

Lessons From Lebanon: Strengthening the Theory and Practice of Noncombatant Immunity within  
the Context of Asymmetrical Warfare

Bradley C. Archer

Written in Pursuit of a Master's Degree in Ethics, Peace and Global Affairs  
Department of Philosophy and Religion and School of International Service  
American University, Washington DC  
May 2007

Lessons From Lebanon: Strengthening the Theory and Practice of Noncombatant Immunity within  
the Context of Asymmetrical Warfare

Table of Contents

Introduction	1-3
A Brief Introduction to Just War Theory	3-6
Chapter 1: Israel's Unjust War Against Lebanese Innocents	
• Introduction	6-9
• The Discourse Surrounding the War	9-12
• The Rise of Hizbollah	12-15
• Background and Events of Israel's War Against Hizbollah	15-20
• Walzer's Just War: <i>Jus ad Bellum</i> Principles and Practice	21-30
• Walzer's Just War: <i>Jus in Bello</i> Principles and Practice	30-40
• Chapter 1 Conclusion	40-44
Chapter 2: Lessons Learned from Lebanon	
• Introduction	45
• Fighting a just war against guerillas	46-48
• Cluster bombs as arms <i>mala in se</i>	49-66
Conclusion	67-68

### Introduction

The relatively brief summertime, 2006 war between Israel and Hizbollah provided those interested in the just war theory (JWT) discourse with a near-perfect case study with which to morally assess the *jus ad bellum* and *jus in bello* strategic and tactical decision-making of belligerents. Using one of the many permutations of JWT as a guide, one can, with relative ease, draw clear and striking conclusions about the morality of the actions of both sides of the conflict. So doing would lead one to conclude that it is evident that Hizbollah, in sparking the war with its cross-border kidnapping raid into Israeli territory, acted as an unjust aggressor. Furthermore, its ensuing strategy of targeting Israeli population centers with indiscriminate unguided rockets rightfully earned the militant group condemnation from the international community. Likewise, I argue that, while Israel's initial military response to the attack could be deemed just, its subsequent actions in Lebanon, which included largely indiscriminate and disproportionate attacks against noncombatants, ought to be unequivocally condemned in the strongest moral terms.

Because of the widespread suffering this conflict caused to civilians, it is imperative that we assess the actions of both Hizbollah and Israel in ethical terms in order to more clearly define the line between combatants and innocents. This distinction has become blurred as modern warfare increasingly traps noncombatants in its web of violence, and moral philosophers ought to play a central role in redrawing this boundary as a means of protecting the rights and lives of civilians. The resulting discourse can serve as a tool for informing the public about the threats posed to innocents, and this increased awareness will hopefully serve as the foundation for demands for reforming the way we wage current and future wars.

The following paper has two main goals: a) to provide a moral critique of both Israel's *jus ad bellum* decision to wage a full-scale war in response to Hizbollah's attack and its subsequent *jus in bello* actions and b) to present the "lessons learned" from this assessment in order suggest actionable reforms capable of diminishing the harm done to innocents in times of war. The first chapter, "Israel's Unjust War Against Lebanese Innocents," engages in a Walzerian JWT analysis of the war. In so doing, I suggest that Michael Walzer's JWT, as outlined in his *Just and Unjust Wars: A Moral Argument with Historical Illustrations (Just Wars)*, provides a useful model with which we can assess the ethical issues emanating from the conflict. However, in comparing Walzer's model with his rather uncritical justification of Israeli actions in Lebanon, it appears that he himself departs significantly from his own JWT. Nonetheless, this chapter is particularly useful for those unfamiliar with Walzer's work, as it provides a clear break-down of key JWT principles some might otherwise find difficult to extrapolate from his casuistical approach.

The second chapter, "Lessons Learned from Lebanon," sets out to provide suggestions on how belligerents might wage wars less harmful to noncombatants. Generally speaking, more rigorous rules of engagement ought to be instituted and enforced if we are to insure against the wonton killing of innocents. The U.S. has done just this in its war in Iraq, and civilian casualties resulting from encounters with American forces have decreased dramatically as a result. More specifically, I argue that cluster munitions ought to be declared arms *mala in se*, in terms of JWT. Such a pronouncement promises to help shape the moral discourse surrounding these and other weapons causing indiscriminate and disproportionate harm to noncombatants, and this discourse has the potential to serve as a powerful rallying cry for change, as evinced by the success of the land mine ban movement of the mid-1990s. If these two reforms are promoted by the public and embraced by those responsible for waging wars, we might hope to decrease the suffering experienced by innocents.

#### A Brief Introduction to JWT

As stated by Brian Orend, especially in the modern era, "[t]he [just war] tradition has . . . been doubly influential, dominating both moral and legal discourse surrounding war. It sets the tone,

and the parameters, for the great debate.”<sup>1</sup> Because of this central role that JWT plays in the “great debate” vis-à-vis when and how wars ought to be fought, it is important to understand the historical context out of which the current JWT discourse has emerged. The ongoing discussion surrounding the morality of conflict has its roots in a rich and textured JW tradition reaching back to the laws and customs of classical Greece and Rome. As these principles have become more refined over the centuries, JWT has played an increasingly important role in how we view warfare.

Writing in the fifth century, Augustine of Hippo produced our earliest conception of the Christian JW doctrine in an attempt to strike a balance between the Church’s proscription against violence and the urgent need for the Roman Empire to defend its people and holdings against invasion.<sup>2</sup> In so doing, Augustine established the foundation underlying the two pillars of the modern JWT, the *jus ad bellum* and the *jus in bello*. While the principles included in the *jus ad bellum* seek to define under what circumstances a community might justly resort to armed violence, the *jus in bello* serves to limit the harm caused by war by placing restrictions on the means and methods used therein. For Augustine, only self-defense motivated by genuine and universal Christian love could be a just use of force. Thus, in responding to an unjust and sinful aggression, the righteous defender must keep in mind that the whole of mankind, including miscreants, is worthy of love, and in so doing must temper his response with a degree of caution. From this ideal emerged the two central principles of the *jus in bello*: noncombatant immunity and proportionality.<sup>3</sup>

Although Augustine laid the groundwork for what would emerge as a cohesive JW doctrine, it wasn’t until the twelfth century that the canonical jurist, Gratian, stimulated the “comprehensive and continuing inquiry. . . into just moral and legal limits to war that produced fruits that defined the just war doctrine of Western Christendom. . .”<sup>4</sup> From the Middle Ages onward, the JW doctrine continued to develop as an increasingly nuanced and relevant code of conduct, and today exists as a largely secularized set of moral principles assessing how wars are waged.

While differing exegeses of how JW principles ought to be applied to contemporary wars continue to emerge from the ongoing JW discourse, there nonetheless exists a generalized JW model currently used by many JW theorists by means of making moral judgments vis-à-vis war. This paradigm, as outlined by Orend, requires that six *jus ad bellum* principles must be satisfied in order for the initiation of war to be justified: 1) Just cause; 2) Right intention; 3) Proper authority; 4) Last resort; 5) Probability of success and 6) (Macro-) proportionality.<sup>5</sup> The principles of noncombatant immunity and (micro-) proportionality remain the two key facets of the *jus in bello*. While this framework serves as a widely accepted guide, it nonetheless cannot lay claim to a monopoly on JW thought and debate. To be sure, other influential thinkers have contributed greatly to the JW discourse in recent years, and the model produced by Walzer is undoubtedly one of the most referenced JWTs today.

In the wake of the human tragedy that was the Vietnam War, Walzer produced what is still considered a masterpiece of JWT. His *Just Wars* presented a fresh and wholly secular guide to how

---

<sup>1</sup> Brian Orend, “War,” in the *Stanford Encyclopedia of Philosophy*, July 28, 2005, <http://plato.stanford.edu/entries/war/#2>.

<sup>2</sup> James Turner Johnson, *Can Modern War Be Just?* (New Haven and London: Yale University Press, 1984), p. 1.

<sup>3</sup> *Ibid.*, pp. 2-3.

<sup>4</sup> James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton: Princeton University Press, 1981), p. 121.

<sup>5</sup> Brian Orend, *Michael Walzer on War and Justice* (Ontario: McGill-Queen’s University Press 2000) pp. 86-109.

we might consider the morality of warfare. A virtually ahistorical approach to JWT, Walzer's casuistical methodology assesses responses to aggression and the treatment of noncombatants through a lens seemingly detached from the JW tradition discussed above. However, as we shall see, it is possible to extrapolate from Walzer's casuistry elements of the traditional, time-honed JWT.

In *Just Wars*, Walzer outlines his "war convention." This conception of JWT presents "the set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements that shape our judgments of military conduct."<sup>6</sup> For Walzer, while positivist international law provides an authoritative framework against which we can judge the decisions emerging from warfare, we must also look at the discourse surrounding the conduct of war in order to create a clear assessment of how societies view combat.<sup>7</sup>

For this reason, Walzer's casuistical approach to JWT provides a nuanced and contemporary alternative to the JW tradition—those principles resulting from centuries of religious, philosophical, and political discourse. Nonetheless, the writings of Augustine, Aquinas and Grotius serve as the foundation of the JW discourse, and their combined ideas provide a clearly enumerated set of values that can be useful in laying out Walzer's own *jus ad bellum* principles. Thus, as Orend does so aptly in his work on Walzer, we will predicate our analysis of Walzerian *jus ad bellum* criteria in the context of Israel's war against Hizbollah upon a JW tradition-influenced backdrop.<sup>8</sup> Doing so will present a more complete model against which we might assess morally the actions of the belligerents.

---

<sup>6</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books 2006, pg. 44. Unless otherwise noted, all mention of "Walzer's JWT" refers to this text.

<sup>7</sup> *Ibid*, p. 45.

<sup>8</sup> Brian Orend, *Michael Walzer on War and Justice* (Ontario: McGill-Queen's University Press 2000) pp. 86-109.

### Israel's Unjust War Against Lebanese Innocents

On 12 July 2006, Hizbollah, the Lebanese Shi'a militant group, launched a brazen attack against Israeli Defense Forces (IDF) operating on the border between Lebanon and Israel. While Hizbollah's instigation of the ensuing month-long war received near-universal condemnation as an unjust and illegal breach of Israel's sovereignty, Israel's subsequent response fomented heated debate vis-à-vis the theory and practice of just warfare. Israel's supporters, which included both hawks and many of those who normally reside in the "peace camp," argued that Israel acted in accordance with its moral and legal obligation to defend its citizens against aggression.<sup>9</sup> On the other hand, opponents of the war condemned Israel's response as a disproportionate and illegal use of force against the citizens of Lebanon. Now that the dust has settled and the rubble has been cleared, we might reflect upon the war within the context of Michael Walzer's JWT and thus shed some light upon the aims, means, and outcomes of the war. Upon such reflection, it can be concluded that while Israel's initial decision to declare war on Hizbollah was justified, its subsequent actions served to violate virtually every *jus in bello* principle central to both traditional and Walzerian JWTs.

It is the intent of the following analysis to help elucidate the key ethical issues that emerged out of Israel's war against Hizbollah. The impetus for this inquiry was the widespread suffering experienced by civilians on both sides of the conflict, for these innocent victims were often times cynically and deliberately targeted by the belligerents. As a result, noncombatants disproportionately paid the cost of the war, in terms of both lives lost and property destroyed. Thus, the central aim of this paper is to serve as condemnation of both Israel and Hizbollah for their wonton attacks on civilians. However, because Israel's actions were exponentially more destructive and found sanctimonious and uncritical approval within the ranks of its government and military, its reasoning and actions will be the focus of this paper.

The following moral assessment is heavily informed by the JWT outlined by Michael Walzer in his *Just Wars*.<sup>10</sup> Accepted by many as an authoritative account of contemporary JWT, this work has for three decades been at the center of the debate surrounding warfare and continues to play a prominent role in the curriculum of warfare taught at U.S. military academies. I also chose Walzer's conceptualization of JWT as the model for the following analysis in order to determine the verity of Noam Chomsky's claim that the JW theorist frequently "assigns a special status to Israel and

---

<sup>9</sup> Sharmila Devi, "Israelis united in support of military offensive," 7 August 2006, *Financial Times*, p. 5.

<sup>10</sup> Walzer, *Just and Unjust Wars*: .

reconstructs the moral world accordingly.”<sup>11</sup> And indeed, based upon Walzer’s response to the war against Hizbollah, it does appear as though he consistently constructs JW justifications with one eye on promoting the interests of Israel, often at the expense of civilian lives.

This chapter is divided into roughly five sections, the first of which provides a sampling, via a literature review, of the just war-influenced discourse surrounding the war. The second section provides a brief history of the emergence of Hizbollah as a major political and military organization in Lebanon. The third section serves as a narrative of key events of the Israeli-Hizbollah war. The following section presents an analysis of Israel’s decision to engage Hizbollah in a full-scale war, within the context of Walzer’s *just ad bellum* JWT principles. The fifth, and final, section weighs the specific military tactics employed by Israel against both traditional and Walzerian *jus in bello* JWT models.

### The Discourse Surrounding the War

Over the course of the war, political pundits, academics and human rights NGOs lent their voices to the contentious debate vis-à-vis the proportionality of Israel’s sweeping response to Hizbollah’s cross-border raid. The following literature review, composed of editorials and investigative reports, serves to present a sketch of the diverse opinions that informed the public discourse surrounding the war.

Famed Harvard law professor and polemicist, Alan Dershowitz, likewise added his voice to the argument in defense of Israel. In his “‘Proportionate?’: Arithmetic of Pain,”<sup>12</sup> Dershowitz argues that because civilians were being used as “human shields,” the militants themselves bore full responsibility for subsequent “collateral damage.” Continuing in this vein, he then argued for a “reassessment of the laws of war,” which would recognize what he defines as the “continuum of ‘civility.’”<sup>13</sup>

Under this view, the range of legal targets would be broadened to include civilians who are not actively involved in fighting, but nonetheless provide indirect support. This argument flies in the face of both international law and contemporary JWT, for both recognize that civilians who are not actively engaged in belligerent acts cannot come under fire, especially when in their own homes. By obfuscating the line between combatants and innocents, Dershowitz’s plan would certainly lead to more unnecessary and unjust suffering.

Adam Shatz, who serves as the literary editor at the *Nation* and frequently comments on Israeli affairs, responded to Dershowitz in his “‘Oops, Sorry,’ Doesn’t Let Israel Off the Hook.”<sup>14</sup> In this piece, Shatz decried the “human shield” argument as an attempt to justify what amounts to “collective punishment” against the citizenry of southern Lebanon. He then cited reports by HRW

---

<sup>11</sup> George Scialabba, “Dissent or Assent?,” 13 December, 2004, *The Nation Online*, <http://www.thenation.com/doc/20041213/scialabba>.

