 1378 of that day merely expressed 'support for the efforts of the Afghan people to establish a new and transitional administration' and encouraged 'Member States to support efforts to ensure the safety and security of areas of Afghanistan no longer under Taliban control'. It was very different from authorizing force under Chapter VII of the UN Charter. No mention of Chapter VII (enforcement) was made in that resolution.

By contrast, ISAF was UN authorized. It was created by the Security Council in Resolution 1386 of 20 December 2001. The resolution included the phrase of 'acting under Chapter VII', though ISAF was not envisioned as an enforcement mission but as a security provider. The Council gave ISAF its mandate and sanctioned its 'taking all necessary measures to fulfil its mandate'. The Council reviewed and extended the mission every six months or annually since 2001.

It was not until 16 April 2003 that the North Atlantic Council, NATO's highest decision-making body, agreed that NATO would assume leadership of the ISAF operation with UN agreement. The military alliance aimed at continuity for the UN-mandated mission as indicated by the title of the NATO announcement (2003a): 'Same name, same banner, same mission as NATO enhances ISAF role'. The Security Council provided the mandate and the North Atlantic Council provided some political direction for the mission, while strategic command and control is exercised by NATO's main military headquarters. NATO Spokesman Yves Bordeur stated: 'ISAF will continue to work within the UN mandate and will operate according to the current and future UN resolutions' (NATO 2003b). ISAF also includes at least a dozen non-NATO nations.

Thus ISAF is responsible to two higher bodies: both the UN Security Council and NATO headquarters. ISAF is required to present quarterly reports to the Security Council. This reporting requirement is important if the Council is to influence the mission mandate and direction, and for accountability. ISAF reports sent to the United Nations, though sometimes many months late, provide a succinct overview of the diverse activities of ISAF and the challenges the mission faces. In contrast to ISAF, OEF assumes it has no reporting requirements to the United Nations, though Article 51 of the Charter states that 'measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council'.

The only mention of OEF in Council resolutions is in relation to ISAF. The first reference came in Resolution 1510 on 13 October 2003, when the Council requested ISAF 'to continue to work in close cooperation' with several entities, including OEF, in the implementation of the ISAF mandate. In 2006, by Resolution 1659, the Council called for closer operational synergy with OEF. Thus, it is fair to state that OEF was not

'UN authorized' but it was eventually 'UN recognized' as being in Afghanistan, some two years after its unilateral establishment.

Thus, the OEF and the ISAF missions have completely different authorizations. As described, ISAF was authorized and mandated by the UN Security Council. Its mandate has been renewed on an annual or semi-annual basis. By contrast, the US-led OEF has neither Security Council authorization nor mandate. It did gain US Congressional approval, but this falls short of the demands of the UN Charter and of the international rules governing the use of force, especially for large military actions such as overthrowing an established government (even one not widely recognized). From its creation, OEF's use of the self-defence provision of the UN Charter has rung hollow since no Security Council resolution authorized the use of force in Afghanistan. Many years after the US invasion the self-defence argument grows even weaker since Article 51 limits self-defence to a period 'until the Security Council has taken measures necessary to maintain international peace and security'. The Security Council has undertaken many measures since 9/11, including the creation of ISAF. Furthermore, if OEF were operating under Article 51, it would be obliged to submit reports to the Security Council, which it does not do. By contrast, ISAF reports regularly, if not always punctually, to the Council. Thus, the scores for the two missions are quite dissimilar for this criterion:

Legitimate Authority: OEF: -2 ISAF: +3

When to Fight?

5. Last Resort

For armed force to be legitimate according to Just War theory it should be applied only as a 'last resort', when all other means of conflict resolution have been exhausted. To what extent were OEF and ISAF initiated as a last resort? And when they employed force in the field, to what extent was it a last resort?

