

# How was the Military Intervention in Afghanistan Legally Justified?

Lynsey Mitchell

Law School, University of Strathclyde  
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## **Abstract**

This thesis suggests that the war in Afghanistan, which was of dubious legality, was legitimated by the US and its allies through repeated deployment of a gendered heroic narrative that focussed on liberating Afghan women. This narrative presented the US and its allies as chivalrous white knights rescuing oppressed Afghan women from the clutches of the evil Taliban. This construction is problematic because the heroic narrative obscures alternative, more complex narratives and readings of the conflict that cast the actors, and as a result the conflict itself, in a less favourable light. Moreover, this thesis will suggest that the narrative is actually based on the false assumption that war can benefit women; an assumption that is not supported by the historical evidence. Furthermore, this thesis will suggest that despite the use of this rhetoric around the liberation of women, the position of Afghan women has not actually improved as a result of the military intervention there.

This thesis will ultimately conclude that as regards the ‘War On Terror’ the gendered heroic narrative was promoted primarily to cloak tenuously legal military force with a veneer of legitimacy, rather than improve women’s lives, and that acquiescence to the use of this narrative is ultimately dangerous. In highlighting this, this thesis draws attention to the endorsement of force by feminists and cautions against such endorsement arguing that war is rarely in women’s interests.

## **Acronyms**

AIHRC Afghanistan Independent Human Rights Commission

ANDS Afghanistan National Development Strategy

CEDAW Convention on the Elimination of All Forms of Discrimination against Women

FMF Feminist Majority Foundation

ICC International Criminal Court

ICRC International Committee of the Red Cross

ICTY International Criminal Tribunal for the former Yugoslavia

ICTR International Criminal Tribunal for Rwanda

ISAF International Security Assistance Force

MOWA Ministry of Women's Affairs

NATO North Atlantic Treaty Organisation

NAPWA National Action Plan for the Women of Afghanistan

NGO Non-Governmental Organization

OEF Operation Enduring Freedom

OHCHR Office of the United Nations High Commissioner for Human Rights

RAWA Revolutionary Association of Women Afghanistan

R2P Responsibility to Protect

UNSC United Nations Security Council

UNAMA United Nations Assistance Mission in Afghanistan

## Glossary of Terms

***Baad*** The tribal practice of giving young women or girls in payment of a debt or to make reparations for a crime committed by a male family member.

***Baadal*** An arranged marriage, usually a reciprocal arrangement between families, often involving minors.

***Burqa*** The word used in most Western media to describe the all covering robe that contains only a lattice mesh window over the eyes. The garment is rarely referred to as 'burqa' by Afghan women themselves, instead they use the term chadori.

***Chadari/chadori*** The Pashtu word for burqa. This term is used more frequently by Afghan women themselves and by some scholars. This thesis mainly uses the term 'burqa' as it is more widely understood, but where the term chadari has been used this thesis reproduces it.

***Jurga*** A gathering of tribal elders.

***Mujahideen*** Muslim guerrilla warriors engaged in Jihad (Holy War). Commonly refers to the commanders and their soldiers who took control of Afghanistan in 1992 after the Soviet withdrawal and the eventual fall of the Soviet backed Afghan Government.

***Northern Alliance*** A coalition of former Mujahideen warlords who held territory in the North and West of Afghanistan. The Northern Alliance were enemies of the Taliban.

***Pashtunwali*** The Pashtun code of social conduct

***Purda*** The seclusion of women from the sight of unrelated men.

***Zina*** Any act of sexual intercourse that takes place outside of a valid marriage

# **Timeline of Key Events in Afghanistan 2001-2015**

## **2001**

### **September**

11<sup>th</sup> September, Twin Towers and Pentagon attacked by terrorists.

12<sup>th</sup> September, NATO invokes article 5 declaring that the attacks on America constitute attacks on all members.

15<sup>th</sup> September, The US attributes responsibility to Al Qaeda and its leader, known terrorist Osama Bin Laden who is already wanted by the US in connection with the 1998 embassy bombings in Kenya and Tanzania.

20<sup>th</sup> September, The US calls on the Taliban to surrender bin Laden.

21<sup>st</sup> September, The Taliban refuse to surrender Bin Laden unless the US provides evidence of his guilt. The US replies that it will not negotiate and no evidence is ever produced.

24<sup>th</sup> September, The UN warns that impending military attacks on Afghanistan will cause humanitarian disaster as its agencies will be prevented from distributing food aid to millions of Afghans. It also warns that the attacks will create a refugee crisis as millions of Afghans try to flee to Iran and Pakistan.

### **October**

4<sup>th</sup> October, The UK releases a document outlining the evidence against Bin Laden

7<sup>th</sup> October, US-led military operation codenamed Operation Enduring Freedom (OEF) commences.

To ensure the success of OEF the US pays five million dollars to the Northern Alliance (a loose coalition of former Mujahideen warlords who hold territory in the North of Afghanistan and oppose the Taliban) to attack the Taliban and march on the capital Kabul.

### **November**

13<sup>th</sup> November, Kabul falls to the Northern Alliance and the remaining key Taliban figures flee to Pakistan. The Northern Alliance fighters remain in Kabul but are joined by US ground troops.

The US pledges to help rebuild Afghanistan and also to continue the hunt for bin Laden. It invites the United Nations to assist with humanitarian aid and to provide a blueprint for the future of Afghanistan.

### **December**

Prominent Afghans meet in Germany to discuss Afghanistan's future and on 5<sup>th</sup> December sign the Bonn Agreement, which outlines the scope for creating a transitional Government and putting in place democratic elections.

20<sup>th</sup> December, The UN mandated International Security and Assistance Force (ISAF) is established pursuant to the Bonn Agreement. NATO countries provide the overwhelming majority of troops to ISAF, which is tasked with providing a security presence in and around Kabul.

22<sup>nd</sup> December, The Afghan Interim Authority, which is to rule for six months, is sworn in and American-educated Afghan scholar Hamid Karzai appointed Chairman and temporary leader of Afghanistan until a *Loya Jurga* can be held to elect the transitional authority, which will govern the country for the next two years.

OEF and the hunt for Bin Laden continues.

**2002**

11<sup>th</sup> June, A *Loya Jurga* is held and Hamid Karzai is endorsed as interim leader of the transitional authority, which is to govern Afghanistan until democratic elections are held in 2004. The *Loya Jurga* is marred by infighting among four rival factions, each backed by different states. The Northern Alliance block attempts to place returning ex pat Afghans in positions of power and demand key positions in acknowledgement of its role in the liberation of Kabul.

Kabul is largely peaceful and vast amounts of foreign aid flow to the country in order to rebuild civic infrastructure.

US-led OEF continues with the focus on hunting Bin Laden and the remaining Taliban figures that are thought to be sheltering in the Tora Bora mountain range.

28<sup>th</sup> March, The United Nations Assistance Mission in Afghanistan (UNAMA) is formed and headed by Lakdar Brahimi who is appointed as Special Representative of the Secretary General. Brahimi's key priority is to craft a new constitution for Afghanistan.

### **2003**

NATO takes full control of ISAF missions, but a lack of political will to extend ISAF's mandate beyond Kabul means much of the country remains unpoliced and unstable.

The US claims that the majority of Afghanistan is now secure and that international forces can move from major combat operations to stabilisation and reconstruction projects. However the Taliban continue to stage guerrilla attacks on coalition forces.

The US invades Iraq and international attention turns from Afghanistan.

### **2004**

26<sup>th</sup> January, The New Afghan constitution, which places power in the President is formally adopted.

9<sup>th</sup> October, Afghanistan's first democratic presidential elections are held. Hamid Karzai is elected as President and forms a Government, although he is accused of selling influential cabinet positions to Northern Alliance warlords. Karzai appoints three women to the cabinet.

### **2005/2006**

5<sup>th</sup> October 2006, ISAF's mandate is expanded to cover the whole of Afghanistan. NATO countries each take charge of a different region of Afghanistan and each is tasked with implementing different priorities contributing to a piece-meal attempt at social reform.

UK troops are tasked with implementing counter narcotics strategies, but the strategy proves controversial when Afghan poppy farmers, whose crops and livelihoods are destroyed, turn in droves to the Taliban.

Guerrilla campaigns against NATO troops increase. Southern Afghanistan sees the worst violence since the fall of the Taliban.

### **2007/2008**

Opium production reaches highest ever level.

Rising NATO troop fatalities spurns a renewed media interest in Afghanistan. Military leaders call for a huge increase in troop numbers in Afghanistan to defeat the insurgency.

US troop numbers in Afghanistan rise from 29950 to 90000.

### **2009-2012**

NATO countries agree to increase troop numbers, which sees the number of ISAF troops rising from 64495 in 2008 to 132457 by 2011.

9<sup>th</sup> March 2009, President Obama declares he is open to reaching agreements with moderate factions in the Taliban.

20<sup>th</sup> August 2009, the second Afghan Presidential election is held. The election is widely marred in accusations of corruption and vote rigging and turnout is only 30%. International pressure forces the Afghan Independent Election Commission to declare a run off between Hamid Karzai and opposition leader Abdullah Abdullah to be held on 7<sup>th</sup> November 2009.

2<sup>nd</sup> November 2009, Hamid Karzai is declared winner by default after Abdullah Abdullah pulls out of the run off stating that transparency is no longer possible.

18<sup>th</sup> September 2010, Parliamentary elections are marred by Taliban violence, corruption and electoral fraud.

### **2013/2014**

5<sup>th</sup> April 2014, The third Afghan Presidential election is held. Initial results prove inconclusive and two recounts are held. The two rivals Ashraf Ghani and Abdullah Abdullah, sign a power-sharing agreement, following a two-month audit of disputed election results.

29<sup>th</sup> September, Ashraf Ghani is sworn in as President.

26<sup>th</sup> October 2014, OEF officially terminates signalling an end to US and UK combat operations in Afghanistan.

12<sup>th</sup> December, The UN Security Council passes resolution 2189 endorsing NATO's operation Resolute Support, a non-combat mission to advise, train and support the Afghan defence and security services.

28<sup>th</sup> December, NATO officially ends combat operations.

31<sup>st</sup> December, Expiry of ISAF's mandate.

### **2015**

US involvement in Afghanistan continues under Operation Freedom's Sentinel and NATO involvement continues under Operation Resolute Support.

*'If people really knew, the war would be stopped tomorrow. But of course they don't know, and can't know. The correspondents don't write and the censorship wouldn't pass the truth. What they do send is not the war, but just a pretty picture of the war with everybody doing gallant deeds. The thing is horrible and beyond human nature to bear and I feel I can't go on with this bloody business.'*

(David Lloyd George in a private conversation to CP Scott, 27 December 1917)

*'There's never been a true war that wasn't fought between two sets of people who were certain they were in the right. The really dangerous people believe they are doing whatever they are doing solely and only because it is without question the right thing to do. And that is what makes them dangerous.'*

(Neil Gaiman, *American Gods*)

# Table of Contents

<b>Acknowledgements.....</b>	<b>iii</b>	
<b>Abstract.....</b>	<b>iv</b>	
<b>Acronyms.....</b>	<b>v</b>	
<b>Glossary of Terms.....</b>	<b>vi</b>	
<b>Timeline of Important Events in Afghanistan.....</b>	<b>vii</b>	
<b>Introduction .....</b>	<b>6</b>	
1. Thesis Purpose, Scope and Concept .....	7	
2. Original Contribution to Knowledge .....	10	
3. Themes of Analysis .....	12	
3.1. How an Illusion of Legality was Promulgated: Unpicking the Attraction of Military Intervention .....	12	
3.2. The Consequences of Presenting Western Military Force as a ‘Force for Good’ and Afghan Women as Victims.....	16	
3.3. Can Force ever be Feminist? Theorising a Feminist Approach to Force .....	19	
4. Thesis Structure and Outline .....	21	
 <b>PART I: ANCHORING THE CONTEXT</b>		
 <b>Chapter 1 The Legal Justifications for Foreign Intervention in Afghanistan .....</b>		<b>28</b>
Introduction .....	28	
1. Background.....	29	
1.1. The Use of Military Force in Afghanistan: Operation Enduring Freedom .....	32	
1.2. The Various International Forces in Afghanistan.....	34	
2. Is Operation Enduring Freedom an Operation of Self-Defence? .....	37	
2.1. Self-Defence Under the UN Charter: Article 51 .....	38	
2.2. Are the 9/11 Attacks ‘Armed Attacks’? .....	40	
2.3. Was Afghanistan Legally Responsible for the 9/11 Attacks? .....	48	
2.4. Has 9/11 set a Precedent for a Lower Threshold of Attributing Responsibility?.....	53	
3. The Constraints on Self-Defence.....	56	
3.1. Collective Self-Defence.....	56	
3.2. Necessity, Proportionality and Immediacy.....	57	
3.3. Was OEF Necessary, Proportionate and Immediate?.....	59	
4. If There is a Right to Self-Defence, When Does it End? .....	61	
4.1. Time limits on Self-defence?.....	61	
4.2. What Constitutes ‘Necessary Measures’? .....	62	

5. Alternative Justifications for the Continuing Operation: Pre-emptive Self-Defence and The ‘Bush Doctrine’ .....	65
5.1. The US National Security Strategy .....	66
5.2. Pre-emptive Self-defence Under Article 51 .....	67
5.3. A Decade after 9/11, Can Self-Defence Still be the Legal Basis for Operation Enduring Freedom? .....	71
5.4. The Consent or Invitation Doctrine .....	73
6. Justifying OEF in the Absence of Legality .....	74
6.1. Seeking Legitimacy: Moral Rhetoric .....	74
7. Conclusion .....	77

## **Chapter 2 Perspectives on Women’s Human Rights in Afghanistan ..... 79**

Introduction .....	79
1. The Status of Women in Afghan Culture .....	81
1.1. A Brief History of Afghanistan .....	81
1.2. The Concept of the Patriarchal System .....	82
1.3. Traditional Gender Relations .....	82
1.4. The Socialist Experiment (1970-1989) .....	84
2. War in Afghanistan.....	84
2.1. The Soviet Intervention .....	84
2.2 Mujahideen Rule and all out Civil War (1992-1997).....	87
3. The Emergence of the Taliban.....	89
3.1. Understanding the Taliban.....	91
3.2. Taliban Decrees .....	94
3.3. Legal Standards Denied to Women.....	97
4. Women’s Rights Since the Fall of the Taliban.....	104
4.1. The Current Legislative Position.....	105
4.2. Problems.....	113
5. Conclusion.....	128

## **PART II: THEORISING THE AFGHAN ALIBI**

### **Chapter 3 The Heroic Narrative..... 132**

Introduction .....	132
1. The Heroic Narrative .....	133
1.1. The Heroic Narrative as an Evolution of the ‘Just War’ Doctrine .....	135
2. The Operation of the Heroic Narrative in the ‘War on Terror’ .....	139
2.1. Constructing a Crisis .....	139
2.2. Constructing the Hero.....	144
2.3. Constructing the Other .....	147
3. The Attraction of the Heroic Narrative.....	154
3.1. The Dark Appeal of the Heroic Narrative .....	155
3.2. Is the Heroic Narrative Really About Women?.....	157
3.3. Embedded Feminism: Is the Heroic Narrative ‘Feminist’?.....	160
4. The Effects of the Heroic Narrative on Afghan Women.....	163

4.1. Victimising the Veil .....	163
4.2. Silencing Afghan Women and Denying Agency .....	167
4.3. The politics of Resistance.....	168
5. The Consequences of the Narrative: Promoting American Hegemony .....	170
5.1. Imperialism by Liberation .....	172
5.2. Depicting Afghanistan as a Feminised State: Feminism’s Complicity .....	176
6. Conclusion .....	178

## **Chapter 4 Propagandising Women’s Human Rights ..... 183**

Introduction .....	183
1. Transforming the 9/11 Attacks into a Call to Arms: The Rhetorical Sleight of Hand ..	185
1.1. The Power of Political Rhetoric .....	186
1.2. The Promotion of Fear, Danger and Paranoia .....	187
1.3. Portraying 9/11 as a Crisis and a Unique Event .....	190
1.4. The Promotion of Victimhood After 9/11 .....	192
2. The Theory of Propaganda .....	198
2.1. Using Propaganda to Sell War to the Public .....	200
3. The Use of Propaganda to Sell the War on Terror .....	204
3.1. Demonising the Enemy .....	204
3.2. Media Censorship .....	205
3.3. The Promotion of Militarism in Other Media .....	213
4. Propagandising the War on Terror in the US: The Operation of the Heroic Narrative.	215
4.1. American Frontier Mythmaking.....	215
5. Propagandising the War on Terror in the UK: Revisiting Colonial Narratives.....	219
5.1. Britain as a Force for Good .....	220
5.2. Britain as a World Leader.....	223
6. Conclusion .....	224

## **PART III: CHALLENGING THE FOUSTIAN BARGAIN**

### **Chapter 5 Feminism Goes to War ..... 227**

Introduction .....	227
1. Sending in the Troops: Feminists Turn to Militarism to Protect Women .....	230
1.1. The Birth of the Feminist Hawks .....	230
1.2. Criticisms of Hawkish Feminism .....	237
1.3. Dispelling the Myths of Military Intervention: Lessons from Kosovo .....	241
2. The Argument against Using Militarism to Protect Women’s Rights .....	243
2.1. Common Occurrences of Gender Abuse During Conflict .....	244
2.2. The Risk of Sexual Violence During Conflict.....	248
3. The Myth of Legal Protection for Civilian Women .....	252
3.1. The Myth of Legal Protection Against Rape.....	255
4. The Postmodern Feminist Project: An Alternative Approach?.....	260
4.1. Unintended Consequences of the Binary Rape Narrative .....	260
4.2. Is the Protectionist Approach of Modern International Courts Detrimental to Women?.....	263

5. Conclusion.....	266
<b>Chapter 6 Conclusion.....</b>	<b>268</b>
Thesis Summary .....	268
Key Conclusions.....	273
<b>References .....</b>	<b>275</b>
Books .....	276
Edited Book Sections .....	285
Journal Articles.....	290
Treaties .....	307
Cases.....	308
UN Docs .....	309
Newspaper Articles.....	314
Other .....	319

## Introduction

This thesis examines the legal justifications for Operation Enduring Freedom (OEF) and explores both the process by which, and the reasons why, this military operation came to be justified. The core argument of this thesis is that OEF was premised on a dubious legality and as such came to be ultimately legitimated by the US and its allies through repeated deployment of a gendered heroic narrative that focussed on liberating Afghan women. In documenting the process by which this operation was justified this thesis exposes the peculiar alliances between feminists and conservative pro-interventionists (hawks) that ensued, raising wider questions about the complicity of some academics in promulgating a dangerous and reductive framing of military intervention. This thesis describes how, in the immediate aftermath of 9/11, international lawyers and others identified a problem with the legal basis of OEF. Thus for those keen to affect a response to the violent events of 9/11, which included politicians and some international lawyers, this legal ‘gap’ needed to be filled. Other international scholars viewed OEF as offering an opportunity to push a particular human rights agenda, despite the fact that those within this latter ideological camp had traditionally always opposed military intervention. As such, this thesis offers an exposition of how and why two such ideologically opposed groups linked up and thus questions whether in doing so, one group allowed its intellectual independence to be compromised.

This thesis offers a critical reading of the heroic narrative and a cautionary response. It argues that the officially sanctioned narrative, as well as appealing to the public, holds an allure for academics through the salvatory power of international law and human rights and as such, rebukes scholars for failing to acknowledge both this power and their attraction to it. This thesis further argues that such was the acceptance of the rescue fantasy as a justification for OEF that even where scholars were aware of the operation of loaded rhetoric that disseminated the narrative, they still failed adequately to critique its operation, perhaps because they too subscribed to it for altruistic reasons. Moreover, this thesis will suggest that such a narrative is actually based on the false assumption that war can benefit women; an assumption that is not supported by the historical evidence. It will deconstruct the assertions of the US and its allies that OEF would benefit Afghan women, and

conclude that despite the widespread endorsement and promulgation of this rhetoric it was problematic to assert that the position of Afghan women would improve as a result of OEF. Therefore this thesis will ultimately conclude that in respect of OEF the gendered heroic narrative was promoted primarily to cloak tenuously-legal military force with a veneer of legitimacy, rather than improve women's lives, and that unqualified acquiescence to the use of this narrative is ultimately dangerous.

## **1. Thesis Purpose, Scope and Concept**

The foundation for this exploration was the Bush Administration's assertion, that the 'War on Terror' would also be a war for the rights and dignities of women<sup>1</sup>, by which it was inferred to the public that the dual motive for the operation was ending the oppression of Afghan women, at the same time as defending the US against future terrorists attacks. Yet on reflection the motivation for OEF appears to be more about retribution against those loosely held to be responsible for 9/11 than about liberating women, particularly considering that the oppression in question has not historically been a priority for the international community.<sup>2</sup> As such, it is suggested that the plight of Afghan women merely served as a convenient alibi to distract from the absence of legality underpinning this war. With that in mind this thesis explores the consequences of co-opting the language of women's rights as a purely rhetorical exercise and ponders why, rather than expose the duplicity of this co-option, some leading feminist scholars instead actively endorsed this exercise.

This thesis first examines the initial justification for military intervention in Afghanistan, which was given as self-defence against the perpetrators and collaborators of 9/11. It outlines how this justification is problematic in law by highlighting the generally accepted limits on both the extent to which self-defence may authorise a state to use force and the temporal validity of such force. As such, this thesis finds that while the justification of self-defence was tenuous in 2001, with OEF continuing until 2014, this tenuous legality has been stretched beyond all reckoning. The fact that a US-led military operation, the aims of

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<sup>1</sup> Laura Bush declared that 'the fight against terrorism is also a fight for the rights and dignity of women. Radio Address by Mrs Laura Bush, 17<sup>th</sup> November 2001. The transcript of this address is available at <http://www.presidency.ucsb.edu/ws/?pid=24992>.