<sup>12</sup> Alan Dershowitz, “‘Proportionality?’: Arithmetic of Pain,” 19 July 2006, *Wall Street Journal*, [http://www.ajiac.org.au/updates/Jul-06/200706.html#Article\\_1](http://www.ajiac.org.au/updates/Jul-06/200706.html#Article_1).

<sup>13</sup> *Ibid.*

<sup>14</sup> Adam Shatz, “‘Oops, Sorry,’ Doesn’t Let Israel Off the Hook,” 2 August 2006, *L.A. Times*, [http://www.michaelbalter.com/Civilizations/08\\_02\\_2006%7Cisrael's\\_responsibilities\\_for\\_its\\_actions.php](http://www.michaelbalter.com/Civilizations/08_02_2006%7Cisrael's_responsibilities_for_its_actions.php).

that claimed to have found no evidence that Hizbollah had, in fact, been deliberately using noncombatants as shields.<sup>15</sup>

In addressing Dershowitz's claim that Israel should be lauded for its attempts to protect Lebanese civilians from harm by warning of imminent attacks, Shatz raises an obvious, yet unfortunately oft-ignored reality: "[M]any people, particularly the elderly, are in no position to leave their homes at a moment's notice."<sup>16</sup> Thus, those too sick, poor, or scared to leave their homes became targets of air assaults. Shatz also noted that in several instances, Lebanese civilians who fled in accordance with such evacuation notices themselves became the targets of air strikes.<sup>17</sup> And indeed, such attacks on convoys of fleeing civilians were recorded extensively in reports published by both HRW and the United Nations Human Rights Council.<sup>18</sup>

While Shatz is thoughtful in his overall critique, his argument does fall prey to the hazards of relying on unnecessary, inflammatory hyperbole. In addressing the blanket approval of Israeli attacks on Hizbollah militants and their "human shields," Shatz suggests that, "the French Resistance would have been 'responsible' if the Nazis had destroyed a village sheltering anti-Fascist partisans."<sup>19</sup> It appears that, by drawing a parallel between Nazis and the Israeli government, Shatz is employing a tactic common amongst jejune critics of Israeli policy who seek to elicit angry responses against the state. Such a comparison is both repugnant and unnecessary, and does little to further Shatz's argument. The central points of his argument would have been better served had he looked for a more appropriate and relevant example. Perhaps the Vietnam War would provide a more pertinent illustration, as it, like the war against Lebanon, was largely an anti-guerilla war whose reasoning was predicated upon the dubious legitimacy of preventative warfare.

Stephen Bainbridge, a UCLA law professor and JW expert, entered into this debate with his "Just War for the Sake of Argument."<sup>20</sup> A Catholic, Bainbridge argued against Israel's war against Hizbollah in terms of the traditional, Catholic JWT. According to the Catechism, war can be engaged in response to aggression only if "the damage inflicted by the aggressor on the nation...[is] lasting, grave, and certain."<sup>21</sup> Using this as the criterion for determining a "just" resort to war, Bainbridge rejects Israel's decision to wage war against Lebanon, considering that Hizbollah's abduction of two soldiers was not a "sufficiently grave offense."

On the face of it, this appears to provide a compelling case against the justness of Israel's war. However, it has been forcefully argued by Walzer, Dershowitz and other supporters of Israel's actions that Israel reacted, not only to Hizbollah's initial incursion, but also to the perceived threat posed by the militant group's arsenal of 13,000 Katyusha rockets and its past threats to destroy

---

<sup>15</sup> Human Rights Watch (HRW), *Fatal Strikes: Israel's Indiscriminate Attacks Against Civilians in Lebanon*, August 2006, <http://hrw.org/reports/2006/lebanon0806/>.

<sup>16</sup> Shatz.

<sup>17</sup> Ibid.

<sup>18</sup> HRW and HRC reports.

<sup>19</sup> Shatz.

<sup>20</sup> Stephen Bainbridge, "Just War for the Sake of Argument," 18 July 2006, *Technology, Commerce and Society Daily*, <http://www.tcsdaily.com/article.aspx?id=071806E>.

<sup>21</sup> Ibid.

Israel. Thus, viewed in this light, the justness of the war cannot be assessed in the black-and-white terms posed by Bainbridge and other supporters of a strict adherence to the Catholic JW doctrine.

The preceding description of arguments vis-à-vis JWT and Israel's war against Hizbollah admittedly presents only a limited sampling of the range of views that contributed to the overall discourse. However, the claims and justifications therein do represent the central views of the dominant schools of thought. It must also be noted that these attitudes reflect the tense emotional climate engendered by the war, and thus provide little in the way of objective, reasoned discourse.

### The Rise of Hizbollah

In June 1982, Israel launched an assault on well-armed and hostile Palestinian Liberation Organization (PLO) factions operating out of southern Lebanon following months of aggressive posturing. This "First Lebanon War" became infamous for the massacre of perhaps two thousand unarmed men, women and children in the Sabra and Shatila refugee camps and laid the groundwork for Israel's 18-year occupation of the region.<sup>22</sup> After three months of fighting, PLO chairman Yasser Arafat was forced into exile and sought refuge in Tunisia, effectively ending major PLO operations in southern Lebanon.<sup>23</sup>

Israel's conquest of the PLO created a power vacuum out of which emerged the Iranian-backed Hizbollah movement. Hizbollah, whose name means "Party of God," was formed under the auspices of Iran's Ayatollah Khomeini, who saw in Lebanon an opportunity to spread his revolutionary Islamic ideology. Trained by Iran's Revolutionary Guard, Hizbollah quickly became a potent threat to Israel's occupying forces, and its supporters are widely believed to have been responsible for a series of devastating terrorist attacks on Western targets.<sup>24</sup> Following the 1983 bombings of its embassy and marine barracks in Beirut, the U.S. removed its military presence from Lebanon.<sup>25</sup>

In 1985, Hizbollah released its manifesto by means of formally announcing its presence in Lebanon. Among its key goals were the expulsion of American and French troops and the creation of an Islamic state. In the first-known manifestation of its program, Hizbollah was clear in its aims vis-à-vis Israel, claiming that

Our primary assumption in our fight against Israel states that the Zionist entity is aggressive from its inception, and built on lands wrested from their owners, at the expense of the rights of the Muslim people. Therefore our struggle will end only when this entity is obliterated. We recognize no treaty with it, no cease fire, and no peace agreements, whether separate or consolidated.<sup>26</sup>

---

<sup>22</sup> "Flashback: Sabra and Shatila massacres," *BBC Online*, [http://news.bbc.co.uk/2/hi/middle\\_east/1779713.stm](http://news.bbc.co.uk/2/hi/middle_east/1779713.stm).

<sup>23</sup> 1982: "PLO leader forced from Beirut," *BBC Online*, [http://news.bbc.co.uk/onthisday/hi/dates/stories/august/30/newsid\\_2536000/2536441.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/august/30/newsid_2536000/2536441.stm).

<sup>24</sup> Adam Shatz, "In Search of Hizbollah," 29 April 2004, *The New York Review of Books*, Volume 51, Number 7, <http://www.mafhoum.com/press7/190P8.htm>.

<sup>25</sup> "Terrorist Attacks on Americans, 1979-1988: The Attacks, the Groups and the U.S. Response," 2001, *PBS Frontline America*, <http://www.pbs.org/wgbh/pages/frontline/shows/target/etc/cron.html>.

<sup>26</sup> "An Open Letter: The Hizballah Program," Fall 1988, *The Jerusalem Quarterly*, Number Forty-Eight, [http://www.standwithus.com/pdfs/flyers/hizbollah\\_program.pdf](http://www.standwithus.com/pdfs/flyers/hizbollah_program.pdf). The website Stand With Us notes that this bellicose language appeared only in the early public speeches of Hizbollah leaders, and has since been removed from their official platform.

Such bellicose language justifiably set Israel ill at ease and demonstrated that Hizbollah was not merely a resistance movement, dedicated to ending the Israeli occupation of southern Lebanon. Now, it seemed, Hizbollah's grand scheme included the creation of an Islamic theocracy in Lebanon and the destruction of the state of Israel.

For the next 15 years, Hizbollah continued a successful campaign against Israel, eventuating the latter's withdrawal from Lebanon in 2000. Aside from its success as a militant group, Hizbollah also emerged as a competent and well-organized political entity. Because the Syrian-dominated government in Beirut failed to exercise effective control over the south, Hizbollah developed its own government capable of providing the basic social services required by those living under its control. Until 2005, the group operated largely independently of the government in Beirut.<sup>27</sup>

Lebanon's political climate changed dramatically following the February 2005 assassination of its former Prime Minister, Rafik Hariri, who had become an increasingly outspoken critic of Syria's 29-year military occupation of Lebanon. The killing sparked a popular revolt against the Syrian-dominated government, and this "Cedar Revolution" succeeded in forcing the withdrawal of Syrian forces and the resignation of the government. The administration of President George W. Bush lauded the unrest as a harbinger of regional democratic reform, calling the overthrow of the pro-Syrian government "a great example for what is possible in the broader Middle East..."<sup>28</sup> Undoubtedly, Bush saw in these changes an opportunity to curb Hizbollah's influence by ushering in a new, pro-U.S. and anti-Syrian government.

However, Hizbollah took advantage of this tide of reform and jumped into the ensuing democratic fray, in hopes of making significant political gains. In the subsequent elections, hailed as the first signs of democracy after decades of Syrian control, the Hizbollah-dominated Shi'a political bloc gained 35 of 128 seats in parliament. Likewise, Hizbollah placed several supporters in key cabinet posts, securing the militant group its strongest-ever political position.<sup>29</sup>

Ironically, this newly-acquired political clout ensured that Hizbollah could stymie the ongoing demands made by the U.S. and Israel to disarm, pursuant to the United Nation's 2004 Security Council Resolution 1559, which called for the "disarmament of all Lebanese and non-Lebanese militias."<sup>30</sup> Thus, the "Cedar Revolution" welcomed so enthusiastically by Israel and the Bush administration served to further empower the hostile militant group. Such was the regional political landscape in the days leading up to the "Second Lebanon War."

### Background and Events of Israel's War Against Hizbollah

Perhaps the greatest challenge in attempting to lay out a coherent timeline of events surrounding the 2006 Israeli-Hizbollah war lies in the fact that, as with all other regional conflicts involving Israel, both sides of the hostilities engage in a chicken-and-egg debate of causality.

<sup>27</sup> Karby Legett, "Mideast Democracy: One Violent Group Finds It Works Fine," 10 July 2006, *Wall Street Journal*, <http://www.pierretristam.com/Bobst/library/wf-299.htm>.

<sup>28</sup> "President Bush Welcomes Prime Minister Siniora of Lebanon to the White House The South Lawn," 18 April 2006, *Office of the Press Secretary*, <http://www.whitehouse.gov/news/releases/2006/04/20060418-2.html>.

<sup>29</sup> Esther Pan, "Lebanon: Election Results," 20 June 2005, *Council on Foreign Relations*, <http://www.cfr.org/publication/8195/>.

<sup>30</sup> United Nations Security Council, "Resolution 1559," 2 September 2004, <http://daccessdds.un.org/doc/UNDOC/GEN/N04/498/92/PDF/N0449892.pdf?>

Ultimately, it is possible to look to Israel's founding in 1948 for the root cause of the general tensions that pervade the region. Others would point at the most immediate cause of the war—Hizbollah's abduction of two IDF soldiers on 12 July 2006, while still others could find myriad causes and justifications in between these two points by means of explaining the outbreak of the war. However, in light of the immediate context in which the war occurred, it seems most instructive to first shift our focus to the Gaza Strip, rather than to Lebanon itself, to identify the locus of the conflict in question.

On 25 June 2006, members of the militant wing of Hamas, the ruling Palestinian party, tunneled into Israeli territory and attacked an IDF outpost. The militants abducted Corporal Gilad Shilat, a young IDF soldier, and crossed back into Gaza. The following day, a coalition of militant groups issued a statement offering the safe return of Shilat in exchange for the release of all females and minors being held in Israeli prisons. Israeli Prime Minister Ehud Olmert rejected these demands and immediately launched "Operation Summer Rain" against the Gaza.<sup>31</sup> This punitive invasion was intended to destabilize Hamas, and the IDF arrested more than 30 Hamas officials in its opening gambit.<sup>32</sup> Over the next four months, approximately 250 Palestinians were killed in Israeli attacks, including 157 civilians, and as of May 2007, Shalit remained in the hands of his captors.<sup>33</sup>

Two weeks after the initiation of "Summer Rain," Hizbollah took advantage of Israel's preoccupation with Gaza and launched its own cross-border raid into northern Israel in order to make good on an earlier threat made by Sheikh Hassan Nasrallah that the militant group would carry out kidnapping raids against Israel.<sup>34</sup> In the audacious attack dubbed "Operation Truthful Promise," Hizbollah abducted two IDF soldiers and killed three others. Following the raid, Nasrallah made clear that his aims were limited to forcing prisoner exchange negotiations with Israel similar to those completed in 2004 that resulted in the release of over 400 Arab prisoners.<sup>35</sup>

At this point it is important to note, unequivocally, that Hizbollah's unprovoked attack on Israel and subsequent abduction of IDF soldiers was both an illegal breach of Israeli sovereignty under the United Nations Charter and a violation of the generalized just war prohibition against aggression. This hostile act ended six years of relative calm between Israel and Lebanon, and engaged Israel and Hizbollah in a month-long war that claimed approximately 1,500 lives, the vast majority of whom were Lebanese civilians. Thus, it is clear that because Hizbollah initiated the hostilities, it is to blame in large part for the tragedy that ensued. However, had Israel responded to Hizbollah's raid in a manner consistent with the just war doctrine to be elucidated in this analysis, much of the suffering and destruction resulting from the war would have been avoided.

---

<sup>31</sup> "Militants issue Israel hostage demands: Palestinian groups seek release of jailed women, children," 6 June 2006, CNN.com, <http://edition.cnn.com/2006/WORLD/meast/06/26/israel.soldier/index.html>.

<sup>32</sup> "Israel arrests Hamas leadership," 2 July 2006, <http://english.aljazeera.net/news/archive/archive?ArchiveId=24095>.

<sup>33</sup> "Israeli shelling kills 18 in Gaza," 8 November 2006, *BBC News*, [http://news.bbc.co.uk/2/hi/middle\\_east/6127250.stm](http://news.bbc.co.uk/2/hi/middle_east/6127250.stm).