It was apparent to virtually everyone that the US needed to take some type of action against the perpetrators and planners of the 9/11 attacks. Within days of the attack, the US fingered Al Qaeda as responsible. Its leader, Osama bin Laden, and his associates were known to be hiding in Afghanistan, where they had training camps. A week after 9/11, as the Central Intelligence Agency and the US military were preparing to mobilize, President Bush (2001b) made a series of demands, 'not open to negotiation or discussion', of Taliban leaders. The President's demands were: 'Close terrorist training camps; hand over leaders of the al Qaeda network; and return all foreign nationals, including American citizens, unjustly detained in your country'. In his address of 7 October 2001, on the eve of the first OEF strikes, Bush (2001d) declared 'none of these demands were met' and 'the Taliban will pay a price'. Bush informed the nation and the world that he ordered 'strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan'. Bush did not state that he was engineering a regime change. That was only insinuated but became readily apparent a few weeks later (Bush 2001c). The Taliban regime in Kabul was overthrown in just 49 days.

There was no attempt to negotiate with the Taliban *de facto* government for the hand-over of the Al Qaeda leadership. Prior to the aerial bombardment, the Taliban showed a willingness to send bin Laden for trial in an Islamic court or a third country (Frantz 2001). But the Bush Administration eschewed any bilateral dialogue, communicating

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its ultimatums instead through Pakistan, a neighbour decidedly unfriendly towards Afghanistan (Moellendorf 2002).¹³ Other possible methods were also pushed aside in favour of regime change. The US did not limit itself to Special Forces operations to locate, capture and try the Al Qaeda individuals deemed responsible for 9/11 attack, or to apply penalizing sanctions against the Taliban for their support of Al Qaeda post 9/11, or even targeted assassinations against a number of Al Qaeda or Taliban leaders. 'Last resort' was not a principle declared relevant by the Bush administration in 2001.

After the fall of the Taliban government, the Bush administration also did not follow the principle of last resort. The Taliban and its allies were not invited to send any representatives to the December Bonn conference. When questioned during a 28 December 2001 press conference about when he believed that the war would be complete, Bush (2001e) responded: 'Taliban gone, the country secure, the country stable, Al Qaeda cells rounded up, Taliban fighters brought to justice'. Bush (2001f) stated what, in effect, were war aims for the Afghanistan campaign, including: 'making sure the Taliban is out of existence'. A decade later with a resilient Taliban, it is apparent that Bush's approach was not only lacking in any outreach or reconciliation, but the goal of wiping out the Taliban was naïve.

Unlike OEF, ISAF was not party to the overthrow of the Taliban regime. When ISAF was created in December 2001, the United Nations was presented with a *fait accompli*: the Taliban had been replaced by another regime, of which the leader, Hamid Karzai, had been handpicked by the US government. The UN-mandated ISAF mission was originally designed to have a light military footprint, in accordance with the views of the UN Special Representative in Afghanistan, Lakhdar Brahimi (UNIS 2002). It thus operated in a defensive mode for the first few years, protecting only Kabul and its environs. This gave plenty of time to the Taliban to adjust to the new situation—some would say time to rearm. Beginning in 2005, ISAF expanded to other provinces, seeking to extend governmental control over large swaths of territory still under the Taliban. ISAF employed increasingly offensive tactics. At first the Taliban resisted using conventional military methods. The rebel force massed large numbers of its 'soldiers' to hold territory. However, NATO gained substantial victories in such force-on-force encounters. So the Taliban resorted to guerrilla tactics, suicide bombing imported from Iraq after 2003, and the use of improvised explosive devices (IEDs), to deadly effect. Even still no attempts were made by ISAF to engage in negotiations.

Under President Obama, the US approach to force has become more nuanced and sensitive. The principle of last resort, though not declared explicitly, now appears in ISAF counterinsurgency guidance. ISAF commander Stanley McChrystal issued directives in 2009 to minimize force in order to reduce casualties and collateral damage. He further stated: 'This directive does not prevent commanders from protecting the lives of their men and women as a matter of self-defence where it is determined *no other options* are available to effectively counter the threat' (ISAF 2009, emphasis added). The specific options were deleted from the publicly released document due to 'operational security'. But the last resort provision is clearly stated.