<sup>2</sup> The international community's disinterest in the Taliban prior to 9/11 is discussed in Chapter 3 at section 3.2.1.

which, were to dismantle Afghanistan's terrorist infrastructure so as to prevent further terrorist attacks, could continue unchallenged for thirteen years suggests that closer inspection of the legitimization of this operation is merited. Therefore, this thesis argues that in the absence of clear legality, OEF required legitimization by alternative means and asserts that this was achieved by propagating a gendered heroic narrative. This thesis therefore combines an examination of the legal and non-legal justifications of OEF and argues that the non-legal justifications have been packaged in an attractive legalistic manner that allows them to compensate for defects in the legal justifications. Where the *jus ad bellum* (legal) arguments expire, the imagery and rhetoric of human rights law is appropriated by the humanitarian (non-legal) arguments in order to bolster their importance. This thesis argues that such recourse to legalistic rhetoric, even when advancing non-legal justifications, imparts an aura of legitimacy. As such, to justify OEF, states invoked a complex narrative framework that invited an equivalence of legal justifications, such as self-defence, with non-legal justifications, such as humanitarian or security concerns.<sup>3</sup> These non-legal justifications permeated the rhetoric that entreated military action by making reference to humanitarian concerns for Afghan women, thereby portraying the intervention as an act of altruistic rescue. The operation was also portrayed as legitimate through repeated reference to the fact that relevant United Nations Security Council resolutions were adopted unopposed, which allowed key states to imply endorsement of the operation by the UN, when the truth was that much of the international community at best appeared to tacitly acquiesce to it. This thesis explores the reasons for the lack of opposition to this operation by suggesting that these 'soft' justifications were presented in such a way as to influence public perception by presenting a solid justificatory narrative for OEF that has proven exceptionally impervious to criticism in either public or academic discourse.

The scope of this thesis is therefore restricted to OEF and the events leading up to it. Although much of the literature referred to in this thesis references the wider 'War on Terror', which includes the events leading up to and encompassing the Iraq war, this thesis

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<sup>3</sup> Engle notes the appeal to both liberal internationalist and feminist rhetoric about respecting women's rights in an attempt to frame OEF as beneficial. See Karen Engle, 'Liberal Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States' 46 *Harvard International Law Journal* 427, at 428.

does not engage with the conflict in Iraq. The reason for this is that there is an abundance of sustained comment and analysis of the legality of the Iraq war, which lacked the universal support that OEF enjoyed. Ordinary people and academics, in both the UK and US, spoke out against military intervention in Iraq and there was a clear understanding that in the absence of Security Council endorsement, any such intervention would be illegal. In comparison, the shocking events leading up to OEF were such that a uniform narrative was promulgated, silencing any widespread criticism despite discomfort over the legality, hence the need for this enquiry.

The justificatory narrative outlined is a gendered heroic narrative that presented the US and its coalition allies as chivalrous white knights rescuing oppressed Afghan women from the clutches of the evil Taliban, thus presenting the intervention in Afghanistan as an unqualified good. While the operation and reductive stereotyping of this Manichean narrative is well documented in academic literature, this thesis asserts that its promulgation is especially problematic because doing so obscures alternative, more complex narratives and readings of the conflict, which cast the actors – and as a result the conflict itself – in a less favourable light. It further argues that the allure of the heroic narrative meant that these alternative narratives of grief and loss, worldwide solidarity or criminal justice were suppressed and their potential to act as a starting point for academic critique of OEF was lost.

By exploring how the heroic narrative operated as an unopposed justification for OEF, this thesis seeks to unearth these alternative narratives and in doing so, offers a unique reading of the US response to 9/11 and provides a cautionary warning against unfettered acceptance of official discourse. This thesis does not wish to suggest that all scholars were keen to endorse the legality or legitimacy of OEF. Rather it seeks to offer a reading of the overwhelming absence of engagement with the intervention and it demonstrates how global power dynamics operated to cause this. It acknowledges the paucity of reference to alternative narratives in either mainstream or academic discourse to conclude that there was a dearth of contemporary engagement with the legality of OEF. This absence of critique can be read as suggesting academic complicity with the official discourse and therefore this thesis attempts to shine a light on why there may have been a reluctance to

engage. It concludes that supporting or at best acquiescing to OEF as a legitimate use of force permitted scholars to inhabit the role of rescuer, with Afghanistan serving as the landscape on which international law and humanitarianism could play out this fantasy. However it may equally be the case that academics were as captive to the effects of the dominant narrative as everyone else. Ergo it appeared that no alternative narrative framings or interpretations of 9/11 were possible, hence the absence of critique.

## **2. Original Contribution to Knowledge**

This thesis makes an original contribution to knowledge and understanding of how OEF was legitimated, or sold to the public. It offers a unique reading of the legality of the operation by combining doctrinal scholarship on international law with critical and feminist approaches to provide a holistic account of how particular uses of military force may be legitimated even in the absence of a doctrinal legal basis.

It does so by providing an in-depth analysis of the reasons given for the operation and then asserts that those justifications are grounded in the language of women's rights. It explores how the appropriation of such rights discourse, in order to justify military intervention, is problematic both in terms of lowering the threshold of legality for use of force, but also in terms of trivialising and adulterating the discourse itself. As such, this thesis builds on critical scholarship which looks at the appropriation of rights discourse by applying it to OEF and the wider 'War on Terror'. The thesis then draws on feminist critiques of rights discourse itself to argue that the saviour/victim binary is a problematic paradigm through which to understand human rights. After highlighting the problems with this paradigm, this thesis then exposes how it has been utilised as a frame through which to understand OEF and the wider 'War on Terror'. This thesis ultimately demonstrates how this appropriation of rights discourse is then especially problematic as it allows this saviour/victim framework to be employed as a *jus ad bellum* legitimation, thereby circumnavigating the accepted legal framework for authorising military force and also serving to silence any alternative critical discourse on the 'War on Terror'.

Where academic scholarship did discuss the legality of the military action it appeared that, just as in mainstream discourse, the 'game changing' nature of the terrorist attacks was

considered unquestionably as sufficient, in and of itself, to explain and justify the use of force that followed. As such, unlike the previous situations where states have used force without UNSC approval,<sup>4</sup> there was little overt criticism of the operation.<sup>5</sup> Although many prominent legal scholars criticised the categorisation of the US's recourse to force as self-defence and highlighted the problems in doing so, most stopped short of condemning OEF itself.<sup>6</sup> Even those commentators who did dispute the legality of the operation seemed to accept that it was inevitable and so there was very little sustained critical analysis of the military response to 9/11. This amounts to a startling gap in international legal scholarship, as a result of which, various competing agendas emerged to endorse and legitimise the official response. While there has been much scholarship on the legality of OEF and the wider 'War on Terror', especially as regards the use of force in Iraq, such scholarship focuses almost entirely on doctrinal international law with a view to determining whether the operation was legal.<sup>7</sup> Alternatively there is also considerable multi-disciplinary scholarship addressing the turn to humanitarianism and how this can be read as a heroic narrative.<sup>8</sup> Yet there is almost no scholarship that considers OEF from both these perspectives. This thesis therefore attempts to plug this gap by offering a sustained analysis of the legality of the intervention before exploring the wider consequences for the public imagination and for academic understanding. This thesis also draws together a wider

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<sup>4</sup> The classic example is the Kosovo crisis and NATO's military operations against Serbia from March to June 1999. Much legal scholarship was generated on the legality of the NATO intervention, with several leading scholars concluding that the operation was illegal, but morally legitimate. See Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1; Antonio Cassese, 'Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *European Journal of International Law* 23. A brief discussion of the Kosovo crisis follows in Chapter 5 at section 1.3.

<sup>5</sup> As Christopher Greenwood notes, much of the controversy over the legality of the USA's use of force in Afghanistan stems from the fact that the events of 9/11 did not fit easily within an obvious category of international law. See Christopher Greenwood, 'International Law and the "War against Terrorism"' (2002) 78 *International Affairs* 301. This hypothesis is expanded in Chapter 1.

<sup>6</sup> See for e.g. Antonio Cassese, 'Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 *European Journal of International Law* 993; Eric PJ Myjer and Nigel D White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?' (2002) 7 *Journal of Conflict and Security Law* 5.

<sup>7</sup> Ulf Linderfalk argues that the scholarship pertaining to OEF did not live up to the standards expected of legal scholars and in his analysis of scholarly articles produced on the issue, concludes that scholars were hesitant to reach any conclusion other than that the OEF was legal. See further Ulf Linderfalk, 'The Post-9/11 Discourse Revisited-The Self-Image of the International Legal Scientific Discipline' (2010) 2 (3) *Goettingen Journal of International Law* 893.

<sup>8</sup> See for e.g. David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, Princeton 2005); David Rieff, *At the Point of a Gun: Democratic Dreams and Armed Intervention* (Simon and Schuster, New York 2006); Wendy Hessford, *Spectacular Rhetorics* (Duke University Press, 2011); Roberto Belloni, 'The Trouble with Humanitarianism' (2007) 33 (3) *Review of International Studies* 451.

thematic analysis of how these competing agendas converged to legitimate the military operation. In doing so, this thesis is able to offer an alternative reading of the response to 9/11 by highlighting legal scholars' fascination with the heroic narrative as a method of critique. Instead this thesis engages with the alternative narratives underpinning 9/11 and OEF to demonstrate how the appeal of the 'dark side' of intervention has served to obscure impartial analysis of the legality of OEF.

### **3. Themes of Analysis**

#### **3.1. How an Illusion of Legality was Promulgated: Unpicking the Attraction of Military Intervention**

In view of the tacit support given to OEF by both scholars and the public, the central examination of this thesis focuses on, not just the legality of the intervention, but the implicit assumption that such intervention was beneficial. It highlights how this presumption operates to justify military interventions by influencing public perceptions. This thesis will therefore engage with the critical and feminist scholarship within international law that critiques whether military interventions *per se* are effective,<sup>9</sup> arguing that they are rarely so, thereby raising the question of why the West might then choose to continue presenting them in this way.<sup>10</sup>

There is an abundance of academic scholarship demonstrating how military interventions are framed within a familiar heroic narrative that appeals to Western audiences and so ensures support.<sup>11</sup> This scholarship provides a critical reading of this heroic narrative

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<sup>9</sup> Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, Cambridge 2003); Kennedy, *The Dark Sides of Virtue*; See also Rieff, *At the Point of a Gun*; Karen Engle, 'Calling in the Troops: The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Intervention' (2007) 20 *Harvard Human Rights Journal* 189; Deborah M. Weissman, 'The Human Rights Dilemma: Rethinking the Humanitarian Project' (2003) 35 *Columbia Human Rights Law Review* 259.

<sup>10</sup> This thesis uses the terms 'West' and 'Western' to refer to the major developed states such as the US, Canada, Australia, the UK and other European states. While there are inaccuracies with this term, particularly when used as shorthand for NATO states, it adequately describes a group of states with loosely similar social and economic values underpinned by liberal capitalism. Some authors prefer the terms 'global north' and 'global south' to better reflect the distinction. However, for ease of use, this thesis replicates the term 'West', which is used in much of the legal literature.

<sup>11</sup> Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' 10 *European Journal of International Law* 679; Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*; David Chandler, *From Kosovo to Kabul and Beyond: Human Rights and International Intervention* (Pluto, Ann Arbor, MI 2006); Sherene Razack, *Dark Threats and White*

arguing that, in fact, the outcomes of such interventions are rarely benign and instead mirror the colonial model in exploiting those whom the intervention was meant to assist.<sup>12</sup> This thesis seeks to draw on this body of work in order to explore the attraction of this narrative and engage in a critique of its operation in order to refute the assumption that military intervention is automatically a ‘good thing’. To do so it primarily utilises the work of critical legal scholar Anne Orford who, in common with scholars from other disciplines, argues that military interventions are premised upon this heroic narrative that casts the Western military as the rescuer of oppressed Third World people.<sup>13</sup> Orford explores how this narrative taps into the lure of the salvatory power of international law itself,<sup>14</sup> allowing Western states to ‘narrate themselves into a hero-spectator role in the enforcement of law on the use of force.’<sup>15</sup> She argues that the success of this narrative is that it allows the Western public to frame military action as altruistic and benevolent, presenting military force as the simple solution to a host of problems, while simultaneously obscuring the wider complex realities of intervention.<sup>16</sup>

Orford’s work draws on critical legal theory, feminist theory and post-colonial theory, in particular the work of post-colonial theorists Gayatri Spivak, Chandra Mohanty and Edward Said. Spivak famously surmised colonial interventions as ‘white men saving brown women from brown men’,<sup>17</sup> an observation that might equally surmise the framing of the military intervention in Afghanistan. This suggests that Western military intervention in the Third World, as in colonial times, is not in fact concerned with the

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Knights: The Somalia Affair, Peacekeeping, and the New Imperialism (University of Toronto Press 2004); JH Stiehm, ‘The Protected, the Protector, the Defender’ (1982) 5 *Women's Studies International Forum* 367; Makau Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42 *Harvard International Law Journal* 201.

<sup>12</sup> Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’; Michael Ignatieff, *Empire Lite* (Vintage Digital, London 2010).

<sup>13</sup> See also Razack, *Dark Threats and White Knights: The Somalia Affair, Peacekeeping, and the New Imperialism*; Chandler, *From Kosovo to Kabul and Beyond: Human Rights and International Intervention*.

<sup>14</sup> Anne Orford, ‘The Destiny of International Law’ (2004) 17 *Leiden Journal of International Law* 441; Orford, ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’. See also Martti Koskeniemi, ‘“The Lady Doth Protest Too Much” Kosovo, and the Turn to Ethics in International Law’ (2002) 65 *The Modern Law Review* 159; Anthony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, Cambridge 2005); Makau Mutua, ‘Why Redraw the Map of Africa: A Moral and Legal Inquiry’ (1994) 16 *Michigan Journal of International Law* 1113.

<sup>15</sup> Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*, at 180.

<sup>16</sup> *ibid.*

<sup>17</sup> Gayatri Chakravorty Spivak, ‘Can the Subaltern Speak?’ in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (Macmillan, Basingstoke 1988) at 297.

treatment of Third World people, but merely a form of imperialism that is justified through depictions of a ‘victimised Third World women’ whose liberation can only be granted by the civilised Western military.<sup>18</sup> Drawing on this work this thesis demonstrates how the military intervention in Afghanistan is framed within this same rescue narrative, which amounts to white men saving Afghan women from barbaric men, and how such a framing generates support for the action. Additionally this thesis posits that this narrative resurrects and enables imperial power dynamics which Anthony Anghie and Martti Koskenniemi argue lie at the very heart of international law and thereby cast doubt on the altruistic motives proffered.<sup>19</sup>

With this in mind, having outlined the narrative framing of OEF, this thesis reflects on the success and desirability of international law’s co-opting of the humanitarian project and the situating of military force as altruistic.<sup>20</sup> Critical scholars demonstrate how there has been a blurring of humanitarianism with humanitarian intervention, which has allowed Western states to situate military actions under the banner of humanitarianism by co-opting the language of charity and human rights.<sup>21</sup> The framework of humanitarianism obscures and silences critical discourse on the harsh realities and consequences of those same interventions.<sup>22</sup> By applying this same approach to the intervention in Afghanistan, this

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<sup>18</sup> Dianne Otto, ‘Disconcerting “Masculinities”’: Reinventing the Gendered Subject (S) of International Human Rights Law’ in Dorris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart, Oxford 2005); Dianne Otto, ‘Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law’ in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press, Cambridge 2009); Ratna Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics’ (2002) 15 *Harvard Human Rights Journal* 1. See also Radhika Coomaraswamy, ‘Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women’ 34 *George Washington International Law Review* 483 and Uma Narayan, *Dislocating Cultures: Identities, Traditions and Third World Feminism* (Routledge, New York 1997), at 54.

<sup>19</sup> See Anghie, *Imperialism, Sovereignty, and the Making of International Law*; Marti Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, Cambridge 2008); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, Cambridge 2006).

<sup>20</sup> Orford, ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’; Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*.

<sup>21</sup> David Chandler, ‘The Road to Military Humanitarianism: How the Human Rights NGOs Shaped a New Humanitarian Agenda’ (2001) 23 *Human rights quarterly* 678; Chandler, *From Kosovo to Kabul and Beyond: Human Rights and International Intervention*; David Rieff, ‘The Humanitarian Trap’ (1995) 12 *World Policy Journal* 1; Rieff, *At the Point of a Gun: Democratic Dreams and Armed Intervention*; Weissman, ‘The Human Rights Dilemma: Rethinking the Humanitarian Project’; Yvonne C Lodico, ‘The Justification for Humanitarian Intervention: Will the Continent Matter?’ (2001) *The International Lawyer* 1027.

<sup>22</sup> Orford, ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’; Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*; Engle, ‘Liberal

thesis demonstrates how this façade of humanitarianism, manifesting as concern for women's rights, was invoked to justify the intervention. As well as Orford, this thesis draws on the work of several critical legal scholars, in particular David Kennedy, to question some implicit assumptions about the humanitarian project.<sup>23</sup> Kennedy's work demonstrates how human rights lawyers narrate themselves into the role of the rescuer, believing that law offers a workable solution to the problems of human rights abuses. He chastises lawyers for failing to recognise the 'dark side' of the humanitarian project and questions whether law is capable of redressing or preventing such abuses.<sup>24</sup> This thesis follows a similar strain of enquiry, although it focuses primarily on international law's ability to redress and prevent abuses of women. Accordingly, this thesis engages with this 'dark side' of feminism, questioning for whom the humanitarian rhetoric is adopted.

To further deepen the examination of the narrative framing of OEF, this thesis draws on the work of several feminist gender theorists. It recalls the scholarship of Anne McLintock, which demonstrates how the highly racialized and orientalist narratives of the Third World, which operate in first world imaginations, are based not only on domination, but also on anxiety.<sup>25</sup> Similarly it utilises the work of Judith Butler who engages in a critical and psychoanalytical reading of the narrative scripting of OEF and the wider 'War on Terror',<sup>26</sup> which (much like her earlier work) calls for a re-imagining of cultural narratives and rejection of the homogenous category of 'woman'.<sup>27</sup> This thesis therefore links the anxiety and fear circulating after 9/11 with the orientalist tropes that served to justify imperialism. It argues that this well-worn narrative is rooted in a fear of the 'other' and as such, is not

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Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States'.

<sup>23</sup> David Kennedy, 'A New World Order: Yesterday, Today and Tomorrow' (1994) 4 *Transnational Law & Contemporary Problems* 329; David Kennedy, 'Spring Break' (1984) 63 *Texas Law Review* 1377; David Kennedy, 'The Disciplines of International Law and Policy' (1999) 12 *Leiden Journal of International Law* 9; David Kennedy, 'The International Style in Postwar Law and Policy' (1994) *Utah Law Review* 7; David Kennedy, 'When Renewal Repeats: Thinking against the Box' (2000) 32 *NYU Journal of International Law & Politics* 335; See also Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart, Oxford 2002).

<sup>24</sup> Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*

<sup>25</sup> Anne McLintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Context* (Routledge, New York 1995).

<sup>26</sup> Judith Butler, *Frames of War: When Is Life Grievable* (Verso, London 2009).

<sup>27</sup> For e.g. in her foundational text Butler rejects the identity politics of radical and liberal feminism arguing that we need to re-imagine an approach to feminism that is not constricted by the terms sex and gender. See Judith Butler, *Gender Trouble* (Routledge, London 1999).

necessarily solely or always about saving the Third World or Third World women, but about vanquishing this fear by casting the West as masculine and protectionist.

### **3.2. The Consequences of Presenting Western Military Force as a ‘Force for Good’ and Afghan Women as Victims**

Global South feminists have long criticised Western feminists’ and indeed the Western media’s focus on Third World cultures as the root cause of women’s oppression.<sup>28</sup> This thesis interrogates this proposition with regard to the plight of women in Afghanistan. It demonstrates how, while daily life for women in Afghanistan is indeed often arduous, the root causes of their oppression can be more accurately described as civil war, drought, famine and political instability rather than simply the practices of barbaric men or fundamentalist ideologies.<sup>29</sup> While Afghan women under the Taliban were undeniably deprived of many basic human rights and faced unfailing hardship in their daily lives, the failure of the media and even some feminist scholars to contextualise this hardship meant that the use of Western military force to overthrow the Taliban was presented as a panacea to the problems faced by Afghan women. Critical scholars highlight how such edited depictions allowed the West to present the military action as being motivated out of concern for women’s rights, in addition to national security.<sup>30</sup> This thesis therefore utilises such scholarship in order to argue that the stereotypical representation of Afghan women as victims is problematic and worrying, thereby cautioning against the endorsement of the rescue narrative.

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<sup>28</sup> See for e.g. Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics’; Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Routledge, London 2005); Aihwa Ong, ‘Strategic Sisterhood or Sisters in Solidarity? Questions of Communitarianism and Citizenship in Asia’ (1996) *Indiana Journal of Global Legal Studies* 107; L Amede Obiora, ‘Feminism, Globalization, and Culture: After Beijing’ (1997) *Indiana Journal of Global legal Studies* 355.

<sup>29</sup> See for e.g. Miriam Cooke, ‘Islamic Feminism before and after September 11th’ (2002) 9 *Duke J Gender L & Pol’y* 227; Elaheh Rostami-Povey, *Afghan Women: Identity and Invasion* (Zed Books, London 2007); Nancy Dupree, ‘Afghan Women under the Taliban’ in William Maley (ed), *Fundamentalism Reborn* (NYU Press, New York 1998); Deniz Kandiyoti, ‘Old Dilemmas or New Challenges? The Politics of Gender and Reconstruction in Afghanistan’ (2007) 38 *Development and Change* 169; Sippi Azarbaijani-Moghaddam, ‘Women’s Groups in Afghan Civil Society: Women and Men Working Towards Equitable Participation in Civil Society Organizations’ (Research conducted for Counterpart International, Kabul, 2006).

<sup>30</sup> Engle, ‘Liberal Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States’; Vasuki Nesiah, ‘From Berlin to Bonn to Baghdad: A Space for Infinite Justice’ 17 *Harv Hum Rts J* 75; R. Khanna, ‘Taking a Stand for Afghanistan: Women and the Left’ (2002) 28 *Sigms Journal of Women in Culture and Society* 464.