<sup>34</sup> "Hizbollah: Group may kidnap more Israelis," 30 January 2004, *China Daily.com*, [http://www.chinadaily.com.cn/en/doc/2004-01/30/content\\_301587.htm](http://www.chinadaily.com.cn/en/doc/2004-01/30/content_301587.htm).

<sup>35</sup> Greg Myre and Steven Erlanger, "Clashes Spread to Lebanon as Hizbollah Raids Israel," 13 July 2006, *New York Times*, p. A1.

Israel's response to the Hizbollah incursion was swift and reactionary, and Hizbollah's attempt at a negotiated settlement was summarily dismissed. Olmert, under pressure to distinguish himself as a decisive military leader, immediately laid blame upon the government of Lebanon, stating: "I want to make clear that the event this morning is not a terror act, but an act of a sovereign state that attacked Israel without reason."<sup>36</sup> Lebanese Prime Minister Fouad Siniora quickly denied any responsibility for the attack, claiming that the Lebanese government did not condone Hizbollah's unilateral aggression.

This tepid attempt to assuage the tension failed, and Israel's military and political leadership made clear their intent to execute a fierce reprisal against all of Lebanon. Major General Udi Adam, after asking rhetorically, "Where to attack?" responded: "Once [we move] inside Lebanon, everything is legitimate -- not just southern Lebanon, not just the line of Hizbollah posts." Likewise, Lieutenant General Dan Halutz promised with great bellicosity to "turn Lebanon's clock back 20 years."<sup>37</sup>

Without hesitation, Israel launched a combined ground, air and sea assault against Lebanon. In its opening salvo, Israel took aim at key Lebanese infrastructure, destroying Rafik Hariri International airport and the primary overland artery between Beirut and Damascus. At the same time, a complete naval blockade was implemented, choking off sea-based commerce until September. In a targeted assassination attempt similar to the various failed "decapitation" strikes employed by the U.S. in the opening days of the current Iraq war, Israel bombed the house of Nasrallah's family, but no one was killed. This failed assassination attempt emboldened the Hizbollah leader, and he threatened Israel, stating: "You wanted an open war and we are heading for an open war. We are ready for it."<sup>38</sup>

In the opening days of the war, dozens of Lebanese civilians were killed in Israeli air strikes, and Hizbollah soon realized its promise to wage "open war" on Israel by launching hundreds of rockets into populated Israeli cities.<sup>39</sup> This escalation of violence marked the beginning of a sustained effort by Hizbollah to strike civilian targets, and nearly 4,000 rockets crashed into Israel over the course of the war. Fortunately, the crude Katyusha rockets rarely found human targets, killing 53 total Israelis. However, the constant threat of being hit by one of the indiscriminating rockets terrified the citizens of Haifa and other northern towns, forcing a million residents to seek refuge in underground shelters or safe rooms, while a quarter-million more Israelis became internally displaced as they fled their homes for safety further south or abroad.<sup>40</sup>

---

<sup>36</sup> Ibid.

<sup>37</sup> "Israel authorizes 'severe' response to abductions," 12 July 2006, *CNN.com*, <http://www.cnn.com/2006/WORLD/meast/07/12/mideast>.

<sup>38</sup> Jennifer Ludden, "Israeli Attacks Increase; Hizbollah Vows 'Open War'," 14 July 2006, *NPR.org*, <http://www.npr.org/templates/story/story.php?storyId=5557835>.

<sup>39</sup> "Haifa Hit A 'Major Escalation'," *CBS News*, 13 July 2006, <http://www.cbsnews.com/stories/2006/07/13/world/main1798784.shtml>.

<sup>40</sup> Uzi Rubin, "Hizballah's Rocket Campaign Against Northern Israel: A Preliminary Report," 31 August 2006, *Jerusalem Center for Public Affairs*, <http://www.jcpa.org/brief/brief006-10.htm>.

As with the initial attack on Israel, Hizbollah's deliberate targeting of civilians was rightly condemned by the international community. According to Ken Roth, executive director of HRW, "Lobbing rockets blindly into civilian areas is without doubt a war crime. Nothing can justify this assault on the most fundamental standards for sparing civilians the hazards of war."<sup>41</sup> This willful ignorance of the principal of noncombatant immunity greatly undermined the just war duty to discriminate between civilians and belligerents, and violates key statutes of international humanitarian law. As such, Nasrallah should be held accountable for those actions.

Violations of the principle of discrimination likewise became the rule, rather than the exception, as Israel waged its war on Hizbollah. Throughout the month-long conflict, Israeli military and political officials openly flaunted the just war doctrine forbidding attacks on civilians, erroneously claiming that the high incidence of collateral damage resulted from Hizbollah's unlawful and immoral use of civilian structures as human targets. Walzer himself echoed this in an essay on the war in which he argued that Hizbollah alone was responsible for civilian deaths, as the militant group consistently used residential areas as launching pads for attacks.<sup>42</sup>

However, what has emerged in the aftermath of the war is clear evidence of a deliberate loosening of the just war principles aimed at protecting innocents. Not only did "Defense Minister Amir Peretz...free the army from limitations regarding the civilian population,"<sup>43</sup> civilians appear to have become the primary targets of many Israeli missions. Nahum Barnea, a top Israeli political commentator, lamented this willful neglect of just war restriction in the wake of the 30 July Qana massacre that claimed 29 civilian lives:

One can understand the accidental killing of civilians in the heat of battle. [However, a] sweeping order regarding the civilian population of ...South Lebanon...is rash, injudicious, and will lead to disaster. We saw the results yesterday, with the bodies of women and children being brought of the bombed house in Qana.<sup>44</sup>

Had Qana been an isolated incident, it would be possible to consider the deaths an unfortunate, yet expected, result of an otherwise just war. However, these attacks on Lebanese civilians were systematic, and for this reason neither the war nor the individual tactics used can be considered just. A pattern of immoral and illegal activity pervaded Israel's war against Lebanon, and we have only to look at the detritus of suffering that the month-long air campaign left in its wake for proof. Entire neighborhoods were destroyed, caravans of fleeing refugees were attacked from the air and millions of unexploded cluster bomblets remain scattered throughout southern Lebanon as a grim warning to those who consider returning to the ruins of their lives. As will be demonstrated in the following discussion, there should be no doubt that Israel violated the central tenets of JWT, with disastrous results.

---

<sup>41</sup> "Israel/Lebanon: Hizbollah Must End Attacks on Civilians," 5 August 2006, *Human Rights Watch*, [http://hrw.org/english/docs/2006/08/05/lebano13921\\_txt.htm](http://hrw.org/english/docs/2006/08/05/lebano13921_txt.htm).

<sup>42</sup> Michael Walzer, "War Fair: The Ethics of Battle," 19 July 2006, *The New Republic Online*, <http://www.tnr.com/doc.mhtml?i=20060731&s=walzer073106>.

<sup>43</sup> Ori Nir, "Israeli Military Policy Under Fire After Qana Attack," 4 August 2006, *The Jewish Daily Forward*, <http://www.forward.com/articles/israeli-military-policy-under-fire-after-qana-atta/>.

<sup>44</sup> *Ibid.*

Walzer's Just War: *Jus ad Bellum* Principles and Practice

The Catholic JW doctrine, as outlined in the Catechism, maintains that the *jus ad bellum* principles must be satisfied simultaneously in order for the initiation of war to be justified.<sup>45</sup> It is important to note, however, that in contrast to the traditional, Catholic JWT, under Walzer's JWT, all the conditions need not be met “[a]t one and the same time.”<sup>46</sup> In fact, it is clear that for him, most of these criteria provide mere suggestions for JW justification, rather than absolute mandates. For Walzer, the “just cause” principle is the most significant moral standard states deliberating about war must satisfy, while the principles of (macro)-proportionality and last resort are of secondary import.

For the sake of efficiency, this analysis omits discussion of the “proper authority” criterion, for it appears to have been adequately satisfied in the case of Israel's government (as opposed to illegitimate authorities) waging war on Hizbollah. And although Walzer mentions the “probability of success” principle only in passing,<sup>47</sup> this analysis seeks to demonstrate that had it been utilized during Israel's deliberation to resort to and maintain its war against Hizbollah, much of the death and destruction that resulted from the war would have been justly avoided.

*Just cause and aggression*

According to Walzer, an aggressor state (or as is the case with Hizbollah, a hostile, well-organized and armed non-state actor) presents the victim state with a dire choice: “your rights or...your lives!” Thus forced to “risk their lives for the sake of their rights,” victim states not only have a right, but also an implied moral *duty* to respond to aggression with force.<sup>48</sup> This right to self-defense is a central tenet of international law, codified in Article 51 of the UN Charter, which guarantees the right to “individual or collective self-defence” if a nation or group of nations becomes victimized by unjust aggression.<sup>49</sup>

As we have seen, Hizbollah violated Israel's territorial integrity with its dramatic, yet limited, attack on the IDF troops operating in Israeli territory. Walzer is explicit in his rejection of attempts to distinguish grave aggressions, such as full-scale invasions, from lesser acts of aggression, because *all* aggression constitutes a “singular and undifferentiated crime” that “challenges rights that are worth dying for.”<sup>50</sup> As such, Walzer asks only whether an act of aggression has taken place, without assessing the nature or intent of the hostile act. Therefore, regardless of the scale or potential of an aggression, the victim state is just in responding militarily.

However, it should be noted that virtually every historical example proffered by Walzer by means of illustrating criminal aggression involve large-scale invasions of weak and vulnerable nations by states with *both the will and the means* of completely and irreversibly altering the make-up of the

---

<sup>45</sup> Ibid.

<sup>46</sup> The phrase “At one and the same time” refers to the Catholic Catechism's insistence that all JW criteria be simultaneously satisfied. For more on the Catechism and JWT, visit <http://www.vatican.va/archive/catechism/p3s2c2a5.htm#III>.

<sup>47</sup> Walzer, *Just and Unjust Wars*, p. 107.

<sup>48</sup> Ibid, p. 51.

<sup>49</sup> *Charter of the United Nations*, <http://www.un.org/aboutun/charter/>.

<sup>50</sup> Walzer, *Just and Unjust Wars*, p. 53.

targeted political communities. Thus, we might question whether Hizbollah's "invasion" of Israel can reasonably be equated with the threats posed by Athens to Melos, by Nazi Germany to Europe, or by Iraq to Kuwait. Nonetheless, based upon Walzer's rather "thin" definition of aggression, we ought to conclude that Hizbollah's hostilities aimed at Israel did, in fact, satisfy the "just cause" criterion of JWT.

*Right intention*

Although Walzer does not address specifically the principal of "right intention," it is possible to extrapolate from his chapter "War's Ends and the Importance of Winning" a few hallmarks of just aims. The chief aim of just war must be winning itself, and Walzer defines victory as the creation of a state of peace which is "more secure than the *status quo ante bellum*." Other, more specific just aims include "disengagement, demilitarization, arms control, external arbitration, and so on."<sup>51</sup> In order to determine whether Israel's aims were just, it is therefore instructive to analyze the various objectives stated by officials whose views greatly informed the decision to engage in and maintain the war against Hizbollah.

U.S. secretary of state Condoleezza Rice repeatedly echoed the Walzerian call for the creation of an improved *status quo* as she argued against the enforcement of a ceasefire to end the war. For Rice, an immediate cessation of hostilities was unacceptable because "[a] ceasefire would be a false promise if it simply returns us to the status quo, allowing terrorists to launch attacks at the time and terms of their choosing and to threaten innocent people..."<sup>52</sup>

In so far as her stated aim was to give Israel sufficient time to create an environment conducive to the creation of a more secure *status quo*, Rice's intention would be just under Walzer's JWT. Furthermore, Walzer's claim that "there are sometimes moral reasons for prolonging a war" lends support to Rice's efforts to hinder the peace process.<sup>53</sup> Of course, the fact that the deliberate protraction of the war caused much unnecessary suffering on both sides of the Israel-Lebanon border likely engendered outrage among opponents of the war, especially in light of the dubious impact the tactic had on improving the *status quo*.

Benjamin Netanyahu, the former Israeli Prime Minister and current leader of the hawkish Likud party, drew a parallel between the war against Hizbollah and the Cuban Missile crisis in describing Israel's central mission in its war against Hizbollah:

Some 44 years ago, when Soviet missiles in neighboring Cuba threatened American cities, John F. Kennedy set one goal and ultimately prevailed in achieving it: Remove the missiles...[O]ur goal should be the same: Remove [Hizbollah's] missiles. Or destroy them.<sup>54</sup>

This stated goal of disarming Hizbollah likewise satisfies Walzer's "right intention" criterion by seeking to create a more stable *status quo*.

Israeli chief of staff Dan Halutz, whose threat to "turn Lebanon's clock back 20 years" was quoted above, also cited the need to "create the conditions for the return of...the abducted soldiers"

---

<sup>51</sup> Ibid, p. 121.

<sup>52</sup> Condoleezza Rice, "Special Briefing on Travel to the Middle East and Europe," 21 July 2006, U.S. StateDepartment, <http://www.state.gov/secretary/rm/2006/69331.htm>.

<sup>53</sup> Walzer, *Just and Unjust Wars*, p. 122.

<sup>54</sup> Benjamin Netanyahu, "No Ceasefire in the War on Terror," 22 July 2006, *Wall Street Journal*, <http://www.netanyahu.org/noceasefire.html>.

as a key aim of the war.<sup>55</sup> Although this is a much more specific goal than those enumerated by Walzer, it is nonetheless reasonable and just, considering the central role the kidnapping played in sparking the conflict.

However, it has been suggested that the general aim of striking a major blow against Hizbollah was privileged over the more urgent objective of retrieving the IDF POWs. In fact, a “senior Israeli official” claimed that had Israel located the Hizbollah group responsible for the abductions “we would have hit them, even if it meant killing the soldiers.”<sup>56</sup> If true, this surprising admission would seem to undermine Israeli claims that retrieving the soldiers was central to waging war on Hizbollah.<sup>57</sup> Nonetheless, because the aim of this section is to assess the officially stated war aims, no judgment will be made regarding this off-the-record assertion. Thus, based upon this limited sample of stated objectives vis-à-vis Israel’s intent in waging war on Hizbollah, one ought to reasonably conclude that Israel generally satisfied the criterion of “right intent.”