The last resort provision of the Just War framework states that all peaceful means should be exhausted before deadly military force is brought to bear. Both OEF and ISAF are flawed from this point of view since no attempt to negotiate with the opponent has been made—though this may change in the future, as all sides grow weary of war. Negotiations at the local and national level may prove to be the only way to end the war. Before the

overthrow of the Taliban government, the US delivered ultimatums but made no effort at discussion, though several avenues remained unexplored, such as the Taliban offer to submit bin Laden to trial in a third country (Bush 2001c). Furthermore, the US has remained adamant that no negotiations are possible with terrorists, ignoring that insurgent fighters include moderates and those simply defending their homeland against 'foreign occupiers'. While ISAF as a whole has not conducted negotiations, some national contingents within ISAF, including the United Kingdom and the Netherlands, have attempted limited local discussions and negotiations. Nevertheless, any efforts to negotiate have been neither sustained nor supported by ISAF as a whole, and the battle with the Taliban has been waged without any effort to date to explore peaceful means of dispute settlement, save a demand for Taliban surrender.

In 2001, alternatives to force were not considered. Military historian Sir Michael Howard observed about the Global War on Terror: 'the use of force is seen no longer as a last resort, to be avoided if humanly possible, but as the first' (Howard 2001). Because OEF was involved at the outset of hostilities, when alternative (peaceful) means could have been tried, its score is considerably lower than that of ISAF, though they both ignored the 'last resort' provision. In contrast, ISAF makes some mention of last resort in its Commander's 2009 Directive. However, negotiating with the Taliban leadership is not one of the options currently used, though this may change.

Last resort: OEF: -2; ISAF: +1

What Level of Force?

6. Proportionality of Means

Both OEF and ISAF employ far more sophisticated, accurate and lethal weaponry than do the insurgents. Whereas Western forces utilize high-tech weaponry such as strategic and stealth bombers, cruise missiles, unmanned Predator drones, Leopard tanks, and Bradley fighting vehicles, insurgents are limited to small arms: rocket-propelled grenades, assault rifles, mines, booby traps and IEDs. The numbers of combatants on both sides also shows dissimilarity. Taliban forces are typically estimated at only 10,000 to 20,000 strong. Other insurgent groups may have the same number in total. The OEF and ISAF together make up over 130,000 and the Afghan National Army has about the same number, though this abundance of forces does not ensure victory.

This asymmetry in forces does not necessarily imply that coalition means were disproportionate. Sophisticated weaponry and large numbers are necessary for the protection of coalition forces and civilians, particularly when the enemy is indistinguishable from the civilian population. It is often necessary to use high technology and precision weapons to detect and destroy insurgents at night and prevent harm to civilians. However, the amount of firepower used was immense and air strikes have been heavily criticized for the large numbers of civilian casualties. Typically, 500–1,000 civilians a year die from coalition attacks.

OEF relies heavily on Special Forces and armed CIA drones to conduct search and destroy missions as well as targeted assassinations. ISAF and UN project managers have sometimes complained that their development efforts, having the goal of winning hearts and minds of locals, have been rendered ineffective, if not sabotaged, by OEF's uncoordinated attacks.

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More importantly, the strategic question concerning OEF is: was an invasion of a country and overthrow of a regime necessary to deal with Al Qaeda and its leader Osama bin Laden? Was this a proportionate response? The main supportive argument is that otherwise the Taliban would have continued to harbour terrorists, even in the face of limited US surgical attacks. While such a statement is counterfactual and not verifiable, especially given the uneasy relationship that existed between the Taliban and their foreign terrorist visitors, it is true that the defeat of the Taliban government dealt a heavy blow to Al Qaeda, forcing its fighters to move to the tribal belt of Pakistan. But an equally strong counterfactual argument also holds: a more precise series of attacks on Al Qaeda targets could have yielded better results, possibly even the capture of bin Laden early on. The search for a small network of individuals would have been much easier for Special Forces and US intelligence agencies if the country had not been turned upside down through regime change. By whacking the hornets' nest, so to speak, it became much harder to find the hornets that had originally stung America.