As such this thesis sits within the post-colonial feminist school of thought,<sup>31</sup> and particularly compliments the work of postcolonial legal feminists Orford, Karen Engle, Diane Otto, Vesuki Nesiah and Ratna Kapur, who (along with many others) challenge liberal/structural bias feminist discourse understandings. A common theme of such work is its rejection of the idea of women as one-dimensional victim subjects of international law and the idea that women's rights can be considered in a vacuum outside factors such as economics, culture and globalisation.<sup>32</sup> These scholars reject the perpetration of stereotyping narratives in which the Third World woman is universally oppressed and situated as a binary opposite to the liberated Western subject. They further caution against the use of law as an effective remedy for the harms that women experience, arguing that this merely reinforces oriental representations of 'Third World culture' and in doing so elevates Western culture.<sup>33</sup> It draws on the work of Mohanty who, in her seminal text, highlighted the 'absence of the histories of Third World women's engagement with feminism'.<sup>34</sup> Similarly this thesis is critical of many foundational liberal/structural bias feminist discourses, which focus on culture as the situation of oppression for Third World women.<sup>35</sup> Much of this scholarship, although motivated out of a desire to help Afghan

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<sup>31</sup> The label 'post-colonial feminism' is used throughout this thesis as a loose umbrella term that encompasses both Third World feminists who challenge the predominant Western structural bias critique and Western scholars who have been equally critical of the failure of liberal/structural bias feminism for its obsession with culture as the root of victimisation and its failure to address issues such as globalisation and poverty, which may play a bigger role in women's subjugation. For examples of early challenges to the structural bias critique see Isabelle R Gunning, 'Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries' (1991) 23 *Columbia Human Rights Law Review* 189; Vasuki Nesiah, 'Toward a Feminist Internationality: A Critique of US Feminist Legal Scholarship' (1993) 16 *Harvard Women's Law Journal* 189; Karen Engle, 'Female Subjects of Public International Law: Human Rights and the Exotic Other Female' (1991) 26 *New England Law Review* 1509; Obiora, 'Feminism, Globalization, and Culture: After Beijing'. This thesis also situates Third World Approaches to International Law (TWAAIL) within this description, although it acknowledges that not all TWAAIL scholarship is 'feminist'. For a helpful overview see Makau Mutua and Antony Anghie, 'What Is Twail?' (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 31.

<sup>32</sup> Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics'; Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism*; Obiora, 'Feminism, Globalization, and Culture: After Beijing'.

<sup>33</sup> *ibid.*

<sup>34</sup> Chandra Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1988) *Feminist Review* 61.

<sup>35</sup> The structural bias school is epitomised by the foundational feminist text. See Hilary Charlesworth, Christine Chinkin and Shelly Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613. The structural bias approach viewed international law as being male dominated and so biased against women. For an overview of structural bias feminism see Karen Engle, 'International Human Rights and Feminism: When Discourses Keep Meeting' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart, Oxford 2005). Much of the literature in this field focusses on the public/private divide and situates the private sphere as the location of women's oppression. See for e.g. Celina Romany, 'Women as Aliens: A Feminist Critique of the Public/Private

women, unintentionally helped perpetrate a simplified narrative in which Afghan women were reduced to homogenous victims awaiting help that could only come from the Western military.

Accordingly, following a similar approach, this thesis criticises the promulgation of, and exposes the hidden consequences of, uniform depictions of Afghan women as victims in need of rescue. In order to demonstrate how stereotypical representations of Afghan women as victims have facilitated support for the military intervention, this thesis engages with a diverse body of scholarship referred to as the ‘Afghan Alibi’<sup>36</sup> genre.<sup>37</sup> Although multidisciplinary, emanating from scholars in political science, sociology, anthropology and women’s studies, this scholarship tends to draw heavily on post-colonial and feminist theory. It critiques the representation and depiction of Afghan women as victims, often arguing that such depictions belie Western prejudices and rarely inform or depict the complex reality of Afghan women’s lives. It highlights the denial of agency given to Afghan women and situates this within a wider orientalist trope perpetrated by the heroic narrative, which results in the denial of agency to all women.<sup>38</sup> This thesis demonstrates how, while stereotypical representations of Third World women as victims offer a ready-made justification for military action, depicting the Western military as rescuers, this is

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Distinction in International Human Rights Law’ (1993) 6 Harvard Human Rights Journal 87; Rebecca Cook, ‘The Public/Private Distinction and Its Impact on Women’ in Dorinda Dallmeyer (ed), *Reconceiving Reality: Women and International Law* (American Society of International Law, Washington DC, 1993)

<sup>36</sup> Rae Lynn Schwartz-DuPre, ‘Portraying the Political: National Geographic’s 1985 Afghan Girl and a US Alibi for Aid’ (2010) 27 Critical Studies in Media Communication 336, at 337.

<sup>37</sup> Lila Abu-Lughod, ‘Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others’ (2002) 104 American anthropologist 783; J. Ann Tickner, ‘Feminist Perspectives on 9/11’ (2002) 3 International Studies Perspectives 333; Dana Cloud, ‘“To Veil the Threat of Terror”: Afghan Women and the Clash of Civilizations in the Imagery of the US War on Terrorism’ (2004) 90 Quarterly Journal of Speech 285; Nancy W. Jabbara, ‘Women, Words and War: Explaining 9/11 and Justifying US Military Action in Afghanistan and Iraq’ (2013) 8 Journal of International Women’s Studies 236; Meghana Nayak, ‘Orientalism and ‘Saving’ US State Identity after 9/11’ (2006) 8 International Feminist Journal of Politics 42; LJ Shepherd, ‘Veiled References: Constructions of Gender in the Bush Administration Discourse on the Attacks on Afghanistan Post-9/11’ (2006) 8 International Feminist Journal of Politics 19; G. Youngs, ‘Feminist International Relations in the Age of the War on Terror: Ideologies, Religions and Conflict’ (2006) 8 International Feminist Journal of Politics 3; Zillah Eisenstein, *Sexual Decoys: Gender, Race and War in Imperial Democracy* (Zed Books, London 2007); Deniz Kandiyoti, ‘Between the Hammer and the Anvil: Post-Conflict Reconstruction, Islam and Women’s Rights’ (2007) 28 Third World Quarterly 503; Kandiyoti, ‘Old Dilemmas or New Challenges? The Politics of Gender and Reconstruction in Afghanistan’; Sunera Thobani, ‘White Wars: White Feminisms and the “War on Terror”’ (2007) 8 Feminist Theory 169; N. Al-Ali and N. Pratt, *Women and War in the Middle East* (Zed Books, London 2009); Engle, ‘Liberal Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States’; Nesiah, ‘From Berlin to Bonn to Baghdad: A Space for Infinite Justice’.

<sup>38</sup> Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism*.

ultimately problematic for feminists. As such, this thesis unpicks the narrative framing to demonstrate, not only how it operates to legitimate intervention, but also how, in doing so, it damages feminist claims to serve women's rights by cementing unhelpful and dangerous stereotypes about Third World women that reveal international law's imperialist roots and situate feminism within that same imperialist paradigm.

### **3.3. Can Force ever be Feminist? Theorising a Feminist Approach to Force**

In view of such charges, this thesis then seeks to explore the motivations that led to an alliance between feminists and military hawks<sup>39</sup> and the implications of such an alliance. Accordingly, it engages with wider feminist scholarship in order to question whether military interventions can ever be in the interests of women.<sup>40</sup> It draws on the growing body of feminist critiques of international humanitarian law that challenge the governance feminism model,<sup>41</sup> as well as international law itself. It argues that the charges levied by post-colonial feminists are merited because Afghan women 'provide the perfect grounds for an elaborate ventriloquist act in which they serve as the passive vehicle for the representation of US interests.'<sup>42</sup> Despite the rhetoric that sought to justify the 'War on Terror' as a war for women's rights, the reality is that women often suffer most as a result of military intervention.<sup>43</sup> Their needs and wants are ignored, while their image as victims

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<sup>39</sup> Engle notes how there is no official definition of the term, but that a "hawk" is considered to be "a person who advocates an aggressive or warlike policy, especially in foreign affairs." This term is in contrast to a "dove," which is "a person who advocates peaceful or conciliatory policies, especially in foreign affairs." Thus, when someone describes herself as a "human rights hawk" or "humanitarian hawk," she would seem to support military action over negotiation.' See Engle, 'Calling in the Troops: The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Intervention'. The alliance between feminists and military hawks coined the term feminist hawks. The emergence of this movement and the associated problems are discussed infra at Chapter 5, section 1.

<sup>40</sup> Cynthia Enloe, *Bananas, Beaches & Bases: Making Feminist Sense of International Politics* (University of California Press, Berkeley 1990); Cynthia Enloe, *Maneuvers: The International Politics of Militarizing Women's Lives* (University of California Press, Berkeley 2000).

<sup>41</sup> The term governance feminism was coined by Chantal Thomas, Prabha Kotiswaran, Hila Shamir and Janet Halley to describe the increasing tendencies of feminists to seek to use law as a means of implementing feminist policies. Halley surmises it as a 'grown-up feminism adept at wielding power for the good of women globally and locally'. See Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, Princeton 2008). See also: Janet Halley, 'Take a Break from Feminism?' in Karen Knop (ed), *Gender and Human Rights* (Oxford University Press, Oxford 2004); Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' (2008) 30 Michigan Journal of International Law 1.

<sup>42</sup> Carol Stabile and Deepa Kumar, 'Unveiling Imperialism: Media, Gender and the War on Afghanistan' (2005) 27 Media, Culture & Society 765, at 778.

<sup>43</sup> See Chapter 5.

is used to legitimate the action.<sup>44</sup> This entrenching of women in the role of victims further reduces their capacity to have agency.<sup>45</sup>

Moreover, as Gina Heathcote argues, despite a growing body of feminist scholarship in international law, feminists have failed to theorise an approach to use of force, neither addressing determinately whether force can ever be feminist, or indeed what such use of force might entail.<sup>46</sup> She asserts that such absence is indicative of a larger silence in feminist scholarship on the relationship between law and violence.<sup>47</sup> This thesis therefore situates itself within this gap, offering a critique, grounded in feminist methods, of the justifications for military force in Afghanistan. While not seeking to adopt all of Heathcote's conclusions, this thesis recalls Heathcote's reasoning that the justifications for the use of force by states 'mirror the gendered model of interpersonal justifications for violence apparent in Western liberal democracies.'<sup>48</sup> Similarly, it posits that military force deployed to save women is rarely capable of ending sexual violence or other gender based violence in armed conflicts and so cautions against a feminist endorsement of military actions such as OEF, especially when they are framed almost entirely as being in women's interests.

As such, this thesis engages with a curious paradox: whether military force is ever a good or adequate response to violence and whether such force can be described as 'feminist'. To do so it avails itself of wider post-modern feminist scholarship, which has attempted to re-evaluate the war paradigm and draw attention to the fact that the much-heralded age of intervention has done little to protect women.<sup>49</sup> Many such feminists have focussed on

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<sup>44</sup> See Chapter 5, section 2. See also Obrad Kesic, 'Women and Gender Imagery in Bosnia: Amazons, Sluts, Victims, Witches, and Wombs' (1999) *Gender Politics in the Western Balkans: Women and Society in Yugoslavia and the Yugoslav Successor States* 187; Robin Morgan, *The Demon Lover: On the Sexuality of Terrorism* (Piatkus, London 2001).

<sup>45</sup> This theme is discussed throughout chapters 3 and 5.

<sup>46</sup> Gina Heathcote, *The Law on Use of Force: A Feminist Analysis* (Routledge, London 2013).

<sup>47</sup> *ibid.*

<sup>48</sup> *ibid.*, at 3.

<sup>49</sup> Engle, 'Calling in the Troops: The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Intervention'; Janet Halley and others, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 *Harvard Journal of Law and Gender* 335; Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law'. See also Enloe, *Maneuvers: The International Politics of Militarizing Women's Lives* Claire Duncanson, *Forces*

issues of violence against women emanating from militarism, including high levels of domestic violence around military bases, the growth of the sex industry and ‘the performance of masculinity that is central to military ideologies’,<sup>50</sup> which they claim, perpetuates such violence. They argue therefore that force (which some take to include peacekeeping) can never be feminist and highlight the difficulty with feminists endorsing military force.<sup>51</sup> This thesis makes similar claims about the intervention in Afghanistan, arguing that war has served to cement patriarchal hierarchies that contribute to women’s oppression in Afghanistan and so concludes that the ‘War on Terror’ has not achieved the promised liberation for the women of Afghanistan. It therefore cautions against the unqualified acceptance and proliferation of the heroic narrative concluding that this merely allows states to legitimate uses of force that continue to perpetrate real harm as well as orientalist and stereotypical victimisation rhetoric.

#### **4. Thesis Structure and Outline**

The thesis is structured in chronological chapters, but is divided into 3 parts, each with a separate method of enquiry.

##### ***4.1.1. Part I***

Part I encompasses the first two chapters and provides context and background of both the legality of OEF and the status of women in Afghanistan. Chapter 1 establishes the legal and contextual framework of OEF, in order to analyse the legality of the operation. Since military action was not authorised by the United Nations Security Council (UNSC) this chapter explores the only other legal avenue; the doctrine of self-defence, enshrined in Article 51 of the UN Charter. It outlines the legal requirements for a state resorting to self-defence, in particular the need for an armed attack. It discusses whether the 9/11 attacks constitute an armed attack and concludes that they do not. Therefore this chapter posits that the US had no recourse to self-defence and concludes that OEF cannot therefore be

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*for Good?: Military Masculinities and Peacebuilding in Afghanistan and Iraq* (Palgrave Macmillan, Basingstoke 2013) and Joshua Goldstein, *War and Gender* (Cambridge University Press, Cambridge 2001).

<sup>50</sup> Gina Heathcote, ‘Feminist Politics and the Use of Force: Theorising Feminist Action and Security Council Resolution 1325’ (2011) 7 *Socio-Legal Rev* 23, at 33.

<sup>51</sup> See for e.g. Krista Hunt and Kim Ryzgiel (eds), *(En) Gendering the War on Terror: War Stories and Camouflaged Politics* (Ashgate Publishing Company, London 2006); Susan Hawthorne and Bronwyn Winter, *September 11, 2001: Global Feminist Perspectives* (Raincoast Books, Vancouver 2002); Shepherd, ‘Veiled References: Constructions of Gender in the Bush Administration Discourse on the Attacks on Afghanistan Post-9/11’.

unequivocally considered lawful. Despite this, the chapter highlights how both the UK and US insisted upon their acting in self-defence and how they were keen to frame the military operation within the language of international law. This chapter concludes by asserting that although the operation was of dubious legality, it was legitimised by invoking both the language of international law and the discourse of humanitarianism. As such it suggests that this dubious legality was remedied in national discourse by presenting the operation as a humanitarian mission as well as an enforcement one.

In Chapter 2, the thesis turns specifically to the arguments put forward that the ‘War on Terror’ was to be ‘a war for women’s rights’.<sup>52</sup> In an attempt to refute this assertion, this chapter outlines the gap between the legislative changes in Afghanistan and the measurable improvements since the commencement of OEF. In particular, Chapter 2 examines the simplistic explanation that maintained that the barbarous Taliban were the sole obstacle to Afghan women’s liberation and that their removal would eliminate the discrimination faced by those women. This chapter initially focuses on the status of women’s rights in Afghanistan prior to the arrival of the Taliban, highlighting that, in opposition to what was suggested by the Western media, the oppression of Afghan women did not begin with the Taliban. It notes that while the Taliban edicts were some of the most conservative and restrictive impositions ever made on women, in many cases these decrees merely codified the traditional tribal customs that were already practised and considered the norm. The chapter concludes by noting that, despite the promises of Western leaders and the removal of state sanctioned discrimination, the actuality for women in Afghanistan can be said to have changed little in the decade since the Taliban were ousted. This chapter therefore highlights the danger of linking women’s liberation to a military operation whose key objectives were security and counter terrorism.

#### ***4.1.2. Part II***

Part II encompasses chapters 3 and 4 and engages in a theoretical critique of the heroic narrative and the methods by which language is used to frame the public’s understanding

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<sup>52</sup> Laura Bush declared that ‘the fight against terrorism is also a fight for the rights and dignity of women. Radio Address by Mrs Laura Bush (17 November 2001). See also US Government ‘Report on the Taliban’s War Against Women’ (Bureau of Democracy, Human Rights and Labor, United States of America, Washington DC 17 November 2001) <http://www.state.gov/j/drl/rls/c4804.htm> (accessed August 2015)

of situations. It explores how OEF and the wider 'War on Terror' came to be sold to the public and demonstrates how effective propaganda methods were utilised to ensure a solid justificatory narrative was deployed that served to be impervious to criticism.

In view of the conclusions drawn in Part I of this thesis, Chapter 3 attempts to explain how the US and its allies were able to 'sell' the 'War on Terror' and in particular OEF to the public as a benevolent operation in pursuit of women's rights. It argues that this was possible because of the influence of the rescue narrative on public consciousness. In terms of OEF, the masculine hero is the West and its military, while the women of Afghanistan are the feminine victims in need of rescue from the evil Taliban who occupy the role of villain. This chapter argues that the media's co-option of Afghan women's oppression is ultimately dangerous to feminism because it erroneously suggests that the solution to the problems faced by Afghan women lies in their rescue by Western forces. In addition to this, Chapter 3 argues that the heroic narrative simplifies the climate of intervention and as a result raises false expectations of the outcome of that intervention. This chapter therefore highlights the pertinent point that, when politicians claim to be acting in the name of women's rights, such campaigns run the risk of being misappropriated and reduced to mere rhetoric. So much so that, far from being a war *for* women's rights, the 'War on Terror' can be said to be a war *on* women's rights.<sup>53</sup>

This chapter also criticises the feminist hawks – those feminist activists and scholars who were willing to endorse military intervention and the promulgation of such a simplified narrative because they believed that it would ultimately improve women's rights. Such complicity was dangerous because it situated the human rights movement within the frame of imperialist militarism. By situating themselves in this role, feminists come to inhabit the patriarchal role, assuming a right to speak for and about 'other' women. The chapter argues that this endorsement of the narrative is problematic because it situates feminists in the role of the masculine rescuer/hero; a role that is rooted in imperialist and patriarchal ideology that sits uncomfortably with the feminist project. This chapter concludes that the narratives deployed to justify OEF are merely a replay of this colonial tactic where there is little sustained concern for the actual women whose image is used to entreat the military

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<sup>53</sup> Hunt and Rygiel, (*En*) *Gendering the War on Terror: War Stories and Camouflaged Politics*, at 11.

interventions. By falling into this role, feminists are at risk of inhabiting the very role that they claim to critique.

Building upon this critique, Chapter 4 serves to recast the preceding theory through a discourse analysis of political rhetoric regarding OEF and the 'War on Terror'. It argues that the framework of the heroic narrative, though helpful, may itself be too simplistic and as such this chapter, seeks to deconstruct how narratives promoting war are created. The chapter charts the transformation of the 9/11 attacks into the 'War on Terror', demonstrating how this was achieved through the construction of the heroic narrative and the rejection of alternative narratives, drawing parallels with war propaganda throughout history. This chapter, although complementing Chapter 3 and seeking to demonstrate how the heroic narrative was constructed through political rhetoric, concludes that there were several metanarratives, such as victimhood and grief, American exceptionalism, global solidarity and good versus evil which also operated around OEF and the wider 'War on Terror'. This chapter concentrates on how the 'War on Terror' was portrayed in the media and compares this to the portrayal of previous conflicts arguing that it follows a well-trodden path. The remainder of this chapter then analyses how traditional methods of propaganda, such as appealing to nationalist sentiments and instilling a climate of fear, were utilised to sell the 'War on Terror'. It demonstrates that 9/11 was rhetorically 'transformed' via specific tropes from a terrorist attack by private actors into an act of war necessitating a military response. It argues that this military response was framed in a particular way in the US and UK in order to resonate with the particular culture and history of each state. It also demonstrates that although the heroic narrative was constructed early on, it did not gain currency as the dominant narrative until after OEF had commenced thus again highlighting that there were alternative framings but it was the war framing that was elevated.

#### ***4.1.3. Part III***

Finally, Part III encompasses Chapter 5, which engages with the wider assertions of hawkish feminism that posit that war can and should be used as a method to liberate women. This chapter aims to analyse the peculiar attraction of militarism as a viable tool with which to secure women's rights. It explores the so called 'marriage of convenience'

between feminists and military hawks and challenges some of the main assumptions that popular hawkish feminism has made, namely that military force is a useful tool for promoting women's rights. The chapter outlines how feminist scholars and activists recognised that they could appropriate the rhetoric and narratives deployed to provoke intervention in furtherance of women's rights. Given this anxiety regarding hawkish feminism, this chapter then outlines the well-known consequences and effects of conflict on women and demonstrates how they are disproportionately affected by conflict. It then highlights the incongruity of those advocating war; their utilisation and glorification of the feminine image as a motivation for men to fight while simultaneously ignoring the actual harm that befalls women as a consequence of such fighting. It notes how the orthodox framing of war still endures and continues to hold appeal, despite the irrefutable evidence that it does not protect women.

This chapter then turns to the pro-interventionist arguments advocated by prominent (non-feminist) hawks, but argues that, despite the simplicity and apparent logic of advocating military force to protect women, hawkish feminism is a flawed approach. It does so by highlighting the problems with hawkish feminism: namely its tendency to succumb to a crisis mentality and its inclination to present complex situations in a black and white manner, which implies that the choice is to intervene militarily or do nothing. This chapter questions whether this 'marriage' is altogether a victory for feminism rather than women, and whether such an alliance should be viewed with caution. The chapter questions whether this conflation has furthered the elevation of a narrative whereby military force is viewed as a benevolent gesture that has only positive consequences for women. As such, this chapter ultimately presents an argument against using military force to secure women's rights and concludes that as women are the main victims during conflict, that promoting militarism is a dangerous solution for feminists to accept, far less advocate.