#### *Last resort*

While Walzer allows, in a more recent work on the first Gulf war, that “[o]ne always wants to see diplomacy tried before the resort to war,” he rejects attempts to present this ideal as a moral imperative. On the contrary, in responding to claims that the U.S. had failed to peacefully assuage the crisis that resulted in the first war against Iraq, he chides critics, stating “[W]e can never reach lastness...There is always something else to do.”<sup>58</sup> Nonetheless, we can use his vouchsafed promotion of diplomatic responses to aggression as our test for whether Israel attempted, or even considered, diplomacy as a means to resolving the hostilities instigated by Hizbollah.

Immediately following the abduction of the two IDF troops, Nasrallah made a public statement in which he made clear that negotiations resulting in a prisoner swap would be the only solution to the crisis. He also suggested that such negotiations would bring an end to the Gaza hostilities. As discussed above, such negotiations had been successfully carried out two years before. However, the Olmert administration emphatically rejected the idea of a prisoner exchange, and straight away made clear its intent to send “a clear message to...Lebanon that they’ve swallowed a cancer [Hizbollah] and have to vomit it up,” or else the nation “will pay a very high price.”<sup>59</sup>

Such pugnacious language dominated the official Israeli discourse, and the immediate resort to a military reprisal clearly indicates that Israel failed to even entertain the possibility of employing any means short of all-out war as a response to Hizbollah’s aggression. Thus, the decision to wage war failed to satisfy the principle of “last resort.” As will be argued in the next section, had Israel considered its options, or at least exercised a modicum of restraint, the war likely would have been a much more limited engagement, thus avoiding much of the wonton destruction experienced on both sides of the border.

#### *Probability of success*

---

<sup>55</sup> Joel Greenberg, “Israel strikes Hizbollah leader’s headquarters,” 15 July, *The Chicago Tribune*, [http://www2.ljworld.com/news/2006/jul/15/israel\\_strikes\\_hizbollah\\_leaders\\_headquarters/](http://www2.ljworld.com/news/2006/jul/15/israel_strikes_hizbollah_leaders_headquarters/).

<sup>56</sup> Scott Wilson, “Israeli War Plan Had No Exit Strategy,” 21 October 2006, *Washington Post*, [http://www.washingtonpost.com/wp-dyn/content/article/2006/10/20/AR2006102001688\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/10/20/AR2006102001688_pf.html).

<sup>57</sup> As of early May, 2007, both IDF soldiers abducted by Hizbollah remain in their captors’ hands.

<sup>58</sup> Michael Walzer, “Justice and Injustice in the Gulf War,” in *But was it Just? Reflections on the Morality of the Persian Gulf War*, ed. David E. Decosse, Doubleday 1992, pp. 5-6.

<sup>59</sup> Steven Erlanger, “Israel Vows to Rout Hizbollah as Violence Escalates,” 15 July 2006, *New York Times*, <http://select.nytimes.com/search/restricted/article?res=F0071EFD34540C768DDDAE0894DE404482>.

In discussing aggressive interventions, Walzer presents the “reasonable expectation[ ] of success” as a standard for just war only as an afterthought. The principle appears nowhere else in his *Just and Unjust Wars*, giving the impression that he does not consider it to be a necessary criterion for making decisions involving the use of force. However, in the case of Israel’s war against Hizbollah, the due consideration of this traditional criterion of success (or failure) would have likely vitiated the reliance on those air strikes that resulted in so many needless civilian deaths.

Two days into the war, Israel’s military analysts submitted their startling findings to the government: the massive air campaign currently being escalated would very quickly present “diminishing returns” and the overall war plan “would neither win the release of the two Israeli soldiers in Hizbollah’s hands nor reduce the militia’s rocket attacks on Israel to fewer than 100 a day.”<sup>60</sup> In light of this grim news, Tzipi Livni, Israel’s pragmatic foreign minister, immediately began lobbying to halt the bombing of Beirut’s suburbs. However, the cabinet dismissed her concerns and, led by Olmert, continued to escalate the air campaign. Thus for a month, Lebanon’s villages and suburbs were needlessly targeted by air strikes predicted to be futile against Hizbollah; and as envisaged in that early report, Hizbollah’s rockets continued to rain down upon northern Israel.

While the “probability of success” principle, as with the other *jus ad bellum* criteria, is intended to be engaged prior to the resort of war, in this case it ought to have at least been considered in the early stages of the conflict, when it became apparent that the carnage wrought upon Lebanese civilians would serve no just purpose. Knowing now what Israeli officials knew then, we must wonder what, exactly, was their true aim. If, as the evidence suggests, Israel deliberately targeted civilians absent any possible just benefit, its officials are guilty of violating both JWT and key tenets of humanitarian law.

*(Macro-) proportionality*

Orend’s terms (macro-) proportionality and (micro-) proportionality serve to distinguish between the general *jus ad bellum* principle that calls on potential belligerents to calculate the overall costs and benefits of resorting to war from the *jus in bello* principle that calls for warring parties to weigh the costs and benefits of individual actions. Walzer is generally dismissive of attempts to endorse a strong principle of (macro-) proportionality due to the impossibility of calculating intangible values, such as sovereignty, against quantifiable ones such as potential casualties. He forcefully argues this point in his earlier noted work on the first Gulf war, asking

How do we measure the value of a country’s independence against the value of the lives that might be lost in defending it? How do we figure in the value of defeating an aggressive regime or the value of deterring other, similar regimes? All values of this latter sort are sure to lose out to the body count, since it is only bodies that can be counted.<sup>61</sup>

Due to this challenge, Walzer suggests that the calculus of proportionality functions best within the ambit of *jus in bello*, wherein specific judgments about tactics and weaponry can be made in order to restrict unintended damage to persons and property.<sup>62</sup>

Despite Walzer’s disdain for it, the principle of (macro-) proportionality was at the center of the discourse surrounding Israel’s decision to wage war on Hizbollah. Opponents of the war

---

<sup>60</sup> Wilson.

<sup>61</sup> Walzer, “Justice and Injustice in the Gulf War,” p. 7.

<sup>62</sup> *Ibid*, p. 8.

vociferously charged that Israel had grossly over-reacted to what amounted to a minor transgression, and had thus violated this key tenet of traditional JWT. These invectives pulled Walzer into the proportionality debate and, as a challenge to these detractors, he argued that Israel was responding not only to what “Hizbollah [has] already done, but also against what they are (and what they say they are) trying to do.”<sup>63</sup>

On the face of it, this seems a reasonable claim. Hizbollah was believed to possess approximately 12,000 rockets and had already unleashed some of them upon northern Israel at the outset of the 12 July attack.<sup>64</sup> And, as the war increased in intensity, so did the rhetoric of Hizbollah’s leadership, which threatened to retaliate for Israeli strikes on Beirut with rocket attacks on Tel Aviv.<sup>65</sup>

However, it is important to reiterate that Nasrallah threatened an “open war” only after Israel had carried out massive attacks on both civilian targets and his own private residence, thus putting his threat and subsequent rocket attacks into the realm of *jus in bello*. Before that time, he had been clear that Hizbollah sought negotiations, not war. That said, what Israel actually responded to was the kidnapping of two, and killing of five, IDF soldiers. Viewed in this light, it appears as though Walzer was conflating Israel’s *jus ad bellum* justifications with Hizbollah’s *jus in bello* actions. In other words, Walzer attempted to use the escalating hostilities as an *ex post facto* justification of Israel’s initial decision to resort to war.

Furthermore, upon closer inspection of Walzer’s JWT, it appears as though his purported right to respond to potential threats contradicts his own principles vis-à-vis military reactions. In the updated preface of *Just and Unjust Wars*, he claims that “when we act militarily, we must respond to the ‘evil that men do,’ which is best read as ‘the evil that they are doing,’ and not to the evil that they are capable of doing or have done in the past.”<sup>66</sup> In this case, the “evil” being done was limited to the initial, unjustified aggression, so we ought to balance this initial act against Israel’s resort to war. Viewed this way, one ought to question the justice of engaging Hizbollah in a large-scale war. Likewise, considering that the Israeli response to Hizbollah’s raid was predicated entirely upon what Israel feared Hizbollah *might* do, it would seem as though such rationale would be undermined by Walzer’s insistence that force ought to only be used in response to a *received* harm, rather than a *perceived*, but not certain, threat.

#### *Jus ad bellum conclusion*

Because Walzer privileges the “just cause” criterion over the other JW principles, the initial act of aggression carried out by Hizbollah against Israel would likely satisfy his definition of JW at the *jus ad bellum* level. Thus, in Walzerian terms, it seems reasonable to suggest that Israel’s resort to war was justified. However, the above analysis of Walzer’s JWT exposes huge moral gaps that greatly undermine traditional JWT. By giving short shrift to the principles of “last resort” and “(macro-) proportionality,” while completely ignoring the criterion of “probability of success,” Walzer opens the door to grave violations of the basic rights of the citizens of both the “just” nation waging the war and the aggressor state by allowing for hair-triggered, full-scale responses to relatively minor aggressions.

---

<sup>63</sup> Walzer, “War Fair: The Ethics of Battle.”

<sup>64</sup> Netanyahu, “No Ceasefire in the War on Terror.”

<sup>65</sup> “Bombs pound Beirut for second night,” 3 August 2006, *CNN.com*, <http://www.cnn.com/2006/WORLD/meast/08/03/mideast.main/index.html>.

<sup>66</sup> Walzer, *Just and Unjust Wars*, p. xiii.

### Walzer's Just War: *Jus in Bello* Principles and Practice

Despite the realist, “war is hell” view of warfare that permits virtually unlimited death and destruction so long as it results from the overarching aim of “winning” the war, a mainstay of JWT is the belief that harm can, and ought, be restrained once hostilities are initiated. Once wars begin, the second set of JWT principles, the *jus in bello*, becomes engaged as a means of assessing the particular tactics and strategies used by belligerents. As previously discussed, the principles of noncombatant immunity and (micro-) proportionality are the central *jus in bello* tenets, and both serve in tandem to check the violence of war.

The greatest tragedy of modern warfare is the disproportionate manner in which it targets the innocent. According to the United Nations, “[n]early 90 per cent of victims of war today are civilians, mainly women and children.”<sup>67</sup> For this reason, it is imperative that belligerents begin to employ tactics that decrease the likelihood that non-combatants become the targets of aggression. As was previously noted, both Hizbollah and Israel are guilty of targeting civilian areas, and thus both sides of the conflict ought to be held morally and legally accountable for the lives destroyed by the failure to discriminate between combatants and noncombatants. Due to the tragic toll the war levied on civilians, the following discussion on *jus in bello* principles will focus on those rules established to protect the innocent.

#### *Noncombatant immunity*

Walzer is explicit in his privileging of the rights of civilians over all other JW principles. *Just and Unjust Wars* is peppered with various permutations of the general prohibition against targeting civilians, and this standard is predicated upon “a certain view of noncombatants, which holds that they cannot be used for some military purpose, even if it is a legitimate purpose.”<sup>68</sup> That said, Walzer has little to say about the traditional JWT principles of necessity and proportionality, as noncombatant immunity is the paramount JW standard under which the other principles fall. Nonetheless, these principles do inform the discourse vis-à-vis noncombatants, and will thus be addressed to some degree in the following analysis.

Under Walzer's conception of noncombatant immunity, even those who support a war effort by providing labor or materiel, cannot be attacked when not actively engaged in those actions. Thus, noncombatants who are in their homes or vehicles while carrying out the workaday duties of civilian life are “*innocent* people, a term of art which means that they have done nothing, and are doing nothing, that entails the loss of their rights,” and thus may not be “attacked at any time.”<sup>69</sup> Based upon this definition of “innocence,” the civilians of Lebanon, even those who supported Hizbollah, ought to have been protected by the principle of noncombatant immunity.

However, as has been discussed above, Lebanese civilians accounted for the vast majority of casualties in Israel's war against Hizbollah. While both traditional and Walzerian JWTs make allowances for incidental civilian deaths, evidence suggests that Israel not only ignored the JWT principle of discrimination, but also deliberately targeted noncombatants. In so doing, Israel

---

<sup>67</sup> Frehiwot Bekele, “Wanted: a just, humane world,” 2000, *United Nations Africa Recovery*, <http://www.un.org/ecosocdev/geninfo/afrec/vol13no4/3unicef.htm>.

<sup>68</sup> Walzer, *Just and Unjust Wars*, p. 137.

<sup>69</sup> *Ibid*, pp. 146, 151.

eviscerated the *jus in bello* standards that serve as buffers between innocents and the wars raging around them.

In response to widespread criticism of its tactics, Israel and its supporters argued that civilian casualties were the direct result of Hizbollah's use of residential areas as launching pads for rocket attacks. Thus, because the militant group was using Lebanese civilians as "human shields," it alone was responsible for the deaths. Walzer added his own voice to this argument in defense of Israel, claiming that "[c]ivilians will suffer so long as no one on the...Lebanese side takes action to stop rocket attacks. From that side, though not from the Israeli side, what needs to be done could probably be done without harm to civilians."<sup>70</sup>

This justification for attacks on civilians is troubling for two reasons. First, Walzer appears to argue that Israel cannot "do what needs to be done," presumably win, without killing civilians. This blanket validation of Israel's tactics threatens to engender a slippery slope, at the bottom of which we find a war waged against civilians. Interestingly, Hizbollah, on the other hand, has no corresponding right to target civilians. The second reason this claim is startling is less dialectic, and more pragmatic in nature: Walzer and other Israel apologists were dead wrong. Little evidence has emerged to support the "human shield" claims posited by Israel.<sup>71</sup> In fact, in some of the most dramatic examples of civilians coming under attack, it is clear that Israel's military planners had no reason to believe that Hizbollah forces were in the area.

The following assessment of Israel's actions within the context of *jus in bello* principles focuses on three specific instances in which Lebanese civilians were targeted by the Israeli military: air strikes carried out against Lebanese refugees as they fled from their homes; an air strike on the village of Qana that killed 29 civilians; and the flooding of civilian areas with upwards of four million cluster bomblets in the waning hours of the war. Had these been isolated incidents, we might perhaps be able to dismiss them as tragic, yet acceptable examples of collateral damages. However, viewed in the context of the 34-day war, these graphic illustrations provide evidence of an overall war plan directed at killing innocents.

#### *Air strikes on Fleeing Civilians*

A few days into the war, Israel began ordering the evacuation of Lebanese civilians living in the region south of the Litani River. Leaflets dropped by airplanes and radio broadcasts warned of a looming attack, setting off a mass exodus of civilians seeking refuge with friends and relatives in safer areas.<sup>72</sup> The bulk of this migration continued until 27 July, when Israel's ominous declaration that "All those now in south Lebanon are terrorists who are related in some way to Hizbollah,"<sup>73</sup> turned the region into a virtual free-fire zone. Therefore, those Lebanese innocents who, due to illness, lack of funds, or fear of being killed, could not leave and thus became targets.