In summary, given that OEF employs more offensive measures, more targeted assassinations, and less caution than ISAF, its proportionality criterion is quantified as net neutral (0) while ISAF is positive (+2). Both types of coalition forces, desperate to defeat the Taliban, have sought military dominance using overwhelming force. The failure of such a strategy to achieve victory has shown that it is not only the level of force but the strategy and conduct of the forces that matters.

Proportionality of Means: OEF: 0; ISAF: +2

Where and How to Fight?

7. *Right Conduct*

Right Conduct is concerned with the ethical application of armed force in the field, including that it be applied as humanely as possible, in accordance with the laws of armed conflict. This includes attacks only on military, not civilian, targets. Thus, some locations are clearly out of bounds for targeting, such as medical facilities or civilian facilities and events, such as weddings. Furthermore, targets should be chosen so as to not to inflict harm on innocent persons and civilian structures. The *risk* of civilian fatalities must be minimized, if not eliminated. This principle of *distinction* (sometimes referred to as *discrimination*) between combatants and non-combatants is not only part of the Just War tradition but has become a key part of the law of armed conflict, including the 1977 Additional Protocols to the Geneva Conventions. In guerrilla warfare, however, distinction can pose a difficult challenge since insurgents often mix freely with the local civilian population.

The record of undesirable collateral damage, especially from US air strikes is substantial and highly tragic, showing that risks were not successfully minimized. For instance, early in the war, the Red Cross compound in Kabul was hit by stray bombs on two occasions (16 and 26 October 2001) (PBS 2001; Telegraph 2001). Many other documented occasions of incorrect targeting and seemingly indiscriminate use of force have been documented (see AFX News 2007; MSNBC 2007; Human Rights Watch 2008; Sameem 2008; United Nations 2008; Agence France Presse 2009). President Karzai firmly and frequently insisted that foreign forces exercise greater discretion in aerial attacks, in entering into Afghan homes (especially night raids undertaken by OEF) and called for an end to civil casualties. The Obama administration proved sympathetic to this call. In 2009,

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General McChrystal finally issued directives to minimize casualties, which was largely successful. The Tactical Directive of 9 July 2009 stated that ‘excessive use of force resulting in an alienated population will produce far greater risks’ and called for the ‘carefully controlled and disciplined employment of force’. He limited the use of force, especially close air support, against residential compounds and other locations where civilian casualties are likely.

NATO directed that forced entry into Afghan houses should be done by Afghan National Security Forces rather than ISAF soldiers. Since mosques have a special protected status for Muslims, the commander also specified that ‘no ISAF forces will enter or fire upon a mosque or any religious or historical site except in self-defence’ (ISAF 2009). Furthermore, ISAF forces have been given orders to consider ‘tactical withdrawal’ rather than calling for air support in civilian-populated areas (Rondeaux 2008), where collateral damage from combat can be significant.

The United Nations has been tracking local fatalities attributable to both ‘anti-government’ and ‘pro-government’ forces (including the Afghan Government and all international forces). The casualty counts from both sides have increased dramatically, as shown in Table 1. While the bulk of fatalities can be attributed to the anti-government elements, this does not absolve Western forces from having caused many civilian deaths, especially before the 2009 restrictions were placed on the use of force.

Right conduct in Just War theory includes adherence to the international laws of armed conflict, especially the Geneva Conventions. However, the United States held that the Geneva Conventions were not binding in the Global War on Terror and hence they were not applied uniformly in OEF in Afghanistan. The Bush Administration claimed that terrorists were not lawful combatants so they did not deserve the rights and protections granted by the Geneva Conventions. The GWOT not only bent the rules of armed conflict (Bush 2006) but also distorted them to such an extent that the US Supreme Court ruled that certain US practices were unlawful, especially in relation to detention.¹⁴ Prominent in news coverage was the unlawful treatment of prisoners (‘detainees’) from Afghanistan and elsewhere held in the Guantanamo Bay. The facility was deliberately chosen since it was located outside the continental US and hence presumed outside the reach of US courts.