#### ***4.1.4. Conclusion***

This thesis concludes that OEF and the 'War on Terror' needed to be sold to the public in the same way as any other military conflict. It argues that in the face of questionable legality, the need for moral legitimacy became pressing. This was cultivated through the deployment of a gendered heroic narrative that positioned the West as heroic figures

rescuing victims from evil oppressors. This narrative was appropriated by the US Government and was soon propagated by Western media in its discovery of the oppression of Afghan women. The hardships and cruelty reported as being meted out to Afghan women meant that their rescue was presented as a *fait accompli*. In the face of such emotive framing the wider discussion of legality was effectively silenced. This thesis warns against subscribing to such seductive narratives and highlights the dangers of doing so. It asserts that the silencing of important dialogue regarding military deployment is a standard feature of propaganda and demonstrates how this is problematic.

This thesis also highlights how the heroic narrative is problematic to feminism because in their attempt to further women's rights, feminists have allowed their rhetoric to be co-opted by those who have contradictory aims. Such co-option runs the risk of devaluing core feminist goals in allowing such rhetoric to be used to justify war. While some feminists have welcomed this alliance, this thesis demonstrates how war is often disadvantageous to women and how liberation rarely flows from conflict. It cautions against hawkish feminism and the idea that war is an effective tool with which to liberate women. This thesis also warns against the use of the heroic narrative because it is ultimately axiomatic to feminist theory. While the depiction of Afghan women as subjugated objects awaiting rescue is indeed problematic, the failure of many critical scholars to excavate those other, more complex, narratives pertaining to the 'War on Terror' is equally dangerous. In their readiness to attribute all acceptance of OEF to the popularity of the heroic narrative those scholars miss the opportunity to analyse other narratives underpinning the 'War on Terror' and the Afghani intervention in particular.

**PART 1:**  
**ANCHORING THE CONTEXT**

# Chapter 1 The Legal Justifications for Foreign Intervention in Afghanistan

## Introduction

Following the 9/11 attacks the US instigated a military offensive in Afghanistan. This action, codenamed Operation Enduring Freedom (OEF), was explained to the international community as a legitimate exercise of national self-defence against the perpetrators of 9/11 and their hosts – the Taliban Government of Afghanistan.

The purpose of this chapter is to delve beneath the rhetoric and determine which, if any, legal basis underpins the use of military force in Afghanistan. This chapter aims to examine the US justification of self-defence within the existing legal parameters of international law and explore whether the option of self-defence was really available to the US and its allies. It outlines the situations which would give rise to the use of force in self-defence and notes the problematic categorisation of terrorist attacks as one of these situations. It further highlights how the categorisation of OEF as an exercise of self-defence is additionally problematic considering that the operation has continued for thirteen years absent any other *jus ad bellum* justification. As such, this chapter concludes that while the self-defence justification of OEF was tenuous to begin with, over a decade later it has been stretched beyond all reckoning of legality, thereby requiring the US and its allies to rely evermore on non-legal justifications deployed in legal language in order to legitimate the operation.

Section 1 offers a brief summary of the facts that led to the use of force in Afghanistan. Section 2 examines whether the 9/11 attacks meet the threshold of an ‘armed attack’ which is necessary to unlock the US’ right to use force in self-defence under international law. This section will dissect the argument that 9/11 cannot be considered an armed attack under international law as it was not committed by a state. It then turns to the question of whether Afghanistan can be held responsible for the 9/11 attacks under the doctrine of state responsibility, by which the acts of private individuals are attributed to a state. Section 3 outlines the legal constraints on self-defence; namely necessity, immediacy and proportionality and explores whether these operate as any sort of rein on OEF and whether

this might further dilute the US's claim. Section 4 then resurrects some historical debate to consider the temporal extent of a state's right to self-defence. In particular, it focuses on the argument that the right of self-defence only exists until such time as the United Nations Security Council (UNSC) has taken measures to deal with the matter, and ultimately questions whether it is possible that self-defence could justify a continued use of military force in a foreign state for more than a decade after the initial attack. In light of the waning validity of self-defence as the legal basis for OEF, Section 5 then turns to the doctrine of pre-emptive self-defence to determine whether this might provide a bolstered justification for the on-going use of force. Finally, having evaluated the validity of self-defence as a justification for OEF and concluding that there was only a tenuous claim to this right, Section 6 then questions whether it is helpful to still frame OEF as an exercise of self-defence. To highlight this, it then introduces and briefly evaluates alternative justifications that began to be put forward by politicians in the US and UK to justify the on-going operation. This chapter ultimately concludes that the events of 9/11 did not strictly give rise to a right of self-defence against Afghanistan and that, as such, OEF operated on a dubious mandate from the beginning, which certainly became more unsustainable as time went on. However any anxiety over this dubiety was subsumed within the wider supportive rhetoric that framed the US' claim to self-defence as both natural and rational leaving academic scholarship reluctant to pronounce against this operation, in part because of the scale of the atrocity. This chapter thus serves to illustrate how the absence of a secure legal justification necessitated an alternative justificatory narrative.

## **1. Background**

The events preceding the offensive in Afghanistan are notorious. On the morning of September 11th 2001 four American commercial passenger jets were hijacked and crashed into the World Trade Centre in New York, the US Pentagon in Virginia and the Pennsylvania countryside.<sup>54</sup> This resulted in over three thousand deaths and was the first foreign attack on US soil since Pearl Harbour. The immediate aftermath saw a mass outpouring of support and condolence from states worldwide. The UNSC met the next day to consider the matter and in a departure with tradition, the members stood to unanimously adopt Resolution 1368, wherein they strongly condemned 'the horrifying terrorist

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<sup>54</sup> 9/11 Commission, 'The Final Report of the National Commission on Terrorist Attacks Upon the United States' (2004) (9/11 Commission Report).

attacks...and regard[ed] such acts, like any act of international terrorism, as a threat to international peace and security.’<sup>55</sup> Notably, this was the first time the UNSC had affirmed the right to self-defence in response to terrorist attacks.<sup>56</sup>

The perpetrators of the attacks were thought to be members of the terrorist organisation Al Qaeda, headed by Osama bin Laden. Bin Laden was already wanted by the US authorities as he was suspected of masterminding previous terrorist plots.<sup>57</sup> He was known to be sheltering in Sudan, but when the international community put pressure on the Sudanese Government to turn him over to the authorities<sup>58</sup> he fled to Afghanistan in 1996, where he was reportedly made welcome by the Taliban (the de facto government) and given carte blanche to continue his terrorist activities.<sup>59</sup> In response the UNSC passed a series of resolutions<sup>60</sup> demanding that the Taliban cease providing sanctuary to international terrorists, but these demands went unheeded. Finally in 1999 the UNSC passed a resolution ordering the Taliban to surrender bin Laden to the US authorities or face sanctions.<sup>61</sup> Still the Taliban refused, and so sanctions were enacted.<sup>62</sup> This remained the situation until the 12th September 2001 when the SC passed Resolution 1368, recalling Resolution 1189 wherein it was stated that ‘every state has the duty to refrain from organising, instigating, assisting or participating in terrorist acts in another State, or acquiescing in organised activities within its territory directed towards the commission of such acts’.<sup>63</sup> Resolution 1368 expressed the UNSC’s readiness to take all necessary steps to respond to the 9/11 attacks and combat terrorism, although it did not specifically refer to bin Laden or Al Qaeda. In a further resolution passed on 28<sup>th</sup> September 2001,<sup>64</sup> the UNSC repeated its

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<sup>55</sup> UNSC Res 1368(2001) UN Doc S/RES/1368, preamble.

<sup>56</sup> The fact that the resolution affirmed the right to self-defence in the preamble and not the operative part of the resolution sparked academic debate over the significance of such a wording. This debate is considered in further detail infra at section 2.2.4.

<sup>57</sup> The 1993 bombing of the World Trade Centre; the 1996 bombing of a US military complex in Saudi Arabia; and the 1998 bombings of US embassies in Kenya and Tanzania.

<sup>58</sup> The UNSC passed SC Resolution 1189(1998) UN Doc S/RES/1189 condemning the embassy attacks and reminding all states of their international obligation to prevent terrorism.

<sup>59</sup> Ahmed Rashid, *Taliban: The Story of the Afghan Warlords* (Reprint edn, Pan Macmillan, London 2001), at 140.

<sup>60</sup> SC Resolution 1193(1998) UN Doc S/RES/1193; SC Resolution 1214 (1998) UN Doc S/RES/1214.

<sup>61</sup> SC Resolution 1267 (1999) UN Doc S/RES/1267.

<sup>62</sup> These included compelling states to freeze Taliban assets and funds and imposing a travel ban. Resolution 1267 also established the Taliban Sanctions Committee to monitor the enforcement of the sanctions. See further <<http://www.un.org/sc/committees/1267>> accessed August 2015.

<sup>63</sup> UN Doc S/Res/1189 (1998).

<sup>64</sup> UN Doc S/RES/1373 (2001).

condemnation of the 9/11 attacks and reaffirmed the inherent right of self-defence recognised in the UN Charter.<sup>65</sup> This resolution also authorised states to take ‘all necessary steps to prevent the commission of terrorist acts’.<sup>66</sup>

It was claimed publically by both the US and the UK (and in their letters to the UNSC)<sup>67</sup> that there was irrefutable evidence that Al Qaeda was responsible for the attacks.<sup>68</sup> Yet, despite this claim, much of the actual evidence was never made public, nor presented before the UNSC. Instead this assertion was taken at face value by much of the public and the media. It was emphasised that while Al Qaeda was not an organ of any state, the group enjoyed endorsement from the Taliban Government of Afghanistan.<sup>69</sup> For this reason the Taliban was presented as equally responsible for the terrorist attacks.<sup>70</sup> As such, in the days after 9/11, the US communicated an ultimatum to the Taliban Government demanding (among other things)<sup>71</sup> that they close all terrorist training camps and hand over all terrorists and their supporters to the appropriate authorities.<sup>72</sup> In response to these demands, the Taliban Government was initially reported to have offered to put bin Laden on trial in Afghanistan if the US could provide sufficient evidence that he had committed the atrocities.<sup>73</sup> However, the US continued to insist that there would be no compromises

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<sup>65</sup> The ‘inherent’ right of self-defence is discussed infra at section 2.1.1.

<sup>66</sup> UN Doc S/RES/1373 (2001).

<sup>67</sup> Letter dated 7 October from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (7 October 2001) UN Doc S/2001/946 and Letter dated 7 October from Stewart Eldon, Charge d’Affairs, UK Mission to the UN in New York, to the President of the Security Council (7 October 2001) UN Doc S/2001/947.

<sup>68</sup> The only official account that linked the Taliban to the attacks was a report released by the British Government, UK Government Press Release, ‘*Responsibility for the Terrorist Atrocities in the United States, 11 September 2001*’ (4 October 2001) House of Commons DEP 01/1407 (Available only in Hardcopy-copy on file with author). The text is available online at <[http://newsrss.bbc.co.uk/1/hi/uk\\_politics/1579043.stm](http://newsrss.bbc.co.uk/1/hi/uk_politics/1579043.stm)> accessed August 2015. The US claimed to have proof that Al Qaeda was responsible, but did not publish this evidence. A brief discussion of the need to produce evidence is provided infra at section 2.3.3. However, the 9/11 Commission would later conclude that there was no evidence and that it was highly unlikely that the Taliban had been involved in planning or sanctioning the attacks. See 9/11 Commission Report.

<sup>69</sup> 9/11 Commission Report.

<sup>70</sup> For further discussion of the portrayal of the Taliban in the media and by the US Administration see Chapter 3.

<sup>71</sup> Bush also demanded that the Taliban hand over all foreign nationals unjustly imprisoned. This was a reference to two American Christian missionaries whom the Taliban had imprisoned on charges of blasphemy. These demands were communicated to the Taliban through Pakistan but also widely reported. See George W. Bush, ‘Address to the Nation: Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11’ 37 WCPD 1347 (20 September 2001).

<sup>72</sup> George W. Bush, ‘Address to the Nation: Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11’ 37 WCPD 1347 (20 September 2001).

<sup>73</sup> See Rajiv Chandrasekarn, ‘Taliban Rejects US Demand, Vows a ‘Showdown of Might!’ *Washington Post* (Washington, 22 September 2001).

and no deviation from its demands. President Bush emphasised that the US would brook no distinction between terrorists and those who harboured them.<sup>74</sup> When the Taliban failed to meet US demands President Bush announced that the US had no option but to take military action to protect itself from any future attacks.<sup>75</sup>

Solidarity was quickly forthcoming; the UK immediately pledging to stand ‘shoulder to shoulder with [America].’<sup>76</sup> Other countries also offered military, intelligence and logistical support for what was generally understood to be an impending military offensive against both the Taliban and Al Qaeda in Afghanistan.<sup>77</sup>

### **1.1. The Use of Military Force in Afghanistan: Operation Enduring Freedom**

On 7<sup>th</sup> October 2001, Bush announced to the world that the US and its allies had commenced military action against Al Qaeda and the Taliban. This action was codenamed Operation Enduring Freedom.<sup>78</sup> Both the US and the UK duly informed the UN Security Council, citing self-defence as the legal basis for such action.<sup>79</sup>

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other states, has initiated actions in the exercise of its inherent

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<sup>74</sup> George W. Bush, ‘Address to the Nation on the Terrorist Attacks’ 37 WCPD 1301 (11 September 2001).

<sup>75</sup> George W. Bush, ‘Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations in Afghanistan’ 37 WCPD 1342 (7 October 2001).

<sup>76</sup> Tony Blair, ‘Statement to the Nation’ (11 September 2001) <[http://news.bbc.co.uk/1/hi/uk\\_politics/153855.stm](http://news.bbc.co.uk/1/hi/uk_politics/153855.stm)> accessed August 2015.

<sup>77</sup> In his address to the nation, George W. Bush stated: ‘More than 40 countries in the Middle East, Africa, Europe and across Asia have granted air transit or landing rights. Many more have shared intelligence. We are supported by the collective will of the world.’ George W. Bush, ‘Address to the Nation’ (7 October 2001). See also Vernon Loeb and Thomas E. Ricks, ‘US Sends Troops to Ex-Soviet Republics’ *Washington Post* (Washington DC 3 October 2001).

<sup>78</sup> The operation was initially codenamed Operation Infinite Justice, but this was changed after accusations that it might be offensive to Muslims. Muslim clerics advised that in the Islamic faith ‘infinite justice’ was a concept that only Allah could mete out. As such the operation was renamed ‘Enduring Freedom’. See Barry A Feinstein, ‘Operation Enduring Freedom: Legal Dimensions of an Infinitely Just Operation’ (2001) 11 *Journal of Transnational Law & Policy* 201 and also Gary Younge, ‘Pentagon Picks Enduring Codename’ *The Guardian* (London 26 September 2001).

<sup>79</sup> Letter dated 7 October from the Permanent Representative of the United States of America to the United Nations and Letter dated 7 October from Stewart Eldon, Charge d’Affairs, UK Mission to the UN in New York.

right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.<sup>80</sup>

The UNSC met<sup>81</sup> to hear the justifications for the UK and US action and afterwards the President of the UNSC stated that ‘the unanimity of support expressed in the Security Council’s two prior resolutions is absolutely maintained.’<sup>82</sup> There had been a decisive show of support for the US in the UNSC and General Assembly with both Russia and China supporting military action. Indeed, the only state to challenge the legality of the action was Iraq.<sup>83</sup>

The operation commenced on 7<sup>th</sup> October 2001 with an aerial bombing campaign, primarily targeted at anti-aircraft sites, military headquarters, terrorist camps, airfields and concentrations of Taliban tanks. The military operation was considered so successful that by the end of 2001 the remaining Taliban and Al Qaeda forces appeared defeated, with hundreds captured and many fleeing to Pakistan.<sup>84</sup> However, this essentially brought about the fall of the Taliban regime and so effectively left Afghanistan ungoverned. In view of this, the US invited the UN to assist in developing a blueprint for Afghanistan’s future. The UN Secretary-General’s Special Representative in Afghanistan, Lakhdar Brahimi was tasked with drawing up a plan for the creation of an interim Afghan government. This plan was presented to the UNSC on 13<sup>th</sup> November 2001 and was endorsed in Resolution 1378.<sup>85</sup> As well as the creation of an interim government, the plan called for the deployment of a UN force to protect the new government. After nine days of negotiations in Bonn, an agreement was signed<sup>86</sup> by various Afghan factions, creating a broad-based, multi-ethnic government that would rule for 6 months. However, the Taliban and their

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<sup>80</sup> Letter dated 7 October from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc S/2001/946 (Oct, 7, 2001).

<sup>81</sup> For discussion of the assertion that once the SC has convened to deal with a matter then the right of self-defence no longer exists, see *infra*, section 4.2.

<sup>82</sup> Remarks by John Ryan UNSC President, reported in Christopher S. Wren, ‘A Nation Challenged: World Forum; U.S Advises U.N Council More Strikes Could Come’ *New York Times* (New York 9 October 2001).

<sup>83</sup> See General Assembly 19<sup>th</sup> Plenary Meeting (4 October 2001) UN Doc A/56/PV.19.

<sup>84</sup> Sean D. Murphy, ‘Contemporary Practice of the United States Relating to International Law’ (2002) 96 *American Journal of International Law* 706, at 250.

<sup>85</sup> UN Doc S/RES/1378(2001). The argument that the UNSC had therefore taken measures to deal with the attack and so bringing an end to the right of self-defence is discussed below in section 4.2.2.

<sup>86</sup> Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (Bonn Agreement) [Afghanistan], UN Doc S/2001/1154, 5 December 2001, <<http://www.Afghangovernment.com/AfghanAgreementBonn.htm>> [accessed August 2015]

supporters were excluded from these negotiations and were not represented in the new interim government.<sup>87</sup>

## **1.2. The Various International Forces in Afghanistan**

### ***1.2.1. ISAF***

The security force envisaged in the Bonn Agreement is known as The International Security and Assistance Force (ISAF). The agreement called for a UN mandated force to train new security and armed forces, to assist in the maintenance of security in Kabul and also in rebuilding Afghanistan's infrastructure. This force was then to be progressively expanded out to other urban areas. ISAF was duly authorised by UNSC Resolution 1386 for an initial period of six months.<sup>88</sup> The resolution called upon member states to contribute personnel, equipment and other resources and authorised the force to take 'all necessary measures' to fulfil its mandate.

Although having parallels with previous UN peacekeeping forces, ISAF is not a peacekeeping operation in the traditional sense because Afghanistan was categorised as a post-conflict state despite the fact there was no official peace settlement agreed in 2001. Rather than providing an impartial or neutral deterrence, ISAF was tasked with assisting the Afghan authorities to provide security and training to the Afghan security services.<sup>89</sup> It should be noted that there is no subsuming of Operation Enduring Freedom within ISAF's mandate. ISAF is a security force dedicated to bringing order to Afghanistan and assisting the Afghan authorities, but it did not assume responsibility for counter terrorism – i.e the hunt for Bin Laden or the fight against the Taliban and Al Qaeda. Instead the US led OEF

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<sup>87</sup> After years of Taliban insurgency, this decision would come back to haunt the international coalition. By 2010 many parties were openly discussing negotiating with the Taliban and admitting that it had been a mistake to exclude them from the initial agreement. See further Mark Fields & Ramsha Ahmed 'A Review of the 2001 Bonn Conference and Application to the Road Ahead in Afghanistan' (Institute for National Strategic Studies Strategic Perspectives No 8 National Defence University Press, Washington DC 2011), at 19.

<sup>88</sup> That mandate was extended for six months in Resolution 1413 and thereafter has been renewed annually by the SC. See Res 1444 (2002) UN Doc S/RES/1444; Res 1510 (2003) UN Doc S/RES/1510(2003); Res 1563 (2004) UN Doc S/RES/1563; Res 1623 (2005) UN Doc S/RES/1623; Res 1707 (2006) UN Doc S/RES/1707; Res 1776 (2007) UN Doc S/RES/1776; Res 1833 (2008) UN Doc S/RES/1833; Res 1890 (2009) UN Doc S/RES/1890; Res 1943 (2010) UN Doc S/RES/1943; Res 2011(2011) UN Doc S/RES/2011; Res 2069 (2012) S/RES/2069; Res 2120 (2013) UN Doc S/RES/2120.

<sup>89</sup> See < [http://www.nato.int/cps/en/natohq/topics\\_69366.htm](http://www.nato.int/cps/en/natohq/topics_69366.htm) > accessed August 2015.

remained in force with sole responsibility for counter-terrorism and so a separate remit from ISAF effectively creating parallel post-conflict and counter-terrorism operations.

Confusion over foreign forces in Afghanistan has abounded as ISAF has been predominantly staffed by NATO personnel with NATO assuming full responsibility for ISAF in 2003. The expansion of ISAF's mandate from Kabul to the whole of Afghanistan saw NATO forces increasingly drawn into guerrilla warfare against Afghan 'insurgents'.

### ***1.2.2. Operation Enduring Freedom***

OEF was the military operation that signalled the start of the 'War on Terror' and it continued alongside, but separate from ISAF. Unlike ISAF OEF was not directly authorised by the UNSC and so it is the legal basis of this military operation that is in question. From the beginning the US was keen that OEF should appear to be carried out by a coalition of likeminded states in the 'War on Terror'<sup>90</sup> as this would proffer much needed legitimacy.<sup>91</sup> Indeed Christine Gray asserts that wider international involvement was invaluable and that the legitimacy and credibility it bestowed would become 'increasingly important as OEF continued, with no express UN basis beyond the initial reference to self-defence in Security resolutions 1268(2001) and 1373(2001).'<sup>92</sup> Interestingly the UK Foreign Affairs Committee noted that the US initially turned down the offer of a NATO organised operation as it was 'set on having a "coalition a la carte" in which there would be no institutional challenge to its leadership.'<sup>93</sup> The title of the operation itself is intriguing as, despite being a counter-terrorism operation, the words 'enduring freedom' themselves evoke a sense of wider humanitarianism and liberal democracy. This, in itself is a metaphor for the operation: a counter-terrorism operation marketing itself as one of liberation.