For three weeks, entire villages evacuated and headed north en masse, believing that the IDF had guaranteed them safe passage. However, this safety soon proved illusory, as the IDF began to systematically target both individual passenger vehicles and extensive convoys in aerial attacks.

---

<sup>70</sup> Walzer, "War Fair."

<sup>71</sup> United Nations Human Rights Council (HRC), *Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution s-2/1*, 10 November 2006, <http://www.ohchr.org/english/bodies/hrcouncil/docs/CoI-Lebanon.pdf>.

<sup>72</sup> Human Rights Watch (HRW), *Fatal Strikes: Israel's Indiscriminate Attacks Against Civilians in Lebanon*, August 2006, <http://hrw.org/reports/2006/lebanon0806/> (19 September 2006).

<sup>73</sup> "Israel says world backs offensive," *BBC Online*, 27 July 2006, [http://news.bbc.co.uk/2/hi/middle\\_east/5219360.stm](http://news.bbc.co.uk/2/hi/middle_east/5219360.stm).

From 15-23 July, Human Rights Watch (HRW) documented a half-dozen cases in which the Israeli military employed such attacks against civilian targets, and media reports described in graphic detail the smoking, stinking ruins of vehicles, their passengers burnt beyond recognition.<sup>74</sup> In one such incident near the village of Marwahin, 23 civilians, including 14 children, were killed when their caravan was targeted by an Israeli helicopter.<sup>75</sup> In a cruel irony, the victims, largely Sunni Muslims, had long been at odds with Hizbollah, a Shi'a group, and were thus unlikely to be even passive supporters of the group. Nonetheless, no weapons or other signs of militant activity were discovered near the wreckage.<sup>76</sup>

It is clear that these attacks, in which all the victims were civilians, amount to violations of the principle of noncombatant immunity. In failing to exert even a modicum of effort in order to determine whether the vehicles and their occupants were either militants actively engaged in belligerent activities or rather the “innocent” as defined by Walzer above, the IDF failed to abide by its obligation of discrimination. Nor, does it appear, do such attacks comport with the utilitarian principle of necessity, which requires that actions in some way contribute to a military victory.<sup>77</sup> This view was reaffirmed by the United Nations Human Rights Council (HRC) report, which claimed that “[the Marwahin] attack clearly was disproportionate, violated the principle of distinction, and cannot be justified on the basis of the convoy being a military objective.”<sup>78</sup>

At this point, it is appropriate to introduce Walzer’s innovative restatement of the principle of *double effect*. In traditional JWT, the rule of double effect allows for the killing of civilians so long as their deaths are not intended. Thus, if the legitimate, stated military objective is to destroy a munitions factory and military planners are aware that civilian casualties are likely to result, their deaths are acceptable so long their killing is not the *intent* of the mission. As Walzer points out, this standard “invites an angry or a cynical response: what difference does it make whether civilian deaths are a direct or an indirect effect of my actions? It can hardly matter to the dead civilians...”<sup>79</sup> Thus, this loose conceptualization of double effect gives too much latitude to belligerents as they weigh the potential gains of an action against the imminent loss of civilian life.

In his restatement, Walzer argues that double effect outcomes are legitimated only when they result from a “double intention,” and thus

[t]he intention of the actor is good, that is, he aims narrowly at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends, and aware of the evil involved, he seeks to minimize it, accepting costs to himself.<sup>80</sup>

This requirement of personal risk-taking serves to reduce the likelihood of unnecessary collateral damage, for it creates a “positive commitment to save civilian lives.”<sup>81</sup> Walzer goes further by

---

<sup>74</sup> HRW, pp. 35-42.

<sup>75</sup> HRC, p. 38.

<sup>76</sup> HRW, pp. 37-38.

<sup>77</sup> Walzer, *Just and Unjust Wars*, p. 131.

<sup>78</sup> HRC, p. 38.

<sup>79</sup> Walzer, *Just and Unjust Wars*, p. 153.

<sup>80</sup> *Ibid*, p. 155.

<sup>81</sup> *Ibid*.

suggesting that belligerents ought to be prepared to take risks up to the point at which “any further risk-taking would almost certainly doom the military venture or make it so costly that it could not be repeated.”<sup>82</sup>

If adopted, this principle of risk would undoubtedly cause military planners to consider more seriously the tactics they employ, especially when those actions are likely to result in civilian deaths. Using this revised doctrine of double effect as our guide, we see that Israel failed to take adequate measures to decrease the likelihood of civilian deaths, not only in its attacks on fleeing Lebanese civilians, but also in virtually every aerial mission carried out against Hizbollah.

### *Qana*

In response to international criticism that its actions constituted a disproportionate use of force against largely civilian targets, the Israeli Ministry of Foreign Affairs (MFA) presented a legal justification for its tactics, quoting Luis Moreno Ocampo of the International Criminal Court: “[A] crime only occurs if ‘there is an intentional attack directed against civilians or an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage.’”<sup>83</sup> The MFA went on to present

two fundamental questions...in relation to the legitimacy of the planning and execution of an operation: 1) Is the target itself a legitimate military objective? And 2) Even if the target is...legitimate, is there likely to be disproportionate injury and damage to the civilian population...?<sup>84</sup>

After laying out these basic rules vis-à-vis the principles of necessity and proportionality, the MFA then provided a blanket justification for Israel’s actions, based largely on the claim that Hizbollah was using civilians as shields. In granting its military *carte blanche* in southern Lebanon, the MFA paved the way for the declaration that all people remaining in southern Lebanon were “terrorists.” And the world witnessed the danger of such attitudes played out in the village of Qana three days later.

On 30 July, Israeli warplanes unleashed its missiles upon Qana, killing 29 and wounding scores more. Most of the dead and wounded were members of the Shalub family, 63 of whom had sought refuge in the basement of a house. According to the HRC report, 17 of those killed were children under the age of 13, and many others were women.<sup>85</sup> The IDF initially justified the strike, claiming that Hizbollah rockets had been fired from the village, but no signs of militant activity were discovered in the rubble, nor were Hizbollah fighters among the dead. In the days following the attack, the IDF admitted that “It now appears that the military had no information on rockets launched from the site of the building, or the presence of Hizbollah men at the time.”<sup>86</sup>

<sup>82</sup> *Ibid*, p.157.

<sup>83</sup> Israel Ministry of Foreign Affairs, “Responding to Hizbullah attacks from Lebanon: Issues of proportionality,” 25 July 2006, *MFA Website*, <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hizbullah+attacks+from+Lebanon+Issues+of+proportionality+July+2006.htm>.

<sup>84</sup> *Ibid*.

<sup>85</sup> HRC, p. 32.

<sup>86</sup> HRW, “Israel/Lebanon: Qana Death Toll at 28,” 2 August 2006, <http://hrw.org/english/docs/2006/08/02/lebano13899.htm>.

The Qana massacre violated both traditional and Walzerian JW *jus in bello* principles, as well as those legal precepts lauded by the Israeli government. The IDF failed to identify legitimate military targets, yet it nonetheless carried out the mission against civilians. There can be no Walzerian double effect justification for such blatant cases of indiscriminate killing, for it is evident that no effort was made to discriminate between militants and noncombatants; nor was there any risk assumed by the IDF as it carried out the attack. Shockingly, in light of the Qana attack and other obvious violations of his own JWT, Walzer continued to support Israel's actions, stating that "[f]rom a moral perspective, Israel has mostly been fighting legitimately."<sup>87</sup>

HRW noted that in the first two weeks of the war alone, there were "some two dozen cases, representing a third of Lebanese civilian deaths,"<sup>88</sup> wherein no evidence of Hizbollah activity had been found. Thus, the Marwahin and Qana attacks provide a mere glimpse at the widespread and unjust killing of Lebanese civilians.

#### *Cluster bombs*

In the waning hours of the war, even as ceasefire negotiations were underway in the UN Security Council, the IDF blanketed southern Lebanon with an estimated four million cluster bomblets.<sup>89</sup> Due to the high "dud" rate of these small yet devastating explosives, approximately one million unexploded sub-munitions littered the landscape. According to one report, "[the bomblets] are stuck in the branches of olive trees and the broad leaves of banana trees. They are on rooftops, mixed in with rubble and littered across fields, farms, driveways, roads and outside schools." This unexploded ordnance created virtual minefields throughout the region, posing a threat to civilians as they returned home following the cessation of hostilities. By late September, cluster bombs had killed 18 Lebanese civilians, leaving scores more seriously wounded.<sup>90</sup>

As noted in the HRC report, although cluster munitions are not illegal *per se*, their use against nonmilitary targets is a violation of the laws of war.<sup>91</sup> Furthermore, because they continue to kill and maim once warfare has ceased, cluster bombs are "indiscriminate" weapons.<sup>92</sup> Although the IDF officially dismissed criticisms of its use of cluster bombs, the head of a rocket unit serving in Lebanon lamented that "[w]hat we did was insane and monstrous, we covered entire towns in cluster bombs."<sup>93</sup>

---

<sup>87</sup> Nir, p. 3.

<sup>88</sup> Aryeh Neier, "The Attack on Human Rights Watch," 2 November 2006, *The New York Review of Books*, Volume 53, Number 17, <http://www.nybooks.com/articles/19500>.

<sup>89</sup> Greg Myre, "Israel Orders Investigation of Bomb Use in Lebanon," 21 November 2006, *New York Times*, <http://select.nytimes.com/search/restricted/article?res=F40C1EFE395A0C728EDDA80994DE404482>.

<sup>90</sup> Michael Slackman, "Israeli Bomblets Plague Lebanon," 29 September 2006, *New York Times*, <http://www.nytimes.com/2006/10/06/world/middleeast/06cluster.html?ex=1317787200&en=a0abad92d44682dd&ei=5088&partner=rssnyt&emc=rss>.

<sup>91</sup> HRC, p. 6.

<sup>92</sup> "Shooting Without a Target," 18 September 2006, *Haaretz.com*, <http://www.haaretz.com/hasen/spages/762427.html>.

<sup>93</sup> Meron Rappaport, "IDF commander: We fired more than a million cluster bombs in Lebanon," 12 September 2006, *Haaretz.com*, <http://www.haaretz.com/hasen/spages/761781.html>.

The HRC offered the following as a critique of Israel's inexplicable, eleventh-hour employment of cluster bombs:

[T]he pattern and manner of attacks is not justifiable in terms of military necessity and was both indiscriminate and disproportionate. The use of cluster bombs suggests a degree of vindictiveness and an effort to punish the population as a whole, including those returning to town. The Commission finds that these weapons were used deliberately to turn large areas of fertile agricultural land into “no go” areas for the civilian population.<sup>94</sup>

Because cluster bombs are often unpredictable, in many cases landing a mile from their “intended” targets, and considering that up to 80% fail to detonate and thus become *de facto* anti-personnel mines, Israel's widespread use of these munitions amounts to a violation of the principle of discrimination.<sup>95</sup>

*Jus in bello conclusion*

Based upon the three preceding case studies detailing Israeli tactics in its war against Hizbollah, combined with the alarmingly high rate of civilian casualties, it appears as though Israel systematically violated the key *jus in bello* principles of discrimination, necessity, and proportionality. The HRW and HRC reports confirm dozens of cases in which civilians were the sole targets of the Israeli military, and the *ex post facto* admissions of IDF personnel lends credence to the claims that Israel completely failed to discriminate between militants and noncombatants. While under Walzer's JWT, Israel's decision to wage war against Hizbollah might be deemed just, we see that virtually every mission that resulted in civilian casualties contravened the standards governing how wars are fought.

*Rationale for attacks on civilians*

It is now important to question why Israel so frequently targeted Lebanese civilians as it waged its war on Hizbollah. As has been suggested above, Peretz relaxed the ROE, with the effect of obfuscating the distinction between combatants and innocents. Military planners were instructed “not to be deterred by Hizbollah's use of civilians as ‘human shields’,”<sup>96</sup> thus paving the way for indiscriminate and disproportionate attacks. It has been argued that this tacit approval of strikes against civilians was intended to “inflict punishment on the host population” so that public opinion would turn against Hizbollah.<sup>97</sup> Thus, because Israel realized it would not likely be able to destroy, or even significantly destabilize Hizbollah from the air, it chose instead to make life so painful for Lebanese civilians that they would oppose the militant group, leaving Hizbollah without its needed support base.

Ze'ev Maoz, a professor of political science at Tel Aviv University, most succinctly expressed the central argument of this paper as he rejected claims that Israel's actions were just:

This war is not a just war. Israel is using excessive force without distinguishing between civilian population and enemy, whose sole purpose is extortion. That is not to say that morality and justice are on Hizbollah's side. Most certainly not. But the

---

<sup>94</sup> HRC, p. 35.

<sup>95</sup> Slackman.

<sup>96</sup> Nir, p. 1.

<sup>97</sup> Ibid.

fact that Hizbollah "started it" when it kidnapped soldiers from across an international border does not even begin to tilt the scales of justice toward our side.<sup>98</sup>

While under Walzer's JWT, Israel's decision to wage war against Hizbollah might be deemed just, we see that many (perhaps most) Israeli missions contravened the standards governing how wars are fought.

In Walzerian terms, Israel could reasonably argue that its decision to launch a counter-attack in response to Hizbollah's cross-border raid was a just one. Because in Walzer's JWT, the paramount *jus ad bellum* criterion of "just cause" allows for unjust aggression, even relatively minor acts, to be met with a military response, Israel acted in accordance with the "war convention." However, it is important to question whether Walzer's refusal to differentiate between aggressions that threaten the very existence of a political community from lesser, more limited actions serves as a truly just principle. In this day of limited strikes involving non-state actors, such a policy completely undermines the traditional JWT principle of proportionality in allowing for overwhelming and virtually unlimited military responses to actions of marginal significance and scope.

As has been argued above, Israel's failure to discriminate between Hizbollah fighters and noncombatants and its wonton, systematic targeting of civilians is a gross violation of Walzer's principle of noncombatant immunity. Both HRW and the HRC documented attacks on Lebanese civilians that served no military purpose, and the public disclosures made by Israeli political and military officials acknowledging that the ROE involving noncombatants had been relaxed confirmed that civilians were seen as legitimate targets. Because the principle of noncombatant immunity is paramount in Walzer's JWT, it ought to be concluded that in terms of *jus in bello*, Israel's war against Hizbollah was unjust.