At Guantanamo, CIA interrogators employed a variety of coercive techniques on suspects. In particular, water-boarding (forced suffocation) was used at least 266 times on two prisoners at the facility (Shane 2009). Other practices later disclosed included choking, mock executions and threatening a prisoner with a gun and power drill, and another with threatening to kill the detainee’s children. Sleep deprivation was common. The growing list of atrocities led Obama’s Attorney General Eric H. Holder Jr. to appoint a criminal prosecutor to investigate the interrogations of suspects (Mazzetti & Shane 2009).

TABLE 1

Civilian fatalities in Afghanistan caused by anti-government elements and pro-government forces, including international military forces from 2007 through 2010. Data Source: UNAMA (2011). Figure by author.

	2007	2008	2009	2010
By Anti-Government Elements	700 (46%)	1,160 (55%)	1,630 (67%)	2,080 (75%)
By Pro-Government Forces	629 (41%)	828 (40%)	596 (25%)	440 (16%)
By Others or undetermined	194 (13%)	130 (5%)	186 (8%)	257 (9%)
Total civilian fatalities	1,523	2,118	2,412	2,777

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Similarly, the treatment of detainees within Afghanistan also caused considerable controversy since coalition forces were not able to guarantee that persons they turned over to the Afghan government were not being tortured. Detainee treatment after transfer to Afghan authorities has also been a challenge for the US, particularly after the US State Department's 2008 annual report on the human rights situation around the world stated that women and children detainees face rape in Afghan prisons, whilst 'security forces continued to use excessive force, including beating and torturing civilians,' as well as 'pulling out fingernails and toenails, burning with hot oil, beatings, sexual humiliation, and sodomy' (Koring 2009). Under the Geneva Conventions it is a crime to turn over prisoners if they will likely be tortured.

Improper conduct by US forces in Afghanistan was in theory investigated and punished via court-martial under the Uniform Code of Military Justice. But many deadly incidents have gone unpunished, including cases of friendly-fire and civilian deaths. Furthermore, the US insists that its forces are immune from prosecution by the International Criminal Court (ICC), given that the Bush administration has 'unsigned' the ICC Statute. Furthermore it forced immunity agreements upon ICC signatories, including Afghanistan (Elsea 2002), so that no US soldier could be brought before the Court.

The loss of Afghan civilian lives in coalition attacks, particularly from the air, has been both considerable and very tragic. In cases where insurgents use civilians as 'human shields', blending into the population to defend themselves, the resulting civilian casualties are explainable, if not defensible. However, on too many occasions the use of force was excessive and the choice of targets inappropriate, as evidenced by frequent Afghan and international news reports. This is particularly true for OEF, which commanded most of the air strike assets. Although civilian fatalities are not deliberate, due caution appears not to have been exercised by international forces, particularly OEF, to the degree possible.

The issue of improper conduct by international forces extends from excessive fatalities to the treatment of detainees. As outlined above, OEF has employed detention facilities and methods illegal under international law. To a lesser extent, ISAF forces have been complicit in this potential war crime by handing over detainees to the US and to the Afghan government. The Afghan government's domestic intelligence agency, the National Directorate of Security, is known to commit frequent human rights abuses such as torture. Most ISAF countries, including Canada, have affirmed that the national behaviour will 'fully accord with the Laws of Armed Conflict' (Eggleton 2001). For this final criterion, the evaluation is:

Right Conduct:	OEF: -2	ISAF: +1
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JWI Analysis

The final scores for all seven criteria, for the two missions (OEF and ISAF), are presented in Table 2. The average of the even criteria, the Just War Index, gives OEF a score of -0.4 (out of -3 minimum) and ISAF a score of +1.7 (out of +3 maximum). This quantifies the author's opinion that OEF is partially unjust and that ISAF is substantially more just. Readers will naturally have their own perspectives and can arrive at their own estimates under this methodology. The difference in scores does not mean that the two missions are competitive or work across purposes. They can, in certain ways, be considered complementary. However, the scores helped contrast the missions and, hopefully, this makes ethical conclusions clearer.