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<sup>90</sup> The US received support from a host of states in launching airstrikes against the Taliban. As well as NATO countries, access to airspace was provided by Georgia, Oman, Pakistan, Saudi Arabia, Tajikistan, Turkey, Qatar, the Philippines and Uzbekistan, while nations such as China, Russia and Egypt announced support for the campaign. See Murphy, 'Contemporary Practice of the United States Relating to International Law', at 248-250.

<sup>91</sup> See Christine Gray, *International Law and the Use of Force* (Oxford University Press, London 2008), at 206.

<sup>92</sup> Gray, *International Law and the Use of Force*, at 206.

<sup>93</sup> Foreign Affairs Committee, *Global Security: Afghanistan and Pakistan* (HC 302 2 August 2009), at 17.

As the years wore on and the self-defence justification appeared stretched there appeared tenuous attempts to bolster the legality of OEF. The UNSC later began to make references to OEF when authorising the continuation of ISAF.<sup>94</sup> However, whilst it can be argued that these references can be read as an inherent acceptance of OEF and therefore bestow an element of legitimacy, ‘they contain nothing express on its legal basis’, which has never been discussed by the Security Council.<sup>95</sup> Indeed, not until 2007 did the UNSC fleetingly address OEF after Japan threatened to withdraw from the maritime operation unless there was express UNSC authorisation.<sup>96</sup> However, while the UNSC passed Resolution 1776 (2007), which made reference to the maritime component of OEF and thanked the contributing nations for their assistance, there remained an absence of debate by the UNSC on the legal basis of OEF, or any attempt to authorise it as a UN operation under Chapter VII of the Charter. This caused Russia to abstain from the resolution arguing that, as the activities of OEF were outwith the remit of the UN, it was unwise for the UNSC to refer to them in its resolutions. Thus it is clear that OEF was not a UNSC authorised use of force, leaving self-defence as the only legal avenue to justify the operation<sup>97</sup> which, as Gray notes, is problematic because the longer this operation continues ‘the further it is detached from its initial basis in self-defence.’<sup>98</sup>

### **1.2.3. UNAMA**

In addition to OEF and ISAF there is also a UN-mandated political mission. The United Nations Assistance Mission in Afghanistan (UNAMA) was established by the UNSC in 2002.<sup>99</sup> Its mandate is to support the Afghan Government in areas such as security, economic development and regional cooperation. It is directed and supported by the United Nations Department of Peacekeeping Operations and has two main areas of operation, development and humanitarian issues, and political affairs.<sup>100</sup> UNAMA is not a security mission and therefore even though it makes use of military forces it is not seen as a

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<sup>94</sup> SC Res 1510 (2003); SC Res 1563 (2004); SC Res 1589 (2005); SC Res 1623 (2005); SC Res 1659 (2006); SC Res 1707 (2006)

<sup>95</sup> Gray, *International Law and the Use of Force*, at 206.

<sup>96</sup> Japan later resumed its involvement. See UN Press Release SG/SM/11370 (14 January 2008).

<sup>97</sup> See Minutes of UNSC 5744<sup>th</sup> meeting (19 September 2007) UN Doc S/PV.5744.

<sup>98</sup> Gray, *International Law and the Use of Force*, at 206. The issue of the continued legal justification of OEF a decade on is discussed in further detail infra at 5.4.

<sup>99</sup> SC Resolution 1401 (2002) UN Doc S/RES/1401.

<sup>100</sup> The mandate and structure of UNAMA are laid out in UNSC and UNGA, ‘The Situation in Afghanistan and its Implications for International Peace and Security’ (Report of the Secretary General 18 March 2002) UN Doc S/2002/278.

military mission as it is also staffed with non-military personnel who act in an advisory capacity to the Afghan authorities. UNAMA has specific responsibility for assisting with elections and working with the Afghan Independent Human Rights Commission (AIHRC). It also assists the Afghan authorities with aid distribution, reintegration and reconciliation, and regional cooperation.<sup>101</sup>

Therefore, while these three military missions have a similar remit, they are authorised in different ways and have differing mandates. This creates confusion as often the personnel serving under ISAF are from the same states that are contributing to OEF and UNAMA. There is also conflation in the media as regards military operations in Afghanistan with the result that there is a widespread assumption that OEF was subsumed under the UN mandated ISAF. This conflation of the two operations is particularly helpful as there is reduced scope for criticism of OEF if it is commonly assumed to have ended. Yet this was not the case, with OEF continuing and remaining separate to the other missions in Afghanistan. Indeed while OEF officially came to an end in December 2014, there is a continuing anti-terrorism operation on-going in Afghanistan called Operation Freedom's Sentinel, which subsumed OEF's mandate, although on a much smaller scale. Thus, as Gray highlights, the continuation of a military operation ordinarily explained as an operation of self-defence sits awkwardly with prior state practice and doctrinal international law. As such, it is the problematic characterisation of the legal basis of OEF that will now be explored.<sup>102</sup>

## **2. Is Operation Enduring Freedom an Operation of Self-Defence?**

The US' use of military force against Al Qaeda and the Taliban was initially justified as a lawful exercise of self-defence, as enshrined in Article 51 of the UN Charter. This section examines whether it is legally correct to justify OEF as an operation of self-defence.

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<sup>101</sup> <<http://unama.unmissions.org/Default.aspx?tabid=12269&language=en-US>>.

<sup>102</sup> ISAF and UNAMA are authorised by the SC under Chapter VII of the UN Charter, and as such, their legal basis is not explored.

## 2.1. Self-Defence Under the UN Charter: Article 51

Prior to the 20<sup>th</sup> Century, the positivist inclinations of international law allowed states to wage war freely.<sup>103</sup> While there was a code developed which states had to abide by once they engaged in war, the *jus in bello*, there were few legal restrictions on when a state could actually resort to force against another state. Instead decisions to go to war were often morally justified under the guise of just war tradition.<sup>104</sup> However in the aftermath of World War I (WWI) there emerged a consensus that sought to limit states' recourse to war as a means of resolving disputes. The result was the Kellogg-Briand Pact of 1928, which provided for the prohibition of war, except in the act of self-defence.<sup>105</sup> Yet such prohibition was powerless to prevent World War II (WWII), thus emphasising the fragility of any such peace treaty. Therefore, with the horrors of WWII still recent, the drafters of the UN Charter were keen to realistically limit states' recourse to force in solving disputes. As such, the Charter is quite clear in prohibiting both the threat and use of force against the territorial integrity of any member state. This rule is enshrined in Article 2(4) of the UN Charter as the cornerstone of the UN system of collective security.<sup>106</sup> The Charter allows for only two exceptions to this blanket prohibition on force: force authorised by the UNSC under Chapter VII of the Charter; and force used in self-defence, outlined in Article 51 of the Charter.<sup>107</sup>

### 2.1.1. The Scope of Article 51

Even prior to the Charter's inauguration, there was discontent among states about the scope

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<sup>103</sup> Bruno Simma (ed) *The Charter of the United Nations: A Commentary*, vol I (2nd edn, Oxford University Press, Oxford 2002), at 789.

<sup>104</sup> The use of the just war tradition to justify war is discussed further in Chapter 3.

<sup>105</sup> Treaty Between the United States and other Powers Providing for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) (adopted 27 August 1928) (entered into force 24 July 1929) 94 LNTS 57, Article 1.

<sup>106</sup> The ICJ confirmed this in: *Armed Activities on the Territory of the Congo (DRC v Uganda Case)* [2005] ICJ Rep 201 at para 148; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Nicaragua case)* [1986] ICJ Rep 14 separate opinion of President Singh, at 153 ('the very cornerstone of the human effort to promote peace in a world torn by strife'); *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America) (Oil Platforms Case)* (Judgment of 6 November) [2003] ICJ Rep 161 dissenting opinion of Judge Elaraby, at 291 ('The principle of the prohibition of the use of force in international relations ... is, no doubt, the most important principle in contemporary international law to govern inter-State conduct; it is indeed the cornerstone of the Charter').

<sup>107</sup> Article 51 states that: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measure necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

and limits of Article 51. Article 51 enshrines the ‘inherent’ right of self-defence. The use of ‘inherent’ has led to much confusion and counter claims as to what right actually exists. It has been argued that in addition to Article 51 there exists a wider right of self-defence in customary international law that operates free of the constraints enshrined in Article 51.<sup>108</sup> However, Ian Brownlie notes that ‘it is not incongruous to regard Article 51 as containing the only right of self-defence permitted by the Charter’<sup>109</sup> and he concludes that: ‘the right of self-defence, individual or collective, which has received general acceptance in the most recent period has a content identical with the right expressed in Article 51 of the Charter.’<sup>110</sup> Yet, writing in 2002, he concedes that the International Court of Justice (ICJ) did not fully endorse his opinion that the *only* right of self-defence was that contained in the Charter.<sup>111</sup> Instead the Court opined that:

‘Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.’<sup>112</sup>

Although, despite saying this, the Court did appear to conclude that the content and scope of the customary international law of self-defence corresponds almost entirely with that of Article 51.<sup>113</sup>

Thus according to Article 51, in order for a state to legally engage in self-defence it must have suffered an armed attack. While this appears a straightforward situation to establish, in reality it has proven to be difficult, with states keen to advocate a more subjective test; i.e. that it is for the victim state to determine whether it has suffered an attack. While acknowledging this perspective, in the *Case Concerning Oil Platforms*, the ICJ was clear

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<sup>108</sup> Presumably this right would allow states to use self-defence without having to report matters to the Security Council, or have the right extinguished upon the UNSC taking measures to restore international peace and security. For further discussion of a customary right of self-defence, see Simma, *The Charter of the United Nations: A Commentary*, at 805.

<sup>109</sup> Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press, Oxford 1963), at 271.

<sup>110</sup> *ibid*, at 280.

<sup>111</sup> Ian Brownlie, ‘“International Law and the Use of Force” Revisited’ 1 *Chinese J. Int’l L.* 1 2002 at 7.

<sup>112</sup> *Nicaragua* [176] cited in *ibid*.

<sup>113</sup> *ibid* [176] and [235].

that ‘the burden of proof of the facts showing the existence of an armed attack’<sup>114</sup> rested on the state justifying its own use of force in self-defence, effectively trying to curtail states from utilising the flimsiest pretext of armed attack in order to resort to force.

## **2.2. Are the 9/11 Attacks ‘Armed Attacks’?**

Therefore, if OEF is to be considered a legitimate exercise in self-defence, it must first be established in law that the US was the victim of an armed attack. The question then is whether the 9/11 attacks meet the legal definition of armed attack, which would unlock the US’ right to lawful self-defence. Following 9/11, the UNSC, for the first time, affirmed the right to self-defence in response to terrorist attacks,<sup>115</sup> although it gave little indication as to who could utilise this ‘inherent’ right and in what situation, neither did it specifically refer to 9/11 as an armed attack. The General Assembly also condemned the atrocity, but likewise did not call it an armed attack.<sup>116</sup>

### **2.2.1. What Constitutes an ‘Armed Attack’?**

Article 51 is silent on what exactly is to be considered an armed attack.<sup>117</sup> It is reasonable to assume that the attacks the San Francisco delegates in 1945 had in mind were armed incursions by neighbouring states attempting to seize power or land. Many European delegates were keen that the Charter explicitly enshrined a right of self-defence to be used in: ‘measures of urgent nature’, ‘cases of emergency’ or ‘immediate danger’, but they did not elucidate what these situations were.<sup>118</sup> It must be assumed that this was intentional as the drafters wanted to avoid interpretative language. The draft article on self-defence initially referred to ‘aggression’,<sup>119</sup> but this reference was removed after the UK delegation noted that it had proven impossible for the international community to agree on a definition

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<sup>114</sup> *Oil Platforms Case*. [61].

<sup>115</sup> Both UN SC Res 1368 and 1373 assert in the preamble that the SC recognises the inherent right to self-defence in accordance with the Charter.

<sup>116</sup> UN GA Res 56/1 (18 September 2001) UN Doc A/Res/56/1. See further Murphy, ‘Contemporary Practice of the United States Relating to International Law’, at 244.

<sup>117</sup> At the San Francisco Conference on the drafting of the UN Charter it was stated by some delegates that the self-defence exception merely mirrored common sense. ‘Minutes of the Eighteenth Meeting of the United States Delegation, Held at San Francisco’ (26 April 1945) in *Foreign Relations of the United States: Diplomatic Papers 1945* Vol 1 (Washington DC, US Government Printing Office 1967), at 427

<sup>118</sup> KJ Tibori Szabó, *Anticipatory Action in Self-Defence: The Law of Self-Defence-Past, Presence and Future* (Springer, The Hague 2010) at 111.

<sup>119</sup> ‘Minutes of the Thirty-Seventh Meeting of the United States Delegation, Held at San Francisco’ (12 May 1945) in *Foreign Relations of the United States*, at 685-686.

of ‘aggression’ and so there was a risk that including such wording would only lead to confusion.<sup>120</sup>

### 2.2.2. *Who Can Commit an ‘Armed Attack’?*

Accordingly it seems quite clear that the scale and devastation wrought upon the US by the 9/11 attackers meant that *prima facie* it fits the description of an armed attack. However the problem with the 9/11 attacks is that they were perpetrated by private individuals and not a regular army, which can at least be presumed to be acting on behalf of the state. Previously, only the USA and Israel had claimed a right of self-defence against terrorists to justify a use of force<sup>121</sup> and it was generally accepted that no such right existed.<sup>122</sup> The question of whether an armed attack had to be carried out by a regular army was considered by the ICJ in the *Nicaragua* case. The Court used article 3(g) of the General Assembly’s Definition of Aggression<sup>123</sup> (which it took to reflect customary international law)<sup>124</sup> to rule that activities need not be committed by a regular army to constitute an armed attack, but asserted that the groups concerned would still need to be under the control of a state in order to attribute responsibility to that state. This view is generally accepted by states, but there is disagreement over the level of involvement deemed necessary to attribute such actions to a state.<sup>125</sup>

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<sup>120</sup> ‘Minutes of the Third Five-Power Informal Consultation Meeting on Proposed Amendments (Part I), Held at San Francisco’ (12 May 1945) in *Foreign Relations of the United States*, at 692.

<sup>121</sup> Israel was condemned for its bombing of Beirut Airport in 1968 even though it claimed to be acting in self-defence against terrorists operating from Lebanon, whose operations it claimed were condoned by the Lebanese Government. The USA used the same argument in 1986, when it attacked Libya after it said Libya had allowed terrorist attacks to be perpetrated against US citizens. This conception of self-defence was seen as very far from International law. However the US argument was at least based on the premise that the terrorist attacks may have been sponsored by the Libyan Government. Despite this Gray notes that there was clear international consensus that this did not give rise to a right to use force. See further Gray, *International Law and the Use of Force*, at 195.

<sup>122</sup> Cassese argues that the international response to 9/11 has contradicted all previous state practice: previous terrorist attacks did not give rise to a right of self-defence due to being perpetrated by non-state actors and the states that claimed such a right were rebuffed by the UN. See Cassese, ‘Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law’, at 993.

<sup>123</sup> General Assembly Res 3314 (1974) UN Doc A/RES/3314.

<sup>124</sup> *Nicaragua*, [103].

<sup>125</sup> The threshold of control, known as the ‘effective control’ test is discussed further at section 2.3.2

### ***2.2.3. Must an 'Armed Attack' be committed by a State for the Right of Self-Defence to Apply?***

The UN Charter itself does not appear to preclude an armed attack being carried out by non-state actors.<sup>126</sup> Indeed Christian Tams argues that since the 1990s state practice has embraced the right to self-defence against non-state actors.<sup>127</sup> He cites the practice of states such as Russia, Iran, the USA and Israel and notes that unlike in previous instances, there has not been a universal condemnation from the international community.<sup>128</sup> This leads him to conclude that states are more willing to accept such claims as legitimate. Yet such a widened interpretation is problematic because in its 2004 *Advisory Opinion on the Wall in the Occupied Palestinian Territory*,<sup>129</sup> the ICJ reiterated the position it took in *Nicaragua* that an armed attack must be attributable to a state, declaring that: 'Article 51 of the Charter thus recognises the existence of an inherent right of self-defence in the case of an armed attack *by one state against another state*.'<sup>130</sup> Indeed Judge Kooijmans noted that this inter-state reading 'has been the generally accepted interpretation for more than 50 years'.<sup>131</sup>

Thus, the ICJ seems clear that states only have recourse to self-defence when they are attacked by another state or agents sponsored by another state (and any uncertainties regarding this post-date OEF (e.g. *DRC v Uganda*<sup>132</sup>). Adopting the orthodox position would render OEF illegal: 9/11 would not fit the definition of an armed attack since Al Qaeda is not a state. However many are dubious about the Court's statement in the *Wall* case and question the doctrinal value of it.<sup>133</sup> Thomas Franck is particularly scathing about

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<sup>126</sup> This was the conclusion reached by both Judge Higgins and Judge Buergenthal in their dissenting opinions in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, at 215 [33] (Higgins) and at 242 [6] (Buergenthal). This is also the conclusion of scholars such as Brownlie, Simma and Dinstein among others. See Brownlie, *International Law and the Use of Force by States*; Simma, *The Charter of the United Nations: A Commentary*, at 802 and Yoram Dinstein, *War, Aggression and Self-Defence* (4th edn, Cambridge University Press, Cambridge 2005), at 204.

<sup>127</sup> Christian J Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case' (2005) 16 *European Journal of International Law* 963

<sup>128</sup> *ibid*.

<sup>129</sup> *Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep 136.

<sup>130</sup> *ibid* [139].

<sup>131</sup> *ibid*, Separate Opinion of Judge Kooijmans [35].

<sup>132</sup> *DRC v Uganda Case*.

<sup>133</sup> See for e.g. Dinstein, *War, Aggression and Self-Defence*, at 204. Certain states were also unhappy with the Court's interpretation. See Statement from EU states upon the adoption of General Assembly resolution ES-10/18 (20 July 2004) UN Doc A/ES-10/PV.27, at 8, which suggests that EU member states and other states

this interpretation.<sup>134</sup> He notes that the UNSC saw fit to classify the acts of 9/11 as a ‘threat to international peace and security’ and so concludes that:

It is inconceivable that actions the Security Council deems itself competent to take against a nonstate actor under Articles 41 and 42 in accordance with Article 39 should be impermissible when taken against the same actor under Article 51 in exercise of a state’s “inherent” right of self-defence. If the Council can act against Al Qaeda, so can an attacked state.<sup>135</sup>

However, in drawing this rather reductive conclusion, Franck fails to account for the fact that the UNSC may be in a position to act against a non-state actor because it has stronger procedural safeguards in place to necessitate action compared to a state acting under self-defence. Nevertheless, the argument opposing a right to self-defence against non-state actors does seem extreme and renders a very formalistic interpretation of the Charter resulting in absurd consequences. It would indeed seem unfair that the US should have no recourse to self-defence having suffered such an egregious attack. This was the very view of Judge Kooijmans in his dissenting opinion in the later *DRC v Uganda* where he stated that: ‘Article 51 merely conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another state.’<sup>136</sup> Thus effectively focussing more on the scale and effect of an attack than on its perpetrators. This was also the opinion of Judge Simma in the same case, where he concluded that: ‘If armed attacks are carried out by irregular forces from such territory against a neighbouring State, these activities are still armed attacks, even if they cannot be attributed to the territorial State, and, further, that it would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not require so.’<sup>137</sup>

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associated with the statement would not accept the possible implication of the Opinion that self-defence is not available unless the armed attack is by a state.

<sup>134</sup> Thomas Franck, ‘Terrorism and the Right of Self-Defense’ 95 *The American Journal of International Law* 839.

<sup>135</sup> *ibid*, at 840.

<sup>136</sup> *DRC v Uganda Case*, [26] (Separate Opinion of Judge Kooijmans (19 December)).

<sup>137</sup> *ibid* [12] (Separate Opinion of Judge Simma (19 December)).

Therefore it is unclear as to whether the Charter merely affords the right of self-defence when a state is attacked by another state or whether its silence regarding an attack by non-state actors means that attacks such as 9/11 could constitute an armed attack based on an evolving interpretation of the Charter. While the drafters probably did not consider that such mass atrocities could be inflicted across international borders by private actors and so did not see the need to explicitly grant such a right, what is clear is that previous attempts to use force against private individuals have generated condemnation.

#### ***2.2.4. Criminal Attacks or ‘Armed Attacks’?***

In order to shine some light on whether the US may legally resort to self-defence against Al Qaeda, this section now turns specifically to the jurisprudence and scholarly debate regarding terrorist attacks and considers the argument that international law has recently evolved to consider them armed attacks.

Traditionally attacks perpetrated by terrorist groups were considered criminal acts rather than acts of war and Gray highlights that, until 9/11, the concept of a right of self-defence against terrorists had virtually no support among lawyers, as the terrorist conduct usually could not be adequately attributed to a state.<sup>138</sup> Although she acknowledges the previously mentioned state practice outlined by Tams, she reaches an alternative conclusion, noting that, even where there was conclusive evidence of state involvement, previous uses of force against states accused of harbouring terrorists were condemned.<sup>139</sup> Accordingly James Gathii asserts that ‘the [ICJ’s] findings can be read as precluding a reading of Article 51 as permitting the unilateral use of force in the context of the war against terrorism.’<sup>140</sup> This view is shared by Sean Murphy who argues that 9/11 did not meet the conventional view of armed attack contained in the Charter because the perpetrators were a small group of individuals carrying only box cutters, who in no way resembled the “armed bands, groups, irregulars or mercenaries” that the *Nicaragua* Court had in mind’.<sup>141</sup> As

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<sup>138</sup> Gray, *International Law and the Use of Force*, at 195-198.

<sup>139</sup> Gray highlights SC Res 262 (1968) UN Doc S/Res/262 in which the Security Council unanimously condemned Israel for bombing Beirut Airport in 1968, even though Israel claimed to be acting in self-defence against terrorists operating from Lebanon, whose operations it claimed were condoned by the Lebanese Government. See *ibid*.