Furthermore, these actions were violations of the traditional JW principles of proportionality and necessity, standards largely ignored by Walzer. This view was supported by the HRC, which concluded that

the excessive, indiscriminate and disproportionate use of force by the IDF goes beyond reasonable arguments of military necessity and of proportionality, and clearly failed to distinguish between civilian and military targets, thus constituting a flagrant violation of international humanitarian law. The Commission has formed a clear view that, cumulatively, the deliberate and lethal attacks by the IDF on civilians and civilian objects amounted to collective punishment.<sup>99</sup>

Thus, there should be no doubt that, in the main, Israeli actions resulting in civilian casualties constituted grave violations of both traditional and Walzerian *jus in bello* principles.

The war against Hizbollah elucidated a problem increasingly faced by military

planners as they attempt to fight counterinsurgencies against elusive, nonstate actors. The rise in asymmetrical warfare puts many more civilians at risk, as the lines between belligerents and innocents becomes blurred; and those who choose to fight against such guerillas must make the difficult decisions vis-à-vis proportionality and necessity.

---

<sup>98</sup> "'Just War' Reconsidered," 1 September 2006, *The Chronicle of Higher Education*, <http://chronicle.com/weekly/v53/i02/02b00401.htm>.

<sup>99</sup> HRC, p. 83.

Walzer's restatement of the doctrine of double effect raises the bar for making such decisions, and in so doing demands that counterinsurgency forces accept for themselves a greater personal risk in order to decrease the incidence of unjust civilian deaths. And the U.S. military's recent reforms have demonstrated that such tactics do, in fact, serve to protect the lives of innocents. It is a wonder, then, that Walzer himself failed to ask the Israeli military to embrace his "positive commitment to save civilian lives," as they waged their war in Lebanon. Instead, he consistently gave the IDF the green light, even going so far as to claim that Israel, but not Hizbollah, had to kill innocents in order to win.

By deliberately targeting noncombatants as a means of undermining Hizbollah, Israel violated the very essence of both traditional and Walzerian JWT, which are largely aimed at protecting the innocent. Although the JWT paradigm traditionally bifurcates *jus ad bellum* criteria from those of the *jus in bello*, this war in particular illustrates that we ought to rethink this principle. If an initially just war is consistently fought using unjust means, the war itself ought to be denounced as unjust. Conversely, even if an unjust aggressor uses primarily ethical means and methods over the course of a war, its initial aggression nonetheless taints the entire exercise, and the subsequent actions occurring within such an unjust war must likewise be condemned as they are carried out pursuant to an immoral military advantage.

Failing to assess the totality of a war by adhering to the strict bifurcation of the just war doctrine threatens to eviscerate the very idea of making moral judgments about wars by forcing us to accept that, in some cases, a just response to an unjust aggression can include immoral means. In the words of Leon Wieseltier:

A war must not only start just, it must also stay just. A just war can lose its justice. For this reason, conscience must be as dynamic as the battlefield, and moral assessments as regular and as alert (but not as nimble!) as tactical assessments, or else the invocation of justice is only a device for easing the lives of cynics.<sup>100</sup>

Conversely, the traditional division between *jus ad bellum* and *jus in bello* principles could conceivably allow us to reward an aggressor who follows, to a significant degree, the basic rules regulating the tactics and arms used in war. Thus, while it is reasonable to make separate judgments about the justifications for going to war and the subsequent acts therein, we must go still further and assess the *overall* nature of the war, or what could be referred to as the *jus universitas*. This freedom will allow us to make more balanced and more realistic assessments of conflicts and those responsible for their execution.<sup>101</sup>

Having assessed the events of the Second Lebanon War in JWT terms, and in so doing demonstrating that both Hizbollah and Israel violated the key principles of this moral code, it is now possible to look to this war for guidance as to what measures can be taken in future conflicts in order to avoid similar abuses. The next chapter outlines two reforms that, if instituted, promise to greatly reduce the harm done to noncombatants, and thus make warfare more just and humane.

---

<sup>100</sup> Leon Wieseltier, "The Children of Qana," August 14, 2006, *The New Republic Online*, <http://www.tnr.com/doc.mhtml?i=20060814&s=diarist081406>.

<sup>101</sup> Some JW theorists, most notably Orend, have begun advocating for the acceptance of the pursuit of *jus post bellum*, or post-conflict justice. This principle seeks to promote just terms of peace, as a way of ensuring that the ideal of justice dominates throughout the stages of war. For more on this, see Orend, *The Morality of War* (Ontario: Broadview Press, 2006), pp. 160-189.

### Lessons Learned from Lebanon

This war provides a clear illustration of the fact that in times of war, the principle of noncombatant immunity is commonly, and oft-times deliberately, abrogated. When this occurs, the basic rights of innocents are violated, and such moral breaches serve to erode the pillars of the JWT norms aimed at protecting those very rights. Some, like Alan Dershowitz, might argue that the increasingly asymmetrical nature of contemporary warfare calls for a loosening of humanitarian principles, in order to allow for the unavoidable incidence of collateral damage. However, I would argue that if we choose to engage in such hostilities, even if responding justly to wrongful aggression, it is incumbent upon us to redouble our efforts to ensure that noncombatants remain out of harm's way. The Second Lebanon War provides some guidance in determining how, exactly, we can carry out this obligation to protect civilians.

The evidence presented above highlights the need for two urgently needed reforms that belligerents ought to urgently embrace in order to assuage much of the suffering experienced by noncombatants living in war zones. First, those engaged in combat must reflect a dedication to the principle of discrimination by either instituting rigorous ROE aimed at avoiding causing unnecessary suffering to civilians or by abiding by those norms already in existence. Second, and more specifically, cluster bombs ought to be condemned as arms *mala in se*, and thus be banned under international law. I will take up each of these proposed reforms in turn.

#### 1. Fighting a just war against guerillas

In justifying Israel's war against Hizbollah, a seemingly exasperated Walzer asks, "How do you—how does anyone—fight an enemy like that?"<sup>102</sup> Had he looked, Walzer could have found a possible answer to this rhetorical question within the pages of his own JWT. In discussing the U.S. war in Vietnam, Walzer explains that such a war against guerillas

cannot be won, and it should not be won. It cannot be won, because the only available strategy involves a war against civilians; and it should not be won, because the degree of civilian support...makes the guerillas the legitimate rulers of the country.<sup>103</sup>

---

<sup>102</sup> Walzer, "War Fair."

<sup>103</sup> Walzer, *Just and Unjust Wars*, pp. 195-196.

While a strong argument could be made against the legitimacy of Hizbollah's political ascendancy in Lebanon (even though it currently holds significant power in Parliament), the former claim is nonetheless self-evident: anti-guerilla warfare devolves into a war on innocents.

But, does this reality rule out the fighting of *all* wars against guerilla movements? Many would undoubtedly argue that such a passive stance would allow nefarious regimes to emerge from guerilla wars, thus endangering both its own civilian population and the security of neighboring states. Therefore, arguing that wars ought not be fought against guerillas appears as neither a reasonable nor an ethical alternative. So the question remains: "How do we fight against guerilla groups without simultaneously waging war against innocents?"

Surprisingly, the answer to this question might be illustrated by the ROE employed by the U.S. military in Iraq. While the U.S. has been widely criticized by the international community for the war, civilian casualties resulting from encounters with U.S. military personnel have been relatively low, especially when compared to the collateral damage seen in past wars. It has been estimated that since May of 2003, when major combat operations were declared over and the hostilities transformed into a war against insurgent groups, approximately 3,600 Iraqi civilian deaths have been attributed to U.S. troops.<sup>104</sup> If these figures are accurate, the data would indicate that Israel's actions in Lebanon killed 1/3 of this number of civilians in about 1/38<sup>th</sup> of the time.

The relatively low number of Iraqi civilian deaths has been attributed in part to the increasing rigidity of the ROE followed by U.S. military personnel. Following two dismal years in which encounters with civilians commonly resulted in unnecessary bloodshed, the military recently adopted a restrictive ROE that commands troops to employ a greater level of restraint, while putting themselves at greater risk, in an attempt to decrease civilian casualties. House-by-house searches have largely replaced the massive air and artillery strikes used earlier in the war, and commanders are expected to go to great lengths to weigh the benefits of actions against the potential cost in human lives.<sup>105</sup>

This combination of restraint and its concomitant risk was chronicled by a reporter describing the perils faced by U.S. marines in Iraq:

As part of their counterinsurgency operations...marines...are under orders to show restraint, a policy rooted in hopes of winning the trust of the civilian population.

Iraqi snipers seem to know these rules and use them for their own protection. They often fire [at troops] from among civilians...having observed that unless the marines have a clear target, the marines will not shoot.<sup>106</sup>

Such restraint has been frequently witnessed by journalists "embedded" with military personnel, and serves as a testament to the positive impact the strengthening of the ROE has had in the counterinsurgency. Furthermore, this example lends credence to Walzer's suggestion that the "positive commitment to save civilian lives" engendered by the assumption of personal risk results in a decrease in unjust collateral damage.

---

<sup>104</sup> Colin Kahl, "How We Fight," November/ December 2006, *Foreign Affairs*, p. 87. While this article provided the most current figures on noncombatant casualties at the time of its publication, there have no doubt been considerable civilian casualties since. However, no up-to-date study exists at the time of this writing.

<sup>105</sup> *Ibid*, 96-97.

<sup>106</sup> C. J. Chivers, "The Struggle for Iraq: Sniper Attacks Adding to Peril of U.S. Troops," 4 November 2006, *New York Times*, <http://select.nytimes.com/search/restricted/article?res=F20F13F93B5B0C778CDDA80994DE404482> (4 November 2006).

Obviously, critics of the war in Iraq might dismiss such claims as an apologist justification for the ongoing war, which by some figures has caused upwards of a half-million civilian casualties.<sup>107</sup> To be sure, it would be naïve to accept this praise without some skepticism, especially in light of the recently disclosed evidence of a massacre carried out by U.S. troops in the town of Haditha and all-too-regular reports of civilian deaths at the hands of U.S. military personnel. Nonetheless, U.S. military planners have worked to make more rigorous the ROE under which their soldiers are operating in Iraq, and some improvements have been documented.

That said, in the wake of the Lebanon war, Israel would do well to follow the lead of the U.S. and work to create a more stringent ROE for IDF actions. As this analysis has suggested, over the course of the war Israel's leadership did just the opposite by lowering the standards for discriminating between belligerents and civilians, with tragic and unjust results.

## 2. Cluster bombs as arms *mala in se*

There is a growing movement aimed at curtailing the use of cluster munitions, viewed by many as indiscriminate weapons for their record of disproportionately harming noncombatants. Due to both serious design flaws and deliberate misuse by belligerents, these weapons pose a grave threat to civilians, as they are capable of killing and maiming innocents long after hostilities have ceased. While both NGOs and state bodies have made a strong legal case in favor of a moratorium on the production and use of cluster bombs, a moral argument against their use has been noticeably absent from the debate. However, based upon the available evidence, it should be argued in terms of JWT that these weapons are an example of arms *mala in se*, or inherently nefarious armaments.

The tragic civilian costs of cluster bombs have been highlighted by recent wars, and as public awareness of these risks has increased, so have the calls for reform. Israel's massive, eleventh-hour use of these weapons during its summer 2006 war against Lebanon, in which it flooded a huge swath of southern Lebanon with some 3 million bomblets, led even some ardent supporters of Israel to declare that, "whereas it is difficult to gainsay the use of force against terrorists, the sowing of southern Lebanon with cluster bombs in the final hours of last summer's war was an act of genuine malignity."<sup>108</sup>

Israel's deployment, against largely populated areas, of more cluster munitions than had been used in the major combat phases of the wars in Kosovo, Afghanistan and Iraq *combined*,<sup>109</sup> added a

---

<sup>107</sup> David Brown, "Study Claims Iraq's 'Excess' Death Toll Has Reached 655,000," 11 October 2006, *Washington Post*, <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/10/AR2006101001442.html> (12 October 2006).

<sup>108</sup> Leon Wieseltier, "Sympathy for the Other," April 1, 2007, *New York Times Review of Books*, <http://www.nytimes.com/2007/04/01/books/review/Wieseltier.t.html?pagewanted=2&ei=5070&en=b881348590fb5e41&ex=1176523200>.

<sup>109</sup> Human Rights Watch, "Firing Blind: Israel's Use of Cluster Munitions in Lebanon in July and August 2006," pg. 26. This report is expected to be released in May, 2007.

sense of urgency to demands for greater restrictions on cluster bomb usage. In February 2007, 46 nations committed themselves to push for a treaty banning most cluster bombs due to their grave humanitarian threat,<sup>110</sup> while Leahy and his senate colleague, Diane Feinstein, sponsored a bill intended to restrict the manufacture, sale and use of these weapons.<sup>111</sup> As with landmines, this growing chorus against cluster munitions appears to signal the emergence of a moral consensus that views these weapons and concomitant suffering as evils in and of themselves.

It is a central aim of this paper to present a more complete ethical definition of *mala in se*, as such a moral conceptualization of this heretofore legal term will help to inform both the legal and moral debate regarding modern weapons and tactics of war by providing a model with which we may assess certain acts and methods. The resulting framework can assist moral thinkers and other participants in the just war discourse as they assess the moral value, or immoral nature, of specific *jus in bello* practices.

While there are no doubt legal and moral concerns arising from the use of cluster munitions against combatants in times of war, the arguments laid out herein focus specifically upon the ill effects these weapons have on noncombatants. This is not to dismiss the suffering caused to belligerents, but rather seeks to emphasize the disproportionate toll cluster bombs and other means *mala in se* levy against innocents. In so doing I hope to lend support to the belief that we are morally obligated to protect noncombatants, as they are, according to Walzer, “men and women with rights and they cannot be used for some military purpose, even if it is a legitimate purpose.”<sup>112</sup> The exact nature of these “rights” will be discussed below.

The phrase *mala in se* first appeared in late-15<sup>th</sup> century English common law, in reference to crimes evil in and of themselves (e.g. murder and theft) as opposed to crimes *mala prohibita*, which are those crimes deemed wrong solely because they violate legal standards, without necessarily invoking a sense of moral outrage (e.g. parking violations).<sup>113</sup> In recent years, some just war theorists have incorporated the term *mala in se* into the body of *jus in bello* principles, or those ethical restrictions placed on the specific tactics, tools and strategies of warfare.<sup>114</sup>

In this context, *mala in se* is invoked when describing those means deemed “rights-violative,”<sup>115</sup> including rape as a weapon of war, genocidal campaigns, and specific weapons that by and large contravene the just war principles of proportionality and noncombatant immunity. This latter group could arguably include nuclear weapons, chemical and biological agents, and cluster

<sup>110</sup> Cluster Munition Coalition, “Oslo Report and Next Steps,” March 2007, <http://www.stopclustermunitions.org/news.asp?id=53>.