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TABLE 2

Summary of scores for OEF, ISAF in each criterion and the JWI.

	OEF	ISAF
1. Just Cause	+1	+2
2. Right Intent	+1	+2
3. Net Benefit	+1	+1
4. Legitimate Authority	-2	+3
5. Last Resort	-2	+1
6. Proportionality of Means	0	+2
7. Right Conduct	-2	+1
Average (JWI)	-0.4	+1.7

No use of lethal force will be ethically perfect and many unjust strategies may carry practical merit. However, in comparing ISAF and OEF, the ethical evaluations above show that OEF has the most serious deficiencies. While OEF was originally intended to directly attack the perpetrators of the 9/11 attacks, and as such could be considered a just cause, its expansion into a decade-long war against an indigenous movement (even one that displays abhorrent behaviour), vastly expanded the scope of the conflict. The mission rapidly changed in 2001 from counter-terrorism to warfighting. A new enemy, the Taliban, was quickly declared. The Bush Administration based its approach on a simplistic view of 'good versus evil', with others 'either with us or against us', that immediately failed to make a distinction between terrorists and those harbouring them – parties who are not morally or legally equivalent. OEF, as the operational arm of the Global War on Terror, was not legitimated under international law through Security Council authorization. It was definitely not a last resort mission in Afghanistan as no efforts were made for peaceful settlement or to hold discussions with the Taliban, while in government or in exile. The net benefit has proven rather slim so far. The demise of Osama bin Laden is welcome after almost a decade of searching but the overall results are still negative, given the ongoing fighting and terroristic activity in Afghanistan and the violent expansion of fighting and terrorist threats in Pakistan. And OEF's conduct has been highly questionable at times, not only in its night raids and aerial targeting but also in its treatment of detainees in Afghanistan and at the Guantanamo facility. All these characteristics justify the low overall score. Expressed as a percentage (0-100 per cent), OEF would have 43 per cent and ISAF 78 per cent. If the passing mark were set (rather arbitrarily) at 50 per cent, the OEF mission would not receive a passing grade in this ethical evaluation.

ISAF is not so heavily burdened but it has ethical deficiencies as well. While it has a just cause in providing security for reconstruction and is legitimated by UN authorization, it has been implicated in many civilian fatalities, resulting in a medium score for right conduct. It has failed to adopt means for peaceful settlement – discussions and possibly negotiations – with its enemies so it does not have a high score under the last resort criterion. This refusal to negotiate may change as ISAF begins to draw down in the 2014 timeframe. Also, the net benefit has been far from the desired level, especially given the heightened insecurity in the country. Still, the mission has considerable traction and merits the reasonable (and well above passing) score of almost 80 per cent for the JWI.

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In making this ethical evaluation of missions and assigning scores, hindsight has been applied on both missions' past performances. Not all this could have been seen by the US in 2001 or NATO in 2003 upon entering the Afghan quagmire. The lack of success to date certainly is a major factor in any assessment of a conflict that has lasted so long – longer than World Wars I and II combined. Nevertheless, the story of Afghanistan is still being written, with the net benefit and the other criteria yet to be finally determined.

Conclusion

The current evaluation is retrospective but the JWI method can also be used prescriptively to look forward in time, based on both history and likely outcomes. For the missions in Afghanistan, that would entail a separate exercise, though one that could benefit from the considerations and methods of this paper. A JWI analysis of a proposed future UN peacekeeping operation in Afghanistan is provided elsewhere (Dorn 2011).