<sup>140</sup> James Gathii, ‘Irregular Forces and Self-defense Under the UN Charter’ in Mary Ellen O’Connell (ed) *What is War? An Investigation in the Wake of 9/11*, (Martinus Nijhoff, Leiden, 2012), at 108.

<sup>141</sup> Sean D. Murphy, ‘Terrorism and the Concept of Armed Attack in Article 51 of the UN Charter’ (2002) 43 *Harvard International Law Journal* 41, at 45.

such, he asserts that the perpetrators had committed a conventional crime rather than an armed attack.<sup>142</sup>

Yet the prevailing view appeared to be that the gravity and magnitude of 9/11 made it unlike anything that had come before and as such it could be considered an armed attack.<sup>143</sup> Several scholars argued that the sheer devastation of 9/11 demonstrated that the attacks undoubtedly met the threshold contained in the Charter and it was reductive to attempt to describe the 9/11 attacks as anything other than an armed attack in the ordinary sense of the phrase.<sup>144</sup> Some commentators went even further and argued that a state was entitled to protect its territory and citizens from any large scale attack directed at it – whether such attacks were committed by a state or not.<sup>145</sup> Yet, so monumental a departure from established understanding and interpretation of international law were these claims that Cassese remarked:

It would thus seem that in a matter of a few days, practically all states (all members of the Security Council plus members of NATO other than those sitting on the Security Council, plus all states that have not objected to resort to Art. 51) have come to *assimilate* a terrorist attack by a terrorist

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<sup>142</sup> *ibid.*

<sup>143</sup> Franck ‘Terrorism and the Right of Self-defense’ at 840; Georgio Gaja ‘In What Sense Was There an “Armed Attack”?’ EJIL, Discussion Forum: The Attack on the World Trade Centre Legal Responses: <[www.ejil.org/forum/\\_WTC/ny-Gaja.html](http://www.ejil.org/forum/_WTC/ny-Gaja.html)> accessed August 2015; Jordan Paust, ‘Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond’ 35 Cornell International Law Journal (2001-2002) 3, 533 at 534; Nico Schrijver ‘Responding to International Terrorism: Moving the Frontiers of International Law for Enduring freedom’ (2001) 48 (3) Netherlands International Law Review 271, at 285; Michael Schmitt ‘Counter Terrorism and the Use of Force in International Law’ (2002) 32 Israel Yearbook on Human Rights 53 at 76; Carsten Stahn, ‘Terrorist Attacks as “Armed Attack”: The Right to Self-Defense, Article 51(1/2) of the UN Charter and International Terrorism’ (2003) 27 The Fletcher Forum of World Affairs 35, at 35-36; George Walker, ‘The Lawfulness of Operation Enduring Freedom’s Self-Defense Responses’ 37 Valparaiso University Law Review (2003) 2, 489 at 530.

<sup>144</sup> For a helpful analysis of the arguments put forward as to why 9/11 should be considered an ‘armed attack’ see Linderfalk, ‘The Post-9/11 Discourse Revisited-The Self-Image of the International Legal Scientific Discipline’.

<sup>145</sup> See Davis Brown, ‘Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses’ (2003) 11 Cardozo Journal of International & Comparative Law 1, at 24-29; Benjamin Langille, ‘It’s Instant Custom: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001’ (2003) 26 BC Int’l & Comp Law Rev 145 at, 153; Karl Meessen, ‘Unilateral Recourse to Military Force in Response to Terrorist Attacks’ (2003) 28 Yale Journal Int’l L 341, at 345; Steven Ratner, ‘Jus ad Bellum and Jus in Bello After September 11’ (2002) 96 AJIL 905, at 914. The argument that the doctrine of attribution had been abandoned is discussed *infra* at section 2.4. For an analysis of the arguments of those arguing that such abandonment had taken place see Linderfalk, ‘The Post-9/11 Discourse Revisited-The Self-Image of the International Legal Scientific Discipline’.

organization to an armed aggression *by a State*, entitling the victim state to resort to individual self-defence.<sup>146</sup>

Nigel White similarly categorises this argument as an attempt to develop the right of self-defence.<sup>147</sup> However for the events of 9/11 themselves to have changed the law instantaneously, adherents would have to subscribe to the theory of instant formation of customary law, which as Ulf Linderfalk notes, is dismissed by most scholars.<sup>148</sup> If that is so, then the reality is perhaps that scholars described 9/11 as an armed attack because, in the face of such devastation, they felt it would be wrong to describe it as anything less.

Yet it is understandable that many scholars should remain uneasy about states utilising legal powers of self-defence granted to them to safeguard against other states against private actors. Cassese cautioned that the ‘international community was very close to opening a Pandora’s box, setting an extremely dangerous precedent for the use of force in self-defence.’<sup>149</sup> Others noted that the acts of Al Qaeda were criminal acts and as such, the correct course of action was to pursue these individuals under municipal or international criminal justice systems.<sup>150</sup> This proposition was analysed by Christopher Greenwood who established that the acts of Al Qaeda were crimes under US law, giving the US jurisdiction to prosecute.<sup>151</sup> He also argued that the actions could even be considered to be crimes against humanity<sup>152</sup> and as such, had the International Criminal Court been in existence, then it would have been a competent forum in which to try the perpetrators.<sup>153</sup> What is

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<sup>146</sup> Cassese, ‘Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law’, at 996-997.

<sup>147</sup> White, *Democracy Goes to War: British Military Deployments under International Law*, at 195.

<sup>148</sup> Linderfalk, ‘The Post-9/11 Discourse Revisited-The Self-Image of the International Legal Scientific Discipline’, at 922.

<sup>149</sup> Cassese, ‘Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law’ at 998.

<sup>150</sup> See Murphy, ‘Terrorism and the Concept of Armed Attack in Article 51 of the UN Charter’ and Cassese, ‘Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law’.

<sup>151</sup> Greenwood, ‘International Law and the “War against Terrorism”’.

<sup>152</sup> The then High Commissioner for Human Rights, Mary Robinson called the attacks a ‘crime against humanity’ as did US Secretary of State Colin Powell and many scholars. See James D Fry, ‘Terrorism as a Crime against Humanity and Genocide: The Backdoor to Universal Jurisdiction’ (2002) 7 *UCLA Journal of International Law & Foreign Affairs* 169. Some states are now pressing for terrorism to come within the jurisdiction of the ICC. See McGoldrick, *From ‘9-11’ to the ‘Iraq War 2003’: International Law in an Age of Complexity*, at 20.

<sup>153</sup> Greenwood, ‘International Law and the “War against Terrorism”’, at 305. Greenwood notes that while the International Criminal Court was not yet in existence it would have been in the power of the SC to create an ad hoc tribunal to deal with this matter. However, he asserts that there is nothing which compels the US to initiate a criminal prosecution against the 9/11 perpetrators and so concludes that even though 9/11 was a ‘crime’ it can also concurrently be an ‘armed attack’.

clear is that this criminal interpretation fits much more comfortably with the historically restrictive approach to *jus ad bellum*. Tams notes that despite being an international problem during the 1980s, the prevailing view on terrorist acts was that they fell within the criminal sphere and were to be addressed with means short of international military force.<sup>154</sup> Consequently, he concludes that: ‘international law as at 1989 effectively ruled out the possibility that states could lawfully resort to forcible measures against terrorists based in another country.’<sup>155</sup> Concurring with this, Linderholf cites a 1999 NATO strategy document wherein it states that in addition to armed attacks, the alliance must take account of ‘risks of a wider nature, including acts of terrorism.’<sup>156</sup> Thus he concludes that, as NATO regarded acts of terrorism as security risks but outwith the scope of Article 5, then it is fair to assume that prior to 9/11 even NATO did not view terrorist attacks as armed attacks in the sense they could merit a military response.<sup>157</sup>

Yet there are those who argue that the ICJ’s decisions in *Nicaragua* and *DRC v Uganda* should not be interpreted as prohibiting the legitimate use of self-defence against non-state actors unless an armed attack by such actors can be attributed to the state, because those judgments were specific to the particular facts of those cases.<sup>158</sup> Kimberly Trapp maintains that the ICJ has not in fact pronounced on the legality of using force against non-state actors.<sup>159</sup> Further, in his dissenting opinion in *DRC v Uganda*, Judge Simma lamented that the Court had not ‘taken the opportunity presented...to clarify the state of the law on a highly controversial matter which is marked by great controversy and confusion-not at least because it was the Court itself that has substantially contributed to this confusion by its *Nicaragua* judgment of two decades ago.’<sup>160</sup>

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<sup>154</sup> Christian J Tams, ‘The Use of Force against Terrorists’ (2009) 20 *European Journal of International Law* 359, at 363.

<sup>155</sup> *ibid*, at 364.

<sup>156</sup> NATO Press Release ‘The Alliance’s Strategic Concept’ (24 April 1999) NACS(99)65.

<sup>157</sup> Linderholf, ‘The Post-9/11 Discourse Revisited-The Self-Image of the International Legal Scientific Discipline’, at 907.

<sup>158</sup> Kimberley N. Trapp, ‘Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors’ (2007) 56 *International and Comparative Law Quarterly* 141. Trapp draws a clear distinction between use of force against a foreign state and use of force against the non-state actors based in the foreign state. She is clear that in the absence of the requisite level of attribution, force cannot be directed against the host state, but could be directed against the non-state actors.

<sup>159</sup> Trapp, ‘Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors’.

<sup>160</sup> *DRC v Uganda Case*, [8] (Separate Opinion of Judge Simma (19 December)).

In view of the historical categorisation of terrorist attacks as criminal, Gray questions whether the international community's support for the US right of self-defence marked a change in international law.<sup>161</sup> She notes that some commentators have expressed doubts as to whether these resolutions actually support a right of self-defence against terrorism because the reference is in the preamble and not in the operative part of the resolution.<sup>162</sup> Further, these critics also note that the language in the resolutions refers to terrorism as a threat to international peace and security, not as an armed attack. However, Gray concludes that the UNSC is not in the habit of affirming a right to self-defence and therefore views such an inclusion as significant, if not quite determinative.<sup>163</sup>

Even if this shift to categorising terrorist attacks as opening acts of war is accepted, the problem remains that although a non-state actor may be a legitimate target of defensive force, the use of such force requires violating another state's territorial integrity.<sup>164</sup> Those advocating utilising force against terrorists cannot escape the fact that Article 51 is an exception to the prohibition on the use of force against the territorial integrity of another state. Thus as Trapp concludes:

The argument that there is a right to use force directly against non-State actors operating from foreign territory, irrespective of the territorial State's non-involvement in their terrorist activities, not only fails to 'excuse' the violation of the territorial State's sovereignty – it fails to address the issue at all.<sup>165</sup>

### **2.3. Was Afghanistan Legally Responsible for the 9/11 Attacks?**

Therefore while the US might have a moral claim to use force against the 9/11 perpetrators based in Afghanistan, such a claim is problematic in law because this violates Afghanistan's sovereignty unless the acts of the perpetrators can be attributed to the state of Afghanistan, thus bringing Article 51 back into play. Perhaps aware of the legal

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<sup>161</sup> Gray, *International Law and the Use of Force*, at 198.

<sup>162</sup> *ibid*, at 199. See further Cassese, 'Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law'; Myjer and White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?'

<sup>163</sup> Gray, *International Law and the Use of Force*, at 198.

<sup>164</sup> Using military force in another state, even if directed at private actors and not the state itself can still be construed as a violation of Article 2(4) of the UN Charter as well as Article 2(7), which prohibits the interference in the domestic affairs of other states.

<sup>165</sup> Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors', at 146.

quagmire on utilising military force against private individuals in another state, the US sought to attribute international responsibility for the 9/11 attacks to the Taliban government of Afghanistan as well as Al Qaeda. In this way, according to Michael Byers, the US broadened the claim of self-defence to include the State of Afghanistan which, while still contentious, was ‘much less of a stretch from pre-existing international law than a claimed right to attack terrorists who simply happened to be within the territory of another State.’<sup>166</sup>

### ***2.3.1. How Can the 9/11 Attacks be Attributed to the Afghan State?***

As a general rule, states are not liable for the conduct of non-state actors and acts committed by terrorist groups are not normally considered acts of a state.<sup>167</sup> However, it is accepted that acts of *de facto* state actors can be attributable to the state.<sup>168</sup> In the *US Consular Staff in Iran* case,<sup>169</sup> the Court ruled that although the seizing of American hostages was not initiated by the Iranian state or its representatives, the endorsement of the activities by the Iranian Government meant that such activity was effectively adopted by the state and could be attributed to it. A similar logic surfaced as regards the 9/11 attacks. Although the 9/11 attacks were not orchestrated by the Taliban government, it was argued that since the Taliban had condoned and harboured the perpetrators that this was enough to assume responsibility. Indeed rather than state sponsored terrorism, Michael Glennon describes Afghanistan as a terrorist sponsored state.<sup>170</sup> Accordingly, if the Taliban and state of Afghanistan could be deemed legally responsible for 9/11<sup>171</sup> then having suffered an ‘armed attack’ the US would be entitled to defend itself and would be legally justified in using force against Afghanistan.

The question then is whether the terrorist attacks committed by Al Qaeda can be attributed to the state of Afghanistan due to the Taliban Government’s alleged endorsement of their

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<sup>166</sup> Michael Byers, ‘Terrorism, the Use of Force and International Law after 11 September’ (2002) 16 *International Relations* 155, at 160.

<sup>167</sup> *Nicaragua*.

<sup>168</sup> *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v Iran)*[1980] ICJ Rep 3. For further discussion see; Derek Jinks, ‘State Responsibility for the Acts of Private Armed Groups’ (2003) 4 *Chicago Journal of International Law* 83, 445-456; Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press, Oxford 2008), at 445-446.

<sup>169</sup> *Case Concerning United States Diplomatic and Consular Staff in Tehran*.

<sup>170</sup> See further; Michael Glennon, ‘The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter’ (2001) 25 *Harvard Journal of Law & Public Policy* 539.

<sup>171</sup> This question is considered in more detail in section 2.3.

activities. International responsibility of a state stems from the commission of an internationally wrongful act which is attributable to a state under international law.<sup>172</sup> Therefore, for Afghanistan to be legally responsible for 9/11 the conduct in question (the terrorist attack) must be both attributable to the state of Afghanistan and it must also breach an international obligation. Setting aside the legal notion of an ‘armed attack’ as espoused in Article 51 of the UN Charter, it is straightforward to assume that the attack breaches the international obligation not to use force against a state or harm its citizens.<sup>173</sup> As such the crucial question to be addressed then is whether indeed, the conduct is attributable to the Afghan state.

### ***2.3.2. The Effective Control Test***

The standard of attribution for those who are not organs of the state was established by the ICJ in the *Nicaragua* case<sup>174</sup> and is somewhat controversial. The Nicaragua test is whether the state in question ‘exercises effective control’.<sup>175</sup> This judgment was criticised for imposing too high a threshold<sup>176</sup> and indeed it was diluted somewhat by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic Appeal Case*.<sup>177</sup> The ICTY held that the ICJ’s ‘effective control’ test was contrary to the very logic of state responsibility and instead concluded that states need only exercise ‘overall control’ over private armed groups for responsibility to be attributed.<sup>178</sup>

However, although *Tadic* appeared to lower the threshold, it in fact still endorsed the principles of the *Nicaragua* judgment; that states must control or direct the armed groups and so do more than merely finance, encourage or support them: ‘[E]xtensive and

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<sup>172</sup> Article 2, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 (2001) [ILC Articles on State Responsibility].

<sup>173</sup> This obligation is generally considered a *jus cogens* norm. See *Nicaragua* and also the report of the ILC, which states that ‘it is generally agreed that the prohibition of aggression is to be regarded as peremptory.’ International Law Commission, ‘Report of 53rd Session’ (23 April-1 June & 2 July-10 August 2001) UN Doc. A/56/10, at 283.

<sup>174</sup> *Nicaragua*.

<sup>175</sup> *ibid* [86]-[96].

<sup>176</sup> See the dissenting judgments of Judges Jennings and Schwebel in *Nicaragua*. See also Thomas Franck, ‘Some Observations on the ICJ’s Procedural and Substantive Innovations’ (1987) *American Journal of International Law* 116 and John Norton Moore, ‘The Nicaragua Case and the Deterioration of World Order’ (1987) 81 *American Journal of International Law* 151.

<sup>177</sup> *Prosecutor v. Tadic* (ICTY) (Judgment) (Appeals Chamber) IT-94-1-A (15 July 1999) [hereinafter *Tadic Appeal Judgment*].

<sup>178</sup> *Ibid* [116-144].

compelling evidence is required to show that that state is genuinely in control of the units or groups, not merely by financing and equipping them, but also by generally directing or helping plan their actions.’<sup>179</sup> It is this threshold of responsibility that appears to have been endorsed by the International Law Commission (ILC) in its Articles on State Responsibility perhaps because the *Nicaragua* case dealt with state responsibility while the *Tadic* case was in regard to individual responsibility.<sup>180</sup>

### ***2.3.3. Did Afghanistan Meet the ‘Effective Control’ Test?***

In order to meet the ‘effective control’ test the Taliban government of Afghanistan would have had to exercise the necessary control over Al Qaeda and its operations in order to be deemed responsible for 9/11. Interestingly, in the immediate aftermath of 9/11 there was very little evidence produced nor was there much discussion of the level of Taliban control over Al Qaeda.<sup>181</sup> Indeed in its letter to the UNSC, the US highlighted that ‘there is much we do not know.’<sup>182</sup> As such, Jonathan Charney warns against the dangerous precedent that the US Government was setting by refusing to disclose evidence linking Al Qaeda to the attacks.<sup>183</sup> The fact that there is a duty to inform the SC of any action taken under Article 51 *prima facie* suggests that any such use of force would be subject to scrutiny, thereby dissuading states from utilising this option in the absence of any discernible or viable evidence that they had in fact suffered an armed attack or were confident they could identify the perpetrators. The US’ refusal to provide any evidence or submit its actions for oversight might be considered a violation of the spirit, if not the letter, of the Charter.

And yet it appears to have been unquestionably accepted that the Taliban did exercise the necessary threshold of control over Al Qaeda. At the very least there was confusion between two differing obligations: the obligation to not sponsor terrorist attacks and the obligation to exercise due diligence to prevent them. The first may fall loosely under the

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<sup>179</sup> *ibid* [137].

<sup>180</sup> Article 8 of the ILC Articles on State Responsibility states that: The conduct of a person or group of persons shall be considered an act of the state under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

<sup>181</sup> Jinks, ‘State Responsibility for the Acts of Private Armed Groups’, at 8.

<sup>182</sup> Letter from the Permanent Representative of the United States of America to the United Nations, *supra* note 27.

<sup>183</sup> Jonathan Charney, ‘The Use of Force against Terrorism and International Law’ (2001) 95 *The American Journal of International Law* 835, at 236.

remit of article 2(4) of the Charter, while the second is an international wrong that, while in violation of the Charter or specific treaties or UN resolutions, would not justify a military response. Such conflation is problematic because the options for remedying each of these breaches are quite distinct. The first may give rise to a claim of self-defence and so could potentially lead to a use of force. The second, however malevolent, can only ever give rise to a claim for damages.<sup>184</sup>

However, away from the initial hysteria surrounding 9/11, Glennon has questioned whether the requisite level of control over Al Qaeda was in fact met.<sup>185</sup> He is clear that unlike the *Tehran Hostages case*,<sup>186</sup> the Taliban did not overtly sponsor or indeed condone the terrorists' actions. He therefore highlights the difficulty in attributing state responsibility for individual private acts even when there is a clear link between the state and the action:

If the government of Afghanistan had directly provided the terrorists with airplane tickets, funds for flight lessons, and the box cutters used to hijack the aircraft that crashed into the World Trade Center and the Pentagon...such support still would not constitute an armed attack, and use of force against the Afghan government would therefore not have been permitted.<sup>187</sup>

Thus Glennon makes clear that 'passive support' as outlined by the ICJ in Nicaragua<sup>188</sup> is not enough to warrant state responsibility. Instead the support must be active and under the control and direction of the state. In this case the Taliban Government would have had to have conceived and directed the 9/11 attacks in accordance with the 'effective control test'.

However, in the years after 9/11, credible evidence emerged which suggested that in fact the 'effective control' test had not been met, leading Helen Duffy to conclude that 'the legal responsibility of Afghanistan was not asserted in terms by states driving the Afghan

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<sup>184</sup> See further below at section 2.4 and note 202.

<sup>185</sup> Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter'.

<sup>186</sup> *Case Concerning United States Diplomatic and Consular Staff in Tehran*.

<sup>187</sup> Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter', at 543.

<sup>188</sup> *Ibid*.

prong on the “War on Terror”, and was therefore not subject to the full debate and analysis one might expect, given the severity of impending consequences for Afghanistan.’<sup>189</sup> Furthermore, the 9/11 Commission Report concluded that the Taliban would not have supported the 9/11 attacks due to a fear of American reprisals at a time when they were close to defeating the Northern Alliance and gaining control of Afghanistan. It also noted that Mullah Omar (the Taliban leader) was opposed to any major Al Qaeda operation directly against the United States.<sup>190</sup> Therefore, if Glennon is correct and 9/11 cannot be attributed to the state of Afghanistan, no right of self-defence would therefore be available to the US.

#### **2.4. Has 9/11 set a Precedent for a Lower Threshold of Attributing Responsibility?**

Yet as Franck noted in 2002, assertions of a right to exercise self-defence against terrorist and other non-state attacks ‘are no longer exceptional claims’.<sup>191</sup> So much so that Tams argues that a problematic ‘normative drift’ has occurred<sup>192</sup> and thus he offers an alternative solution. He suggests that in situations involving international terrorism, the level of attribution for state responsibility be lowered from ‘effective control’ to acquiescence. This in effect would mean that a host state such as Afghanistan which, (while not actively sponsoring, supporting or controlling the terrorists within their state) did not seek to counter terrorist activity would therefore be seen as acquiescing to terrorist activities through this failure to exercise due diligence. Such acquiescence (which has been previously conceptualised by scholars as indirect responsibility) would be enough to invoke state responsibility for any attacks and presumably give rise to a right to use force.<sup>193</sup> Tams cites evidence of growing state practice in the last two decades to support this change in practice.<sup>194</sup>

Tams’ approach finds sympathy with many commentators who have argued that states such as Afghanistan, which allow terrorism to flourish in their territories, leave themselves

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<sup>189</sup> Duffy, *The “War on Terror” and the Framework of International Law*, at 54.

<sup>190</sup> 9/11 Commission, at 251.

<sup>191</sup> Franck, *Recourse to Force: State Action against Threats and Armed Attacks*, at 64.

<sup>192</sup> Tams, ‘The Use of Force against Terrorists’.

<sup>193</sup> *ibid*, at 385.

<sup>194</sup> *ibid*. While the examples he cites are of states that have consistently used force against terrorists such as Russia, the USA, Israel and Columbia, he claims that what is more telling is the response by a much wider variety of states to claim the right to use force in similar situations: states such as Australia and several African Union states.

open to forceful measures being employed against them.<sup>195</sup> Thus the indirect or strict liability thesis would justify the offensive against Afghanistan on the basis that the Taliban Government acquiesced to Al Qaeda's presence and its activities, as seen by the Government's disinclination to curb such activities. Despite the attraction of an argument that would secure the requisite attribution to Afghanistan and so cure any legal defect in the US's recourse to force, it resurrects a historical debate that has largely been rejected.<sup>196</sup>

In its study on the draft Articles of State Responsibility, the ILC considered acquiescence as a basis for attribution, but ultimately rejected it. Instead it characterised the actions of private individuals as 'acts of state', only when such individuals acted 'on the instructions' or 'under the direction or control' of the host-state.<sup>197</sup> Thus, as Vincent-Jodl Proulx highlights, through this conception, the ILC seems to have 'narrowed the language of attribution to a more traditional model of state-condoned or state-sponsored insurgency, thereby eluding isolated attacks or massive one-time strikes such as 9/11.'<sup>198</sup> He further notes how the commentary on Article 8 encapsulates the narrow application of the concept of attribution as defined before 9/11.<sup>199</sup> Thus when applied to the 'War on Terror', the commentaries 'appear to make attribution dependent on some level of control by the host-state over a terrorist organization, or on a factual nexus between the host-state and the terrorist organization.'<sup>200</sup> As such, presumably because they were written prior to 9/11, the commentaries make clear that the doctrine of attribution does not extend to situations where terrorist organizations are acting independently or autonomously from the state organs, as was the case in Afghanistan.<sup>201</sup>

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<sup>195</sup> See, e.g.: Sean D. Murphy, 'Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?' (2005) 99 AJIL 62; Murphy, 'Terrorism and the Concept of Armed Attack in Article 51 of the UN Charter'; Christopher Greenwood, 'International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 San Diego International Law Journal 7; Brown, 'Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses'.

<sup>196</sup> Vincent-Jodl Proulx, 'Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks?' 23 (2005) Berkeley Journal of International Law 615.

<sup>197</sup> ILC Articles on State Responsibility, article 8.

<sup>198</sup> Proulx, 'Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks?' at 646.

<sup>199</sup> *ibid.*

<sup>200</sup> *ibid.*

<sup>201</sup> See further ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 available at <[http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)> accessed August 2015.

It is thus unclear if the supporters of OEF believed that 9/11 was deemed attributable to Afghanistan, not because it supported the terrorists in committing 9/11, but because failing to counter terrorism *per se* constitutes an internationally wrongful act. Yet even if the indirect responsibility thesis were accepted, the irrefutable fact, which is ignored by many commentators, is that breach of an international obligation, however serious, would not in itself sanction the use of force by another state to police that breach. Instead this failure in due diligence would offer the US legal recourse to sue Afghanistan for damages or reparations, but not an entitlement to use force.<sup>202</sup>

#### **2.4.1 Was 9/11 simply exceptional?**

Given that Afghanistan was clearly deemed by the international community to be responsible for the acts of Al Qaeda, despite absence of any evidence that it was in ‘effective control’ of this group, it would be logical to assert that the threshold for attributing state responsibility for the acts of private actors has been lowered. Taken objectively, endorsement of a US right to use force against terrorists in a foreign state would suggest that harbouring terrorists or ideologically supporting them is now enough to attribute state responsibility for their actions. Yet, if the threshold for attribution has changed since 9/11, then this would create far-reaching consequences for all states, with many more becoming responsible for acts of terrorists, operating in and from their territories. Cassese notes that Al Qaeda’s network of terrorists, who allegedly plotted and orchestrated 9/11, was based in as many as 60 different states. The idea that each of these states could be held responsible for 9/11 and so become a target of armed force is preposterous and taken to its logical conclusion would mean a 3<sup>rd</sup> world war.<sup>203</sup> In view of this, Duffy questions whether the allegations levelled against the Taliban of harbouring terrorists amount to a legal, (rather than a political) claim at all,<sup>204</sup> implying that (despite what states may say) 9/11 has not radically altered international law at all. Similar

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<sup>202</sup> The general principle that there is an obligation to make reparation for the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów* case: *Case Concerning the Factory at Chorzów* (Germany v Poland) (Jurisdiction) [1927] PCIJ Rep Series A No 9, at 21. This was endorsed by the ICJ in *LaGrand* (*Germany v. United States of America*) (Judgment) [2001] ICJ Rep 466, at para 48 and enshrined in Article 31 of the ILC Articles on State Responsibility. The ILC Articles on State Responsibility further outline the various types of reparation. See further ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, articles 35, 36, 37.

<sup>203</sup> See Cassese, ‘Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law’.

<sup>204</sup> Duffy, *The “War on Terror” and the Framework of International Law*, at 54.

conclusions were reached by scholars such as Vaughan Lowe,<sup>205</sup> Christine Gray,<sup>206</sup> and Ian Brownlie,<sup>207</sup> who all cautioned against intuitive views of 9/11 as a tipping point for international law.<sup>208</sup> Indeed since 9/11 similar claims have not been endorsed and in 2005 the ICJ, in the *DRC v Uganda* case, reiterated that self-defence could only be utilised against a state<sup>209</sup> further confirming that 9/11 has not heralded a new legal paradigm of responsibility. It may be that 9/11 is simply the exception to a well-established rule (although if this was the case then there is still very little analysis on why 9/11 would merit such a status).

### 3. The Constraints on Self-Defence

#### 3.1. Collective Self-Defence

While the US can argue self-defence as a legal basis for its action against the Taliban there arises the question of the legal justifications for other states' actions in Afghanistan. It is generally accepted that the right to collective self-defence authorises a non-attacked state to offer military assistance to the attacked state.<sup>210</sup> The ICJ affirmed this in the *Nicaragua* case,<sup>211</sup> where the Court said that the attacked state would need to consider itself the victim of an armed attack and that any support given had this state's consent. While there is a requirement that help must be explicitly requested, the Court saw no need for a pre-existing treaty between states outlining any mutual defence agreements.<sup>212</sup> Therefore, the US' actions and statements after 9/11 would seem consistent with that of a state which perceived itself to be the victim of an armed attack consenting to other states joining it in military enforcement measures under self-defence. As such, the legality and legitimacy of military action by the UK is consistent with the established principles of collective self-defence. However, as discussed in Section 1, the question remains as to whether the US is indeed correct to consider itself the victim of an armed attack.

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<sup>205</sup> Vaughan Lowe, 'The Iraq Crisis: What Now?' (2003) 52 *International and Comparative Law Quarterly* 859.

<sup>206</sup> Gray, *International Law and the Use of Force*, at 208.

<sup>207</sup> Brownlie, *Principles of Public International Law* (preface).

<sup>208</sup> See also McGoldrick, *From '9-11' to the 'Iraq War 2003': International Law in an Age of Complexity*, at 20-23.

<sup>209</sup> *DRC v Uganda Case*.

<sup>210</sup> Simma, *The Charter of the United Nations: A Commentary*, at 802.

<sup>211</sup> *Nicaragua*

<sup>212</sup> *ibid* [197]-[199].

### 3.2. Necessity, Proportionality and Immediacy

In addition to the need for an armed attack, it is also a well-established rule of customary international law that a use of force in self-defence must be ‘proportional to the armed attack and necessary to respond to it.’<sup>213</sup> In theory, if the force used does not meet these conditions then it is neither legal nor appropriate.

#### 3.2.1. Necessity

It was established in the *Caroline*<sup>214</sup> case that if a state resorts to self-defence, then such self-defence has to be necessary, ‘instant, overwhelming, leaving no choice of means and no moment for deliberation.’<sup>215</sup> Although the *Caroline* situation was actually about anticipatory self-defence, the case set the precedent that resort to force in response to an attack would only be legal if such force were necessary, i.e. repelling or preventing the attack cannot be achieved by diplomatic means. This was affirmed by the ICJ in the *Nicaragua* case and again in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.<sup>216</sup>

#### 3.2.2. Proportionality

Proportionality requires that the defensive action is proportionate to achieving its legitimate ends: usually the cessation of the armed attack. In order to decide if action is proportionate, a state must weigh up matters such as violating another state’s territory, damage to infrastructure and environment, and loss of life. Furthermore ‘the means and extent of the defence must not be disproportionate to the gravity of the attack; in particular, the means employed for defence have to be strictly necessary for repelling the attack.’<sup>217</sup> Unreasonable or excessive use of force is not permitted. The force must be measured against any further threat or attack only. As such:

It is important to appreciate that proportionality in the law of self-defence is not a matter of an ‘eye for an eye’ and cannot be assessed by comparing the number killed in Afghanistan with those killed in the World Trade

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<sup>213</sup> *Nicaragua* [176]; Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* [41].

<sup>214</sup> *The Caroline Case* 29 BFSP 1137-1138; 30 BFSP 195-196.

<sup>215</sup> *ibid.*

<sup>216</sup> Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ Rep 226.

<sup>217</sup> Simma, *The Charter of the United Nations: A Commentary*, at 805.

Centre...The test is whether the force used is proportionate to the threat it is designed to meet, not to the events of the past.<sup>218</sup>

Yet Greenwood later concluded that OEF and the eventual removal of the Taliban were proportionate because it was difficult to see how the US could remove the Al Qaeda threat without regime change.<sup>219</sup> However, Cassese asserts that OEF could only ever be proportionate if it was limited to detaining the perpetrators.<sup>220</sup>

According to Judith Gardam, proportionality as a constraint on *jus ad bellum* is a concept much neglected by scholars, perhaps because of the existence of *jus in bello* proportionality (a constraint of international humanitarian law which is expected to regulate the conduct of hostilities.) Perhaps because there is often such a quick transition from *jus ad bellum* to *jus in bello*. Yet she highlights the failure of international humanitarian law as a defined restraint on the conduct of conflict.<sup>221</sup> Thus Gardam suggests that *jus ad bellum* proportionality could be a more widely deployed threshold by which to restrain states and limit their recourse to force in the first instance. She notes how the UNSC has tended to categorise counter-insurgency activities as unlawful reprisals because of their disproportionate nature, but that the US has tended to argue that the proportionality of its actions should be measured on an accumulation basis and not against each individual event. Such claims effectively render the proportionality restraint redundant because ‘the future terrorist activity can always be hypothesised in apocalyptic terms’<sup>222</sup> meaning that there are no limits on what is proportionate. In the immediate aftermath of 9/11 it is clear that where the operation was gauged for proportionality, it was done so against the loss of life in the attacks rather than against the future threat.

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<sup>218</sup> Greenwood, ‘International Law and the “War against Terrorism”’, at 314.

<sup>219</sup> Greenwood, ‘International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’, at 25.

<sup>220</sup> Cassese, ‘Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law’, at 999.

<sup>221</sup> Judith Gardam, ‘A Role for Proportionality in the War on Terror’ (2005) 74 *Nordic Journal of International Law* 3.

<sup>222</sup> Joan Fitzpatrick, ‘Speaking Law to Power: The War against Terrorism and Human Rights’ (2003) 14 *European Journal of International Law* 241, at 247.

### 3.2.3. *Immediacy*

The general customary rule is that force used in response to an armed attack must occur relatively soon after the armed attack.<sup>223</sup> However this does not mean that self-defence must commence immediately after the attack as it is generally accepted that a state would take some time to plan and respond to an attack.<sup>224</sup> Indeed state practice demonstrates that states are not particularly constrained by this provision.<sup>225</sup> Franck even disputes the implication that self-defence requires immediate action.<sup>226</sup> He notes that ‘there is nothing in the travaux preparatoires or the text of the Charter to justify this claim,’<sup>227</sup> which, while correct, fails to outline exactly how long he thinks a self-defence claim might realistically last.<sup>228</sup>

### 3.3 Was OEF Necessary, Proportionate and Immediate?

The three aforementioned constraints operate together to prevent states from resorting punitively or disproportionately to military force. However, they create a paradoxical problem when applied to military force directed against terrorists. To be strictly legal, the force used by the US and its allies must be measured against the threat of any *future* attack. The problem with this is that it is impossible to accurately measure this threat, and while intelligence can be useful, it cannot always be relied upon. In the event of an *ad hoc* terrorist attack, can a state really be justified in pursuing a continued military campaign to subdue those terrorists, especially if there is no hard evidence of a further imminent attack? Indeed Gray questions whether recourse to force can ever be the legitimate response to terrorist attacks. ‘It is not clear that the forcible response to 9/11 will in fact deter future terrorist attacks: if it is not an effective response, then it could be argued that it cannot be a necessary response.’<sup>229</sup>

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<sup>223</sup> *Caroline*.

<sup>224</sup> Dinstein, *War, Aggression and Self-Defence*, at 243.

<sup>225</sup> When Iraq invaded Kuwait in August 1990, this was defined as a breach of the peace by the Security Council. Any response by Kuwait or her allies would have been a lawful and legitimate use of self-defence as envisioned by the Charter. However Operation ‘Desert Storm’ did not commence for another five months, leaving some commentators to speculate that the operation did not meet the requirements of self-defence as the response was not immediate. Further, there was an actual UNSC resolution, 678, authorising force. For further discussion see Eugene Rostow, ‘Until What? Enforcement Action or Collective Self-Defense?’ (1991) 85 *The American Journal of International Law* 506 at 511; Oscar Schachter, ‘United Nations Law in the Gulf Conflict’ (1991) 85 *The American Journal of International Law* 452, at 64.

<sup>226</sup> Franck, ‘Terrorism and the Right of Self-Defense’, at 840.

<sup>227</sup> *ibid*, at 840.

<sup>228</sup> The temporal limits of self-defence are discussed below at section 4.

<sup>229</sup> Gray, *International Law and the Use of Force*, at 203.

In view of this, with the benefit of hindsight, it is difficult to conclude that thirteen years of war and occupation of Afghanistan can be in any way proportionate or necessary or that there was no other choice of means to repel the threat of terrorist attacks. America's primary objective in 2001 was to neutralise Al Qaeda and prevent further terrorist attacks. Given that Bin Laden and his associates were known to have fled to Pakistan via the Tora Bora mountains, it could be argued that such an objective was achieved and thus had long since ceased to be the motive for the continuing presence in Afghanistan. This was the conclusion of the UK Foreign Affairs Committee.<sup>230</sup> Gray questions what would be necessary and proportionate to deter an indeterminate future attack<sup>231</sup> and notes wryly that if the criteria of necessity and proportionality are not present, then there are no limits on the magnitude of force used in self-defence, which conversely may be the very reason why such a justification is so attractive to states and precisely how the US has justified the continuation of OEF. Additionally, if force is used solely in response to an armed attack that has since ceased, and there is no continuing threat, then this constitutes a reprisal,<sup>232</sup> which is illegal under international law.<sup>233</sup> 'Few propositions about international law have enjoyed more support than the proposition that, under the Charter of the United Nations, the use of force by way of reprisals is illegal.'<sup>234</sup>

Therefore, in order to legally exercise self-defence there must be an element of repelling a continuing attack or a future attack. However, as with anticipatory self-defence, there is difficulty in justifying military action in the absence of evidence of a specific imminent attack, which makes the move to condone states' recourse to self-defence against terrorists extremely problematic.

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<sup>230</sup> Foreign Affairs Committee, *The UK's Foreign Policy Approach to Afghanistan and Pakistan (HC 514 2 March 2011)*, at para 184.

<sup>231</sup> Gray, *International Law and the Use of Force*, at 203.

<sup>232</sup> Reprisals can be defined as the use of force as an act of retaliation by one state against another state. See further Brownlie, *International Law and the Use of Force by States*; Bowett, 'Reprisals Involving Recourse to Armed Force'.

<sup>233</sup> Simma, *The Charter of the United Nations: A Commentary*, at 805.

<sup>234</sup> Bowett, 'Reprisals Involving Recourse to Armed Force', at 1.

#### **4. If there is a Right to Self-Defence, When Does it End?**

According to Article 51, the right to self-defence is only available until the UNSC has taken the 'necessary measures'. However, there is no authority as to what may constitute 'necessary measures'. Any measures taken by the UNSC could legitimately be deemed necessary measures in which case, a state's right to self-defence would cease almost as soon as the matter was the subject of a UNSC resolution. Simma asserts that while this may have been the drafters' intention, the subsequent failure of the UNSC to function as intended meant that this proviso has been universally ignored.<sup>235</sup> He therefore concludes that: 'the restriction envisaged by the reporting duty, as well as the related duty to discontinue defensive measures, has so far been almost devoid of practical significance.'<sup>236</sup> However, Oppenheim's International Law states that it is the UNSC that bears primary responsibility for maintaining the peace and as such it is for the UNSC and not individual states to decide what measures are necessary to maintain international peace and security.<sup>237</sup> Given the thaw in the UNSC after the end of the Cold War and the subsequent re-invigoration of the UNSC mechanism, the latter view might appear more attractive.

##### **4.1. Time limits on Self-defence?**

Therefore, the question facing international lawyers, particularly in relation to the 9/11 attacks, is whether there are any agreed time limits on the use of legitimate self-defence. The purpose of self-defence is to repel a threat. However, without limits, such action invites the scenario of open-ended self-defence which can be legitimised and justified by claiming a continuous threat of armed attack.<sup>238</sup> According to Cassese, this conundrum is making a mockery of international law with the 9/11 attacks potentially producing 'shattering consequences.'<sup>239</sup> The universal acceptance of the US' right to self-defence leaves Cassese deeply uneasy: 'Whether we are simply faced with an unsettling

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<sup>235</sup> Simma, *The Charter of the United Nations: A Commentary*, at 804.

<sup>236</sup> *ibid.*

<sup>237</sup> H Lauterpacht (ed) *Oppenheim's International Law, Vol II, Disputes, War and Neutrality*, (Longmans Publishing, Seventh Edition), at 159.

<sup>238</sup> This very claim has been at the heart of Israeli foreign policy for decades and Israel has repeatedly argued that its use of force complies with the Charter, as it is exercising its inherent right of self-defence. The problem is that Israel makes this claim even when it has not recently suffered an armed attack. Until 9/11 this argument had little support and Israel was repeatedly condemned for using force in anticipatory self-defence. For further discussion on Israel and the right of self-defence see Gray, 'The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA' (2006) 5 *Chinese Journal of International Law* 555.

<sup>239</sup> Cassese, 'Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law', at 993.

“precedent” or with a conspicuous change in legal rules, the fact remains, however, that this new conception of self-defence poses very serious problems.<sup>240</sup> The biggest problem is that it is impossible to define when the ‘War on Terror’ will end and as such this wider right of self-defence appears to have legitimised a precedent for infinite and indefinite armed conflicts.

#### **4.2. What Constitutes ‘Necessary Measures’?**

This issue was the source of extensive debate during the 1991 Gulf conflict. The debate centred on the precise legal basis for the use of force authorised in UNSC Resolution 678;<sup>241</sup> whether it was taken under Article 51 (self-defence) or Article 42 (UN collective enforcement). This distinction was important because if Operation Desert Storm was indeed an example of self-defence under Article 51, then the fact that such use of force had to be authorised by the UNSC might have meant that the customary law of self-defence was now curtailed by the UN Charter. If the UNSC had to explicitly authorise the use force in self-defence situations then clearly there would exist the possibility that it may not authorise force in some situations, even if a state had suffered an armed attack. This would constitute a drastic evolution of self-defence in international law, essentially recasting self-defence from an inherent right to a permissible one.

##### ***4.2.1. ‘Necessary Measures’ after the Invasion of Kuwait***

The 1991 debates examined the extent of the right of self-defence and questioned whether Kuwait and its allies retained the right to collective self-defence under Article 51 once the UNSC had begun to take action. Simma asserts that based on the wording of Article 51, the allies did not continue to retain this right.<sup>242</sup> This was also the opinion of Rein Mullerson, a Soviet Professor of international law and frequent spokesman for the Soviet Government, who said that when the UNSC put a situation on its agenda then the right to self-defence would become dormant, only to be revived if the UNSC was unable to resolve the conflict.<sup>243</sup> This view was also endorsed by Franck who asserted that ‘it is obvious on its

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<sup>240</sup> *ibid.*

<sup>241</sup> UN Doc S/RES/678

<sup>242</sup> Simma, *The Charter of the United Nations: A Commentary*, at 804.

<sup>243</sup> Mullerson’s remarks were made at the Conference on International Law and the Non-Use of Force, convened jointly by the American Society of International Law and the Soviet Association of International Law, Washington DC (4-6 October 1990). Cited in Rostow, ‘Until What? Enforcement Action or Collective Self-Defense?’ at 511.

face, that the Charter, in creating the new police power, intended to establish an exclusive alternative to the old war system. The old system was retained only as a fall-back, available when the new system could not be made to work.<sup>244</sup> As such, once the UNSC had begun to take measures to deal with the situation, including imposing economic sanctions, then the inherent right of Kuwait to use force to repel the armed attack ceased. Therefore Operation Desert Storm, which commenced almost five months after the armed attack needed to be authorised by the UNSC under Chapter VII of the Charter, and as such could not be an example of self-defence.

However, this view is not universally endorsed. Oscar Schachter calls such a literal interpretation of Article 51 implausible and absurd.<sup>245</sup> He states that a UNSC decision that called on an aggressor to cease hostilities would certainly be a necessary measure 'but could not be intended to deprive the victim state of its right to defend itself when the invader has not complied with the UNSC's order.'<sup>246</sup> He argues that while the UNSC has the authority to take measures, this does not mean that *any* measure would pre-empt self-defence. He then implies that it would be up to the UNSC to suspend the right of self-defence if it did not wish a state to use force in such circumstances.<sup>247</sup>

In Resolution 661 the UNSC condemned Iraq's invasion of Kuwait and affirmed 'the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter.'<sup>248</sup> Yet the sanctions put in place by this resolution were enforced by the US and the UK through a naval blockade, which was not authorised by the resolution and indeed both the US and UK cited collective self-defence as the justification for their actions.<sup>249</sup> However, UNSC Resolution 665 ultimately formalised this naval blockade and brought it under the auspices of collective

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<sup>244</sup> Thomas Franck and Faiza Patel, 'UN Police Action in Lieu of War: "The Old Order Changeth"' (1991) 85 *The American Journal of International Law* 63, at 64.

<sup>245</sup> Schachter, 'United Nations Law in the Gulf Conflict', at 458.

<sup>246</sup> *ibid.*

<sup>247</sup> Christopher Greenwood takes a similar view. See Greenwood, 'New World Order or Old?' (1992) 55 *Modern Law Review* 153, at 164-165.

<sup>248</sup> UN Doc S/RES/661(1990).

<sup>249</sup> See US Letters to the UNSC on 10<sup>th</sup>, 13<sup>th</sup> and 16<sup>th</sup> August 1990, UN Docs S/21492, S/21498, S/21537 respectively and remarks of Sir Crispin Tickell, UK Representative to the UNSC UN Doc S/PV.2938. Although they supported the adoption of Res 665, both the US and UK argued that the right to use force under Article 51 already existed.

enforcement effectively nullifying the right to collective self-defence.<sup>250</sup> This was followed by Resolution 678, which authorised states to ‘use all necessary means... to restore international peace and security in the area’,<sup>251</sup> but made no explicit reference to self-defence as the legal basis for such action pointing more to the conclusion that the Gulf War was an exercise of collective enforcement authorised by the UNSC rather than an exercise of self-defence.

#### ***4.2.2. Did the SC Take the ‘Necessary Measures’ After 9/11?***

Therefore, in relation to the on-going action in Afghanistan, this question is ever more pertinent. Do the US and its allies still retain any right to self-defence under Article 51 of the Charter after the UN involvement? If Franck’s logic is used then the US only possessed a right of self-defence immediately after 9/11 and until the UNSC had begun to take the necessary measures. Therefore, the US right to self-defence would likely have ceased on 12th of September 2001 when the UNSC adopted Resolution 1368 or certainly when it adopted Resolution 1373 (given its legislative role). However, if Schachter’s argument is correct, then, even though the UNSC took measures by passing Resolution 1368 and Resolution 1373, these resolutions were not enough in themselves to remedy the situation, i.e. they were not the ‘necessary measures’, meaning that the right of self-defence under article 51 was still available to the US in October 2001. Interestingly, in 2001, Franck departed from his previous stance and has since argued that a state still retains the right to self-defence even where the UNSC has passed resolutions on the matter.<sup>252</sup> He appears to suggest that the ‘inherent’ right of self-defence could co-exist with the measures taken by the UNSC.<sup>253</sup>

It is a *reduction ad absurdum* of the Charter to construe it to require an attacked state automatically to cease taking whatever armed measures are lawfully available to it whenever the Security Council passes a resolution invoking economic and legal steps in support of those measures.<sup>254</sup>

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<sup>250</sup> UN Doc S/RES/665(1990).

<sup>251</sup> UN Doc S/RES/678(1990).

<sup>252</sup> Franck, ‘Terrorism and the Right of Self-Defense’.

<sup>253</sup> *ibid*, at 841.

<sup>254</sup> *ibid*, at 842.

Clearly, state practice would suggest that whatever the original drafters' intentions, states invoking the right to self-defence against an armed attack consider that they have the right to continue acting forcefully regardless of the UNSC's dealings concerning the situation. This is in part because the system of collective security envisaged at Dumbarton Oakes was never fully realised and as such, the UNSC has never become the effective body in responding to force. Therefore it may be undesirable but is understandable that states claim a wider right to self-defence than is laid down in the Charter. However the fact remains that the claim that a state may cite self-defence as the justification for a thirteen-year military operation seems not credible and clearly not what the drafters intended.

## **5. Alternative Justifications for the Continuing Operation: Pre-emptive Self-Defence and The 'Bush Doctrine'**

Leaving aside the various issues raised about the legitimacy of the US's claim to self-defence in 2001, it is clear that the viability of self-defence as an *on-going* justification is untenable. If the original aims of OEF, to prevent further attacks and locate the perpetrators, were achieved then it raises the question of whether the on-going military action in Afghanistan could still be credibly categorised as self-defence. Perhaps aware of the perceived waning viability of self-defence, the US has proffered an additional justification for the 'War on Terror'; the doctrine of pre-emptive self-defence.<sup>255</sup> This doctrine would allow the US to strike against not only those who were planning an imminent attack, but also those representing a more remote threat (than is envisaged by a classic self-defence argument) to the US with the potential to attack at an indeterminate point in the future.<sup>256</sup>

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<sup>255</sup> The question of the legality of pre-emptive self-defence has occupied international lawyers for centuries, but is currently generally accepted to be unlawful. See Brownlie, *International Law and the Use of Force by States*, at 275-278; Szabó, *Anticipatory Action in Self-Defence*.

<sup>256</sup> In the 1960s Israel first argued that it was entitled to use self-defence against 'repeated attacks' that amounted to armed attacks because of their continuous nature necessitating defensive action against future strikes. See Letter dated 12 August 1969 from the Permanent Representative of Israel addressed to the President of the Security Council (12 August 1969) UN Doc S/9387. This argument became known as the accumulation of events or needleprick theory and posited that the concept of armed attack could embrace a series of attacks which, taken together, would justify immediate action. Despite the attraction of this doctrine to states the UNSC members maintained suspicion of such an approach and firmly rejected it on the basis that it would raise difficult questions as to the proportionality and necessity of any response. See UN Doc S/PV.1468 (28 March 1969); UN Doc S/PV.1560 (26 June 1972); UN Doc S/PV.1860 (5 December 1975).

## 5.1. The US National Security Strategy

The 2002 National Security Strategy of the United States of America (NSS) has come to be known as the ‘Bush Doctrine’ and is controversial because it endorses the doctrine of pre-emptive self-defence. ‘To forestall or prevent...hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.’<sup>257</sup> This document prompted much debate as it signalled a radical departure from existing norms of international law as discussed already, namely that an ‘armed attack’ must be in progress or be imminent in order to unlock a state’s right to use force in self-defence. The doctrine called for a re-examination of the requirement of imminence to trigger the right to use force in self-defence in light of ‘the capabilities and objectives of today’s adversaries.’<sup>258</sup> However it did not clearly formulate who might invoke such a right or criteria to establish when such a use of self-defence might be utilised.

The NSS has been successful in reigniting the international debate on pre-emptive self-defence. States and scholars have questioned whether the terrorist threats of the 21<sup>st</sup> century meant that a change in the law is needed to allow for a wider range of self-defence against terrorists and rogue states.<sup>259</sup> This led the UN Secretary General to set up the High Level Panel on Threats, Challenges and Change to examine these new threats and determine if any changes were needed to the UN system. Both the Panel and the Secretary General issued reports<sup>260</sup> that addressed whether the right of self-defence should be expanded. Both reports stated that there already existed a right to anticipatory self-defence in the face of an imminent attack but rejected the wider right of pre-emptive self-defence where there was no imminent armed attack.<sup>261</sup>

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<sup>257</sup> The National Security Strategy of the United States of America 2002.

<sup>258</sup> *ibid*, at 15.

<sup>259</sup> See Gray, ‘The US National Security Strategy and the New Bush Doctrine on Preemptive Self-Defense’ at 565-568.

<sup>260</sup> UN GA, ‘In Larger Freedom: Towards Development, Security and Human Rights for all’ (The Report of the UN Secretary General 21 March 2005) UN Doc A/59/2005 and UN GA, ‘A More Secure World: Our Shared Responsibility’ (The Report of the High Level Panel on Threats, Challenges and Change 2 December 2004) UN Doc A/59/565.

<sup>261</sup> UN GA ‘In Larger Freedom’, at para 124 and UN GA, ‘A More Secure World: Our Shared Responsibility’, at para 188.

## 5.2. Pre-emptive Self-defence Under Article 51

However, following the debate at the World Summit in 2005, the Outcome Document in its detail on the UN Charter,<sup>262</sup> did not discuss self-defence and simply concluded that the existing right (as conceived in the *Caroline* case) was wide enough to deal with modern threats, suggesting that the right did not extend to anticipatory self-defence, far less pre-emptive self-defence.<sup>263</sup> This is also the conclusion of several scholars who argue that the constraints of self-defence laid down in Article 51 were done so intentionally, in order to prevent states from claiming a right to self-defence and resorting to force to resolve disputes.<sup>264</sup> The right was purposely limited to use in exceptional circumstances to allow a state to protect itself and repel an attack. Brownlie writes that Article 2(4) is in absolute terms, thus ‘any use of force was to be authorized by the Organisation and any proviso, implied or express, as to self-defence, was understood to be an exceptional right, a privilege.’<sup>265</sup> Similarly Franck notes how at the Charter preparatory discussions in 1945 the US delegates discussed whether the wording of Article 51 restricted instances of self-defence to when an armed attack had already occurred. Franck interprets the fact that the US did not object to the final wording as demonstrating ‘beyond dispute that the negotiators deliberately closed the door on any claim of anticipatory self-defence.’<sup>266</sup>

Thus the problem with the Bush doctrine on pre-emptive self-defence is that the majority of states and scholars do not recognise it as a valid doctrine of international law.<sup>267</sup> If the majority of states consistently object to a particular practice then it is virtually impossible for the minority view to become legal. Indeed in the *Nicaragua* case the ICJ held that instances of State conduct inconsistent with a given rule should generally be treated as ‘breaches of that rule, not as indications of the recognition of a new rule.’<sup>268</sup> What makes the doctrine’s position particularly circumspect is that it is not arguing that there is *opinio*

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<sup>262</sup> UN GA, ‘2005 World Summit Outcome’ (resolution adopted by the General Assembly 24 October 2005) UN Doc A/RES/60/1.

<sup>263</sup> UN GA ‘World Summit Outcome’, at para 79.

<sup>264</sup> Brownlie, *International Law and the Use of Force by States*, at 275; Gray, *International Law and the Use of Force*, at 98; Josef Kunz, ‘Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations’ (1947) 41 *American Journal of International Law* 872, at 877-878.

<sup>265</sup> Brownlie, *International Law and the Use of Force by States*, at 273.

<sup>266</sup> Thomas Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge University Press, Cambridge 2002), at 50.

<sup>267</sup> The doctrine has been recognized by states such as Japan, Australia and Israel.

<sup>268</sup> *Nicaragua*, at 98.

*juris* on pre-emptive self-defence nor even that there should be. The US is careful not to stress too strongly the legality or acceptance of a right to pre-emptive self-defence, presumably because if such a doctrine were regarded as legal then this would allow other states to benefit from it. Promotion of the doctrine then is a double-edged sword for the US in that, in gaining support for its own practice it would open the door to allow others to behave likewise. This is undesirable for the US, and leading scholars have commented on the hypocrisy of ‘pre-emptive’ rhetoric.

This Bush doctrine purports among other things to concede to some states (e.g. Israel, France and India) but not others (e.g. Iran) the right to provide for their defense in whatever manner they deem fit. It also implies the erosion of other core features of national sovereignty, including exclusive authority to exercise police and judicial power within recognised frontiers. It seemingly arrogates to the United States an unfettered discretion to decide to whom other states can give asylum and whom they are obligated to prosecute or extradite.<sup>269</sup>

Perhaps, as UK Foreign Secretary Jack Straw suggested, the Bush Doctrine was utilised more to promote the image of a strong, competent, proactive Government in order to win votes in the 2002 mid-term congressional elections, rather than to demonstrate realistic foreign policy.<sup>270</sup> Indeed the doctrine left such uncertainty as to how any right of pre-emptive self-defence might function practically that some scholars concluded that it was in fact only a rhetorical device designed to put pressure on Iraq and Saddam Hussein,<sup>271</sup> while others argued that it had simply gone too far.<sup>272</sup> However, the subsequent invasion of Iraq in 2003 potentially demonstrated that the US saw this as a viable doctrine. Despite Franck concluding that the NSS aimed at ‘ending all collective control over US force’<sup>273</sup> a key US

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<sup>269</sup> Tom. J. Farer, ‘Beyond the Charter Frame: Unilateralism or Condominium?’ (2002) 96 *The American Journal of International Law* 359, at 3.

<sup>270</sup> See Foreign Affairs Committee, *Foreign Policy Aspects of the War on Terrorism* (HC 384 20 June 2002) at para 195. This observation was rebutted by US National Security Adviser Condoleezza Rice.

<sup>271</sup> Christine Gray, ‘The US National Security Strategy and the New Bush Doctrine on Preemptive Self-Defense’ (2002) 1 *Chinese Journal of International Law* 437.

<sup>272</sup> Richard Gardner, ‘Neither Bush nor the “Jurisprudes”’ (2003) 97 *American Journal of International Law* 585.

<sup>273</sup> Thomas Franck, ‘What Happens Now? The United Nations after Iraq’ (2003) 97 *American Journal of International Law* 607 at 611.

State Department advisor, John Yoo nevertheless argued that it was the right of pre-emptive self-defence which provided the justification for the Iraq war.<sup>274</sup> Yet regardless of President Bush's privately expressed views on Saddam Hussein, the US stopped short of justifying the invasion of Iraq under the doctrine of pre-emptive self-defence and instead attempted to couch the invasion within existing legal parameters. In its March 2003 letter to the UNSC on the eve of the invasion, the US claimed its authority from cumulative UNSC resolutions;<sup>275</sup> which implied US hesitancy to push this newly expanded view of self-defence.

### ***5.2.2. The UK Position on Pre-emptive Self-defence***

In common with the conclusions reached in the UN Secretary General's Report, the UK has always accepted that international law allows for self-defence when an attack is imminent but ruled out pre-emptive strikes.<sup>276</sup> However, in the aftermath of 9/11 the Foreign Affairs Committee initially suggested a need to re-examine the scope of self-defence in international law.<sup>277</sup> The Committee questioned whether the requirement of an imminent attack needed to be removed to allow for a wider interpretation of the law.<sup>278</sup> Gray traces a subtle shift within Tony Blair's government towards adopting the US view on pre-emptive self-defence.<sup>279</sup> In 2006, the then UK Defence Secretary, John Reid, appeared to suggest that the UK Government was considering adopting this view. He reasserted the belief that there was a need to re-evaluate the existing legal framework and determine whether the concept of imminence was sufficient to respond to modern threats facing states, such as terrorism.<sup>280</sup> Tony Blair also spoke of the need to review international law in order for it to adequately meet the threats and challenges of the modern world.<sup>281</sup> However, after noting that there was very little international support for widening the scope of anticipatory self-defence and also a very real fear that such a new formulation

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<sup>274</sup> John Yoo, 'International Law and the War in Iraq' (2003) 97 *American Journal of International Law* 563.

<sup>275</sup> Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/29070.

<sup>276</sup> See Gray, 'The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA'.

<sup>277</sup> Foreign Affairs Committee, *Foreign Policy Aspects of the War against Terrorism* (HC 196 19 December 2002) at paras. 141-161.

<sup>278</sup> *Ibid.*

<sup>279</sup> Gray, 'The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA' at 567.

<sup>280</sup> Royal United Services Institute for Defence and Security Studies (3 April 2006) <<https://www.rusi.org/downloads/assets/Reid.pdf>> accessed August 2015.

<sup>281</sup> UK Government Press Release, 'PM Warns of Continuing Global Terror Threat', 10 Downing Street: <<http://www.number-10.gov.uk/output/Page5461.asp>> accessed August 2015.

would be seized upon by certain states, the Foreign Affairs Committee reconsidered its position and even stepped back from its assertion that there is a right of anticipatory self-defence when an armed attack is imminent.<sup>282</sup>

In a collective European context, the doctrine was also treated with scepticism. While the 2003 EU Joint Security Strategy document acknowledged that the law might require re-examination in the light of modern threats, it was not prepared to accept the doctrine of pre-emptive self-defence as a legitimate strategy.<sup>283</sup> In striking contrast to its US counterpart, the EU document emphasised the role of international law and the UN in maintaining security. Most European heads of state were unwilling to endorse the Bush Doctrine and expressed disquiet when, in his 2002 State of the Union address, Bush described North Korea, Iran and Iraq as an ‘axis of evil’. Frustrated at both the aggressive tone and the inference that there was scope for military attacks on these states, European Commissioner for External Relations Chris Patten described the speech as ‘absolutist and simplistic’<sup>284</sup> while the German Deputy Foreign Minister stated that diplomatic rather than military means should be employed to deal with Iraq’s WMD.<sup>285</sup>

### ***5.2.3 Can Pre-emptive Self-defence Justify OEF?***

Therefore, as OEF stretched into its second decade, there appears an ever widening gap in the justifications of the on-going operation and although pre-emptive self-defence has proven a popular national policy in the US, it has not yielded any wide support internationally. This leaves an uncomfortable question of what is then the continuing legal basis for OEF. The UK Government asserted that its initial intervention was based on the belief that Afghanistan represented a strategic and immediate security threat to the UK because of the presence of Al Qaeda. The Government has continued to claim that Afghanistan is a strategic threat.

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<sup>282</sup> Foreign Affairs Committee, *Foreign Policy Aspects of the War against Terrorism* (HC 441 20 July 2004), at para 429.

<sup>283</sup> The EU Joint Security Strategy is available from [www.ue.eu.int/uedocs/cmsUpload/78367.pdf](http://www.ue.eu.int/uedocs/cmsUpload/78367.pdf). For further discussion see Gray, ‘The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA’.

<sup>284</sup> Foreign Affairs Committee, *Foreign Policy Aspects of the War on Terrorism* (HC 384 20 June 2002) at para 194.

<sup>285</sup> *ibid.*

[T]he decision to stay [in Afghanistan] was based on a hard-headed assessment of our clear national security interest in preventing the re-emergence of Taliban rule or Afghanistan's decline into a failing state again. Either of those outcomes would have allowed Al Qaida to return and recreate their terrorist infrastructure.<sup>286</sup>

As such the UK Government argues that Afghanistan is still a security threat and that OEF is necessary to stabilise Afghanistan in order to prevent it becoming a haven for terrorists again. Although this appears to be a credible motive and the UK has expressed a commitment to improving civilian life in Afghanistan and preventing the return of the Taliban, the legal reality is that in using the motive of future terrorist prevention to justify the use of force in Afghanistan, the UK Government is in practice essentially subscribing to the doctrine of pre-emptive self-defence, a doctrine that it itself (or at least the Foreign Affairs Committee) admits has no basis in international law.

### **5.3. A Decade after 9/11, Can Self-Defence Still be the Legal Basis for Operation Enduring Freedom?**

It is clear that despite the tenuous legal basis of the operation, OEF has not received the same widespread condemnation as the invasion of Iraq. Despite the legal basis being equally shaky, OEF appears to enjoy a legitimacy that Iraq did not. Accordingly it is clear that there is a gap between the rhetoric and reality of the legal basis of OEF and arguably this has garnered more attention now that Iraq has dropped off our radar and Afghanistan continues to generate negative headlines. Indeed the longer the operation in Afghanistan continues, the more difficult it is for international lawyers to reconcile it as a legitimate exercise of self-defence. Despite the lack of clarity on this issue, even those states and scholars who were happy with the view that Resolution 1373 offered a tenuous blessing to OEF and thus inferred authorisation under Article 51, have felt an increasing disquiet in the face of a thirteen-year military operation grounded only in self-defence. There is a real absence of viable justification for the continuing operation's legality. Even if the 9/11 attacks could be considered an armed attack and even if such an attack was attributable to

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<sup>286</sup> Rt Hon John Hutton MP, (then) Secretary of State for Defence at the International Institute of Strategic Studies, 11 November 2008, quoted in Foreign Affairs Committee, *Global Security: Afghanistan and Pakistan* (HC 302 2 August 2009), at para 264.

Afghanistan, it is generally accepted that the initial objectives of self-defence against the terrorists have been achieved and so this initial justification has expired.

The claim that Afghanistan continues to represent an immediate threat to the UK continues to be used by the Government nearly eight years later. However, while the Government may well be correct to suggest that Afghanistan could once again become a safe haven for Al Qaeda if Western forces left prematurely, there is a strong argument to be made that Afghanistan, and the Taliban insurgency, does not currently in itself represent an immediate security threat to the UK.<sup>287</sup>

Furthermore, Cassese highlights how OEF was originally code-named Operation Infinite Justice, thus emphasising that the primary aim was to bring the perpetrators to justice.<sup>288</sup> However the quest for justice appears to have been discarded and the operation's aims appear vague and ambiguous in light of its duration. The 'War on Terror' appears to have fragmented into 'a war against the Taliban; a war against drugs; a war against want; a war against Afghanistan's old traditional ways.'<sup>289</sup> Thus the Foreign Affairs Committee endorsed Lord Ashdown's rebuke that to: 'have too many priorities is to have none.'<sup>290</sup>

Perhaps aware of the expiration of the self-defence narrative, both the US and UK governments have sought to reframe their role and purpose in Afghanistan leading to accusations of 'mission creep'. In 2011 The Foreign Affairs Committee heard how the UK's justification and motives for being in Afghanistan have radically altered from those initially espoused in 2001.<sup>291</sup> This complemented its 2009 conclusion that:

The UK's mission in Afghanistan has taken on a significantly different, and considerably expanded, character since the first British troops were deployed

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<sup>287</sup> Foreign Affairs Committee, *Global Security: Afghanistan and Pakistan* (HC 302 2 August 2009), at para 277.

<sup>288</sup> Cassese, 'Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