<sup>111</sup> “Leahy, Feinstein Introduce Legislation (S. 594) Restricting Use, Sale Or Transfer Of Cluster Bombs,” February 15, 2007, *Office of Senator Patrick Leahy*, <http://leahy.senate.gov/press/200702/021507d.html>.

<sup>112</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), pg. 137.

<sup>113</sup> “The Distinction between “Mala Prohibita” and “Mala in se” in Criminal Law,” January 1930, *Columbia Law Review*, Vol. 30, No. 1, p. 74.

<sup>114</sup> For example, Brian Orend has addressed means *mala in se*, but only in passing, calling it an “imprecise yet interesting idea.” See Orend, *Michael Walzer on war and justice* (Montreal: McGill-Queen’s University Press, 2000), p. 124.

<sup>115</sup> *Ibid.*

bombs, due to their innately indiscriminate nature, as evinced by the disproportionate suffering such arms inflict on innocents living in war zones.

While there is no settled, enumerated body of means declared *mala in se*, we can look at the moral and legal discourse surrounding certain weapons and methods for guidance in this direction. This nexus between moral arguments and positive international law is vital to our understanding of how wars ought to be waged, as JWT principles and legal norms often serve to support each other. According to James Turner Johnson,

By its very nature, law cannot render the fine details of moral argument. Its purpose is also...more narrowly focused: it is a hedge against undesirable behavior. Nonetheless, law bears an important relation to moral concerns, and over time these concerns may emerge in greater fullness through interpretations of positive law...<sup>116</sup>

Thus, while JWT provides a nuanced moral account of warfare, the body of international law serves as the “real-world” bulwark against unjust and immoral acts. From this link, we can devise an ethical conception of the principle of *mala in se* informed by legal arguments vis-à-vis the conduct of war.

In order to make ethical pronouncements about certain means and methods of warfare, we must define what rights have been violated by their employment. But before we can undertake this task, we must first identify a rights-influenced moral theory suitable for considering the kinds of violations emerging from armed conflicts. Jack Donnelly has noted, however, that such human rights-based “moral arguments” are susceptible to critique because “they operate within rather than across communities or traditions.”<sup>117</sup> This is indeed sometimes the case.

Some of the standout contemporary liberal rights theories, such as those of Michael Walzer and John Rawls, largely predicate individual rights upon one’s membership in a defined political system. In the case of the former, we have rights in so far as we are members of “political communities,” while in the latter our rights are derived from being part of a community of “peoples,” or states.<sup>118</sup> One problem that arises from such conceptions of rights is that they fail to seriously consider the rights and needs of so-called “stateless” peoples. In the context of protracted conflict, this is an especially important consideration when looking to protect the rights of refugees forced from their homes into a vulnerable state of political and legal limbo, such as those Sudanese Darfurians currently living in Chadian refugee camps or the hundreds of thousands of Iraqis fleeing their war-torn nation.

In order to ensure that *all* innocent persons impacted by armed conflict receive equal moral consideration, regardless of their association with given communities, it is imperative that our concept of rights be universalizable and cut across cultural and political boundaries. For this reason, I suggest that a rights approach predicated upon a two-pronged version of utilitarianism that takes into account both suffering and the stifling of preferences can serve as a suitable foundation for our discussion of the rights held by noncombatants in times of war. Such a conceptualization of rights promotes equal moral consideration of *all* innocents *qua* persons, regardless of whether or not they are tied to a particular political or cultural community.

---

<sup>116</sup> James Turner Johnson, “Just Cause Revisited,” in *Close Calls: Intervention, Terrorism, Missile Defense, and ‘Just War’ Today* (Washington DC: Ethics and Public Policy Center, 1998), p. 26.

<sup>117</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 2003), p. 22.

<sup>118</sup> For more on this, see Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* (New York: Basic Books, 1977), pp. 53-54 and John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 2002).

As I have envisioned it, this dual-level utilitarian rights approach has its provenance in two related schools of consequentialist thought. The first level seeks to address the basic issue of physiological and psychological suffering caused by war. Clearly, this idea has its roots in the classical utilitarianism of Jeremy Bentham and John Stuart Mill, who generally sought to predicate moral values upon the amount of pleasure or pain a particular action produces. The second level of utilitarian rights seeks to protect the various “preferences” of innocents, of which the desire to continue living is supreme.<sup>119</sup>

It has oft been argued that utilitarianism serves as a poor foundation for human rights because it allows societies to “trade benefits to one person against benefits to another,”<sup>120</sup> in an attempt to produce some greater good (or decrease the overall amount of suffering). In the milieu of armed conflict, however, this basic principle has long been the rule, as seen in the doctrine of “double effect” (DDE). According to the DDE, which is a key component of both JWT and humanitarian legal norms, military planners may carry out attacks knowing that civilian “collateral” damage will occur so long as the attack is pursuant to some clear military advantage and the harming of civilians is not the *intent* of the attack.<sup>121</sup> Thus, JWT and the laws of war do “not really believe in civilian immunity...,” but rather rely upon the “threadbare fabric of ‘due care.’”<sup>122</sup>

Therefore, to promote a utilitarian-based rights approach does not necessarily threaten to *further* undermine the rights of innocents in combat zones by suggesting that their preferences or happiness ought to be traded off for some greater military good. On the contrary, using a clearly defined utilitarian framework as a basis for making ethical denunciations of particular means and methods of warfare actually allows us to *broaden* the scope of protections by providing a more textured moral argument against the use of particular tactics and weapons. As we shall see, this two-pronged consequentialist view of rights can serve as the basis for greater legal protections of noncombatant rights, as the language used to support these rights promises to add moral substance to arguments in favor of bans and other restrictions of particular arms.

For the purpose of defining rights within the specific context of conflict,<sup>123</sup> it is instructive to look to Michael Tooley’s argument vis-à-vis the rights of persons for guidance. Here, the author makes a distinction between the right to be free from wonton suffering accorded to all sentient beings and the “moral right to life” owed to persons “possessing [both] the concept of a self as a continuing subject of experiences and other mental states,”<sup>124</sup> and the “desire [ ] to continue existing as a subject” of such a life.<sup>125</sup> This distinction is key to our understanding of rights, as it confers vital

---

<sup>119</sup> Peter Singer, *Writings on an Ethical Life* (New York: Ecco Press, 2000), p. 134.

<sup>120</sup> Peter Singer, “A Response to Martha Nussbaum,” 2002, *Utilitarian.net*, <http://www.utilitarian.net/singer/by/20021113.htm>.

<sup>121</sup> Brian Orend, *The Morality of War* (Toronto: Broadview Press), pg. 15.

<sup>122</sup> *Ibid*, pg. 261.

<sup>123</sup> That is not to say that the right not to be caused unnecessary suffering and the right to life do not apply outside of the context of war. To be sure, Peter Singer and other utilitarians cogently promote a similar foundation for a generalized moral theory. However, Singer and others would not confer a “right” to not suffer, but would instead describe this issue solely in terms of “interests” or “preferences.”

<sup>124</sup> Michael Tooley, “Abortion and Infanticide,” in ed. Peter Singer, *Applied Ethics* (Oxford: Oxford University Press, 1986), p. 64.

<sup>125</sup> *Ibid*, p. 69.

rights upon two related, and sometimes overlapping, groups of beings: merely sentient beings capable of suffering and self-aware persons desirous of a continuing existence.

Peter Singer, the controversial utilitarian ethicist, has further developed this line of reasoning in his version of preference utilitarianism. According to Singer, to kill a person against her will is wrong in that it “violates not just one preference but a wide range of the most central and significant preferences a being can have.”<sup>126</sup> Therefore, the “right to life” serves to protect our ability to continue, as persons, to pursue our many preferences, of which our “desire to continue existing as a distinct entity”<sup>127</sup> is paramount. Thus, if we conflate the views of Tooley and Singer in order to simplify the key ideas, the argument goes as follows: as persons capable of suffering, we have both the right not to be caused undue suffering by others *and* the right to life.<sup>128</sup>

Such a utilitarian ethical foundation seems to serve as a reasonable basis for determining whether certain means of war ought to be considered *mala in se*, as it takes into account war’s “inhumane consequences” in terms of both the suffering and death brought upon its victims.<sup>129</sup> In addition, because this preference utilitarianism-inspired ethic cuts across communitarian lines, it serves to provide a moral impetus for the protection of *all* innocent persons in conflict zones. I would argue further that such a conception of rights could conceptually be viewed as the basis for much of the body of positive human rights and humanitarian law already in existence. To be sure, a look at the Universal Declaration of Human Rights<sup>130</sup> (UDHR) and the particular covenants it has engendered suggests that many of our most “significant preferences” are represented therein.

Generally speaking, when assessing the moral value of particular means and methods of war, we ought to ask whether they violate the preference utilitarian rights discussed above. To borrow a phrase coined in Protocol One to the Geneva Conventions, means *mala in se* are weapons and tactics that either cause noncombatants “superfluous injury or unnecessary suffering,”<sup>131</sup> *or* violate their “right to life” by killing them against their wills. More specifically, we can thus look to condemn weapons or tactics that: a) cause, by design, permanent physiological or psychological suffering that exceeds the parameters of the JWT principle of proportionality *or* b) are by design or implementation indiscriminate in that they fail to distinguish between military personnel and objects and innocents, and thus kill and/or cause widespread suffering to noncombatants.<sup>132</sup> For our

<sup>126</sup> Singer, *Writings on an Ethical Life*, p. 134.

<sup>127</sup> *Ibid*, p. 135.

<sup>128</sup> While this line of reasoning clearly suggests, I believe correctly, that sentient non-humans possess the right to not be caused unnecessary suffering, this issue will not be addressed here as it falls outside of my argument vis-à-vis noncombatant *persons* in times of war.

<sup>129</sup> Joanne K. Lekea and George K. Lekeas, “Quantitative Military Ethics: Applying Game Theory to Strategic and Tactical Decision-Making,” 2006, *United States Air Force Academy Website*, [http://www.usafa.af.mil/jscope/JSCOPE06/Lekea-Lekeas06.html#\\_edn1](http://www.usafa.af.mil/jscope/JSCOPE06/Lekea-Lekeas06.html#_edn1).

<sup>130</sup> “Universal Declaration of Human Rights (UDHR),” December 10, 1948, *The Office of the High Commissioner of Human Rights*, <http://www.unhchr.ch/udhr/index.htm>.

<sup>131</sup> International Committee of the Red Cross (ICRC), “Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), art. 25,” June 8, 1977, <http://www.unhchr.ch/html/menu3/b/93.htm>.

<sup>132</sup> This is derived from Article 51 of the “Additional Protocol,” which, inter alia, defines indiscriminate attacks and arms.

purposes, the test of “proportionality” will be whether a weapon “may be expected to cause incidental loss of civilian life [or] injury to civilians...which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>133</sup>

While the term “excessive” as used here is indeed vague and the process of determining whether a weapon fails to deliver an expected military advantage while harming noncombatants might, in some cases, require the execution of an unsettled and dubious calculus, it seems reasonable to suggest that “excessive” harm can roughly be defined as that which, under the scrutiny of an informed public, cannot be adequately justified by the belligerents causing the harm. In other words, the burden of justifying the damage to civilians resulting from the use of particular weapons must fall upon those making military decisions, and the failure to provide an acceptable rationale for the harm caused would indicate the violation of the principle of proportionality. The emergence of a moral consensus against the use of particular weapons and means, such as that seen vis-à-vis nuclear weapons, campaigns involving mass rape and siege warfare, would provide a clear indication that certain practices do not stand up under moral scrutiny.

In beginning the discussion of specific arms *mala in se* with a look at the moral and legal discourse surrounding the movement to restrict the use of landmines, I hope to lay the groundwork for a similar ethical prohibition of cluster munitions. As we shall see, these two families of arms are so similar in nature and effect that it is reasonable to conclude that both constitute arms *mala in se*.

#### *Landmines*

While efforts to restrict the use of anti-personnel landmines began in the late 1970s under the leadership of the International Committee of the Red Cross (ICRC), a moral consensus in favor of the prohibition of these weapons did not fully emerge until the mid-1990s, when global civil society organizations and national governments joined forces to deliver a united call for action.<sup>134</sup> In employing language reflecting in large part the consequentialist moral concerns outlined above in the criteria for *mala in se* pronouncements, this movement engendered both ethical and legal proscriptions against the continued use of landmines.

Those advocating for a ban on landmines generally argued both that mines caused excessive wounds and gratuitous pain and that mines were indiscriminate in nature. While the former approach focused on the actual nature of the injury and concomitant suffering caused, the latter emphasized mines’ innate inability to exclusively target combatants and their propensity to disproportionately kill or maim innocents.

The SiRus Project (whose name was derived from the phrase “superfluous injury or unnecessary suffering”), taking the former tack, highlighted the “design-dependent” consequences of anti-personnel landmines that resulted in catastrophic and permanent disability.<sup>135</sup> According to Dr. Robin M. Coupland, mines are especially nefarious because “[t]he treatment of the injury requires, on average, twice as many operations and four times as many blood transfusions as an injury from other weapons.”<sup>136</sup> Thus, because the trauma caused to the victim is *by design* unusually intense and the effects permanent, mines ought to be outlawed. In moral terms, the same reasoning could be used to declare mines means *mala in se*, as they cause suffering disproportionate to any real

<sup>133</sup> ICRC, Protocol 1, art. 51(5)(b).

<sup>134</sup> Jody Williams, “Nobel Prize Lecture,” December 10, 1997, *The Nobel Foundation*, [http://nobelprize.org/nobel\\_prizes/peace/laureates/1997/williams-lecture.html](http://nobelprize.org/nobel_prizes/peace/laureates/1997/williams-lecture.html).

<sup>135</sup> Coupland.

<sup>136</sup> *Ibid.*

military gain and, in so doing, violate the innocent victim's right to not be caused unnecessary suffering. Here, I emphasize this right over the right of innocents in wartime to not be killed against their wills because in the case of landmines, almost half of victims survive and thus must endure the life-long disabilities associated with these weapons.<sup>137</sup>

As previously mentioned, the second argument posited by opponents of landmines is congruent with the preference utilitarian-inspired *mala in se* criterion condemning those arms and means which are "by design or implementation indiscriminate in that they fail to distinguish between military personnel and innocents, and thus kill and/or cause widespread suffering to noncombatants." According to Jody Williams, the firebrand of the landmine ban movement:

Landmines distinguish themselves because once they have been sown, once the soldier walks away from the weapon, the landmine cannot tell the difference between a soldier or a civilian--a woman, a child, a grandmother going out to collect firewood to make the family meal. The crux of the problem is that while the use of the weapon might be militarily justifiable during the . . . battle, once peace is declared the landmine does not recognize that peace . . . [it] goes on killing.<sup>138</sup>

Thus because landmines are designed to be triggered by the movements of unsuspecting passersby, they can potentially lie in wait for years or even decades, only to be detonated long after the war is over. Almost always, these post-conflict victims are noncombatants, and it is estimated that mines maim or kill a new victim every 28 minutes, accounting for around 18,000 deaths and injuries per year.<sup>139</sup>

Such arguments for the prohibition of landmines proved effective, as evinced by the widespread and rapid acceptance of the Ottawa Mine Ban Treaty. Originally entering into force in 1999, this binding international treaty currently claims 155 signatories and is remarkable in that state parties accede to its provisions without the legal "reservations" so often used to eviscerate other multilateral agreements.<sup>140</sup> Furthermore, the near-universal acceptance of the Mine Ban Treaty reflects not only an established moral consensus against land mines specifically, but also the emergence of a broader consensus against the widespread suffering brought about by means *mala in se*.

A real strength of this movement, aside from the steadfastness of its advocates, was its sweeping appeal. The language employed in the arguments against the use of landmines resonated with a wide audience, gaining the movement high-profile support from the likes of Princess Diana of the United Kingdom and Jordan's Queen Noor. American politicians, most notably Vermont senator Patrick Leahy, also lent their influential voices to the call for landmine prohibition.

Just as the prohibition movement was gaining momentum in the early 1990s, Leahy argued convincingly before Congress, asking, "What do chemical and biological weapons have in common with landmines[?] They do not discriminate. A landmine will blow the leg or the leg off of whoever steps on it. It does not make a difference whether it is a

---

<sup>137</sup> Ibid.

<sup>138</sup> Williams.

<sup>139</sup> "Landmine Facts," 2006, *Landmine Survivors Network*, [http://www.landminesurvivors.org/what\\_landmines.php](http://www.landminesurvivors.org/what_landmines.php).

<sup>140</sup> International Campaign to Ban Landmines (ICBL), "The Treaty," 2006, *ICBL Website*, <http://www.icbl.org/treaty>.

combatant [or] a civilian...”<sup>141</sup> To this list of unjustifiably harmful arms should be added cluster munitions, as they share in common this tendency to cause indiscriminate and disproportionate suffering to noncombatants living in war zones.

*Cluster bombs*

Generally speaking, cluster bombs include rockets and artillery pieces that serve as “area weapons” by scattering, at a set time or altitude, from dozens to hundreds of submunitions, or “bomblets” over a target area. These bomblets, mostly anti-personnel or anti-tank explosives, create a broad and lethal “footprint.”<sup>142</sup> Under ideal circumstances, these submunitions explode on contact with either the ground or their intended military targets. Because of their wide dispersal pattern, these weapons are particularly effective in attacks against airport runways, enemy convoys and large troops formations.<sup>143</sup>

However, even when cluster attacks are successful at hitting legitimate military objectives, a significant number of noncombatants living within the large footprint are almost sure to become casualties.<sup>144</sup> Due to both design flaws and deliberate misuse, these weapons often inflict levels of suffering disproportionate to the projected strategic benefits, while indiscriminately targeting noncombatants both during and after periods of conflict. These two characteristics indicate that a strong case can be made for an ethical denouncement of cluster munitions as arms *mala in se*.

It has been suggested by groups such as Human Rights Watch that, when applying the proportionality test to given weapons, military planners ought to weigh both the long and short-term effects they will have on noncombatants. Doing so with cluster munitions by “[t]aking into account both strike and post-strike casualties greatly increases the likelihood that the loss would be excessive in relation to the military advantage.”<sup>145</sup> In fact, a recent report by Handicap International investigating over 11,000 cluster bomb incidents indicated that in excess of 82% of casualties occur post-conflict,<sup>146</sup> sometimes decades after hostilities have ceased. This high incidence of post-strike casualties suggests a violation of the principle of proportionality, as the killing and maiming of noncombatants outside the ambit of open hostilities cannot be deemed to contribute to legitimate military gains.

In contrast to anti-personnel landmines, which are in the main designed to inflict grave, but largely survivable wounds, cluster bombs “contain more explosive power and metal fragmentation, making them more likely to kill and to cause multiple casualties.”<sup>147</sup>

---

<sup>141</sup> Patrick Leahy, quoted in *Landmines: A Deadly Legacy* (New York: Human Rights Watch, 1993), p. 5.

<sup>142</sup> Human Rights Watch, “Off Target: The Conduct of the War and Civilian Casualties in Iraq,” 2003, pg. 55, <http://www.hrw.org/reports/2003/usa1203/>.

<sup>143</sup> For a sympathetic view of cluster munitions, see Thomas Herthel, “On the Chopping Block: Cluster Munitions and the Law of War,” Spring 2001, *The Air Force Law Review*, Vol. 51, pg. 229.

<sup>144</sup> Human Rights Watch, “Off Target,” pg. 55.

<sup>145</sup> Human Rights Watch, “Cluster Munitions and International Humanitarian Law: The Need for Better Compliance and Stronger Rules,” July 2004, <http://www.mineaction.org/downloads/HRW%20paper%20on%20Cluster%20Munitions%20and%20IHL.pdf>.

<sup>146</sup> Handicap International, “Fatal Footprint: The Global Human Impact of Cluster Munitions,” November 2006, [http://www.stopclustermunitions.org/files/Fatal\\_Footprint\\_FINAL.pdf](http://www.stopclustermunitions.org/files/Fatal_Footprint_FINAL.pdf).

<sup>147</sup> Handicap International, “What is a Cluster Bomb?,” [http://www.handicap-international.org.uk/page\\_347.php](http://www.handicap-international.org.uk/page_347.php).

Nonetheless, in the approximately half-century of cluster bomb use, countless thousands of victims have suffered the effects of permanent disability and trauma. Common cluster-inflicted wounds include the loss of limbs, paralysis, blindness, and deafness.<sup>148</sup> These findings illustrate that, because of the gratuitous and oft-permanent harm associated with cluster bombs, they could be deemed arms *mala in se* in so far as they effect the violation of noncombatants' basic right not to be caused "permanent physiological or psychological suffering" disproportionate to any presumed military benefit.

As with landmines, cluster bombs have been proven to be largely indiscriminate weapons, incapable of being properly targeted against a specific military target. Because of their innate imprecision and high failure, or "dud," rate ranging from 5%-80%, a volley of cluster bombs is often needed to effect the desired level of destruction, and the resulting footprint can include an area as large as a kilometer in diameter. Anyone or anything within that radius runs the risk of becoming collateral damage, as the submunitions have no way of distinguishing between military personnel and noncombatants.<sup>149</sup> Furthermore, those bomblets failing to detonate upon initial contact become the most lethal form of unexploded ordnance, posing a threat exponentially greater, in terms of deaths, than that of anti-personnel mines and other explosive remnants of war.<sup>150</sup>

Handicap International's comprehensive report, mentioned above, presents a stark illustration of the global fallout resulting from these armaments. A striking 98% of all reported cluster-related casualties were non-combatants, and most of those were killed or wounded long after the conflict had ended.<sup>151</sup> Children account for almost half of these casualties, and young boys engaged in workaday activities are especially likely to fall prey to errant cluster bomb explosions.<sup>152</sup> These figures serve to turn the principle of discrimination on its head, ironically suggesting that these weapons are virtually *perfectly discriminatory* in that they almost exclusively victimize civilians. Due to this intrinsic propensity to target noncombatants living in conflict zones and areas recovering from war, cluster bombs can be said to violate the *mala in se* principle of discrimination.

Aside from the preceding preference-influenced arguments for an ethical denouncement of cluster munitions, there is also a compelling prudential reason that seemingly vitiates, in most cases, the need to use these weapons. In those instances wherein cluster bombs are most effective, such as attacks on armored vehicle columns and mortar sites, there exist alternative weapons that pose significantly diminished risks to innocents, while providing comparable military utility. Weapons carrying unitary payloads, as opposed to multiple submunitions, can destroy enemy targets within a much more precise footprint, and do not leave behind failed unexploded ordnance.<sup>153</sup> Guided weapons, such as the Sense

<sup>148</sup> Ibid.

<sup>149</sup> Human Rights Watch, "Off Target," p. 55.

<sup>150</sup> Human Rights Watch, "Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan," December 2002, <http://hrw.org/reports/2002/us-afghanistan/Afghan1202.pdf>, p. 9.

<sup>151</sup> Handicap International, "Fatal Footprint," p. 42.

<sup>152</sup> Ibid, p. 43.

<sup>153</sup> Human Rights Watch, "Fatally Flawed," p. 96.

and Destroy Armor Munition (SADARM), seek out only armored vehicles and self-destruct immediately if they fail to identify a target.<sup>154</sup> The high dud rate of cluster munitions and the existence of viable alternatives have caused some in the military establishment to question the necessity of the continued use of these arms, causing many to wonder if these arms are anachronistic “Cold War relic[s].”<sup>155</sup>

Thus, when we consider the indiscriminate and disproportionate suffering caused by cluster bombs, in combination with the fact that these weapons are in large part obsolete, and weigh these facts against the military advantage these weapons promise, it appears that a strong case in favor of a ban can be made in both legal and moral terms. Indeed, if militaries insist on continuing to use these and other arms *mala in se*, the onus of demonstrating that they serve some benefit that trumps the rights of noncombatants lies with our political and military leaders. However, the evidence suggests that, with cluster bombs, such a case would be impossible to make.

The preceding chapter has been intended to provide a framework with which we might make moral pronouncements vis-à-vis certain means and weapons of warfare. When we view the basic rights of persons in preference utilitarian terms, it is possible to clearly define which rights violations, exactly, are effected by certain acts and arms. Such a conception of rights provides a foundation for an ethical definition of *mala in se*, one that views as paramount the rights of noncombatants living in combat and post-war zones.

In applying this ethical restatement of *mala in se*, which considers the rights not to be caused undue suffering by others and the right to life, to landmines and cluster bombs, a strong moral argument against their use can, and ought, to be made. Furthermore, we might use this test in order to make similar judgments vis-à-vis those arms and means that share in common the propensity to violate the basic rights of innocents. For example, using the criteria outlined above, it could be argued that nuclear weapons and blinding lasers constitute arms *mala in se*, as the former are by nature indiscriminate and the latter leave permanent, irreversible injuries.

This ability to assess morally the specific arms used in conflict promises to make more robust the key principles outlined within the *jus in bello*, and will thus provide a catalyst for promoting greater security for noncombatants. Furthermore, this clearly defined conception of arms *mala in se* will provide discussants in the JW debate with an extra criterion with which they might judge the overall justice of a given war, defined above as *jus universitatis*. Thus, in adding an extra layer to the *jus in bello*, this utilitarian, rights-based conception of *mala in se* will assist in the development of a more complex and relevant JWT capable of providing more nuanced and complete moral assessments capable of addressing the asymmetrical wars we now face, and are certain to face in the future.

---

<sup>154</sup> Ibid, p. 84.

<sup>155</sup> Ibid, p. 114.

### Conclusion

While the claims made in this paper serve the immediate purposes of a) condemning, in Walzerian JWT terms, Israeli and Hizbollah actions that caused unnecessary suffering to innocents during the 2006 Second Lebanon War and b) condemning, in terms of *mala in se*, the continued use of cluster bombs, it is my hope that the lessons learned from these arguments will help guide those involved in the JW discourse as they assess the moral value of future wars and the tactics and arms used therein. This moral discourse now plays, and will continue to play in the future, a central role in wartime decision-making processes.

Moreover, the suggestions for a) implementing more rigorous ROE in battle and b) condemning the use of cluster munitions as arms *mala in se* are intended to create a more stringent level of protection with which we might endeavor to protect those most vulnerable members of war-torn societies: those defenseless innocents caught in the midst of the conflicts raging around them. The moral and legal calls for the prohibition of the use of weapons such as landmines and cluster bombs that pose significant post-conflict risks to civilians is especially important, because, as cogently stated by Johnson, “After a war is over, all are noncombatants, and ongoing harm to them violates the immunity from harm they should then enjoy.”<sup>156</sup> Thus, we must take extra care that the effects of war, in terms of human suffering, are limited to the timeframe of particular conflicts. This is the least we can do for noncombatants, although we undoubtedly owe them much more.

As we continue to face asymmetrical conflicts wherein the line between combatants and innocents is clouded by the chaos of warfare, we must not, as did Israel in the case of its war against Hizbollah, lower our standards of conduct with the concomitant effect of waging war on noncombatants. Indeed, it is morally incumbent upon belligerents to take even greater caution when deciding whether and how to execute wars that threaten to overwhelmingly harm innocents. Strengthening the ROE under which militaries operate and prohibiting arms and methods deemed *mala in se* promises to raise the bar for how wars are fought, and in so doing will help preserve the fundamental JW principles of noncombatant immunity and proportionality that frequently come under fire in times of war.

Furthermore, these reforms, predicated upon the utilitarian, rights-based conception of JWT discussed above, will serve to help bridge the gap that exists between: a) human rights theory and practice, which maintain that certain rights exist *absolutely*, regardless of a particular context and b) the theory and practice of warfare which create, via the principle of double effect and the idea of “collateral damage,” a rather slippery slope often-times resulting in the unnecessary suffering of innocents. The conflict between these two schools of law and theory can only be ameliorated by raising the standards by which we fight, and the introduction of a clearly-defined conception of *mala in se* can serve as a first step toward this end. By strengthening the theory and practice of just wars, we can hope to more effectively protect the basic rights of those who are caught in the tumult of war—rights that ought not be so easily traded away for some presumed military advantage.

---

<sup>156</sup> Johnson, *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999), p. 126.

Glossary of Frequently Used Acronyms

DDE--Doctrine of Double Effect

HRC--United Nations Human Rights Committee

HRW--Human Rights Watch

IDF-- Israeli Defense Forces

JWT--Just War Theory

ROE--Rules of Engagement

Brad Archer is a recent graduate from American University's Ethics, Peace and Global Affairs Master's program. As a graduate student, Brad focused his studies on just war theory and international human rights and humanitarian law. He currently resides in San Francisco, where he helps organize the American Friends Service Committee's domestic relief efforts.