While no method can eliminate the subjective nature of ethical assessments, the JWI method can help to elucidate and quantify the degree of ethical justification in the view of an assessor. Its sliding scale method of analysis is versatile. It can be applied to any number of conflicts, and even to opposing sides in a conflict. It can also be applied to specific military operations within a conflict, ranging from warfighting to peace-keeping. The JWI is not only a tool for an individual's analysis but also for summarizing the views of groups. For instance, a study is under way (Dorn 2011) to look at how various experts in international affairs evaluate the wars and conflicts fought by the US and by Canada since 1900. The quantitative results of such surveys is being used to analyse responses for various inevitable biases, including the experts' self-assessed position along the political (left-right) spectrum, age, social orientation and gender. Already, it is apparent that experts on the political right give higher JWI scores than those on the political left but that the ranking of conflicts is similar. Such studies, as in the present one, show that even though ethical views are subjective the use of a numerical scale such as JWI can add both depth and breadth to an analysis of the ethical dimensions of military force.

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NOTES

1. A standard modern work on Just War theory is Walzer (2006). Original texts with commentary, showing the evolution of Just War tradition, are provided in Reichberg, Syse & Begby (2006).
2. President Barack Obama (2009) stated in his Nobel Peace Prize acceptance speech: 'The concept of a "just war" emerged, suggesting that war is justified only when certain conditions were met: if it is waged as a last resort or in self-defense; if the force used is proportional; and if, whenever possible, civilians are spared from violence'.
3. The 'Responsibility to Protect' concept was developed by the International Commission on Intervention and State Sovereignty (ICISS 2001), established by the government Canada in 2000. R2P adopts the following principles explicitly: Just Cause, Right Intention, Last Resort, Proportional Means, Reasonable Prospects of Success, Right Authority, and a series of 'operational principles', including adherence to international humanitarian law. Endorsement of R2P was made by a summit of world leaders in 2005 (United Nations General Assembly 2005: paras. 138-9).
4. A survey of over 100 experts in international affairs was made for wars and conflicts fought by the United States since 1900 (Dorn 2011). Experts who self-identified themselves on the 'political right' tended to evaluate US conflicts higher (JWI more than 1.0 point higher on the scale -3 to +3) than those who consider themselves on the 'political left'. However, the two sides tended to rate US conflicts in a similar order.
5. Though one frequently cited criterion, 'reasonable prospect of success', was not included explicitly in the evaluation here, it is implicit in the evaluation of net benefit and other criteria. For instance, if the Afghan war is unsuccessful, it is hard to imagine that it would result in a net benefit. For instance, 'proportionality of means' is often considered a component of right conduct (*jus in bello*). And 'right intent' and 'net benefit' are closely linked to the 'just cause' criterion.
6. General Stanley McChrystal, the commander of OEF and ISAF forces, said he needed additional troops within the next year or else the conflict 'will likely result in failure' (Schmitt & Shankar 2009).
7. For instance, members of the 'Toronto 18' cited the presence of Canadian soldiers in Afghanistan as an inspiration for their attempted terrorist attacks (see CTV News 2010).
8. Combined with Operations Iraqi Freedom and Noble Eagle (homeland security), 'war funding' in the decade after 9/11 totals well over \$1 trillion (Belasco 2009).
9. See, for instance, Harding (2011) and International Crisis Group (2008: 11).
10. The concept of 'legitimate authority' in international law can be distinguished from the more traditional criterion of 'proper authority', which means a ruler or government in the more traditional Just War literature. For examples of the latter, see Cole (2002: 78); Johnson (2005: 38) and Brown (2008: chap. 4).
11. The monopoly of the Security Council on the use of force is drawn from the UN Charter. Article 53 states that 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council'.
12. Security Council Resolution 1368 (2001) of 12 September 2001 expresses sympathy and condolences to the victims of the 9/11 attack and to the US Government. It calls on states to bring to justice the perpetrators and expressed 'its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism'. The Council's next resolution on terrorism, Resolution 1373 of 28 September

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- 2001, creates the Counter-Terrorism Committee but, like Resolution 1368, makes no mention of Afghanistan or Al Qaeda.
13. The border between Afghanistan and Pakistan has been a point of contention for the governments for decades, especially since 1993 when the Durand Line Agreement is alleged by Afghanistan to have expired, one hundred years after its signature.
 14. In the US Supreme Court, three relevant cases are: *Rasul v. Bush*, 542 U.S. 466, 124 S.Ct. 2686 (2004); *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006); *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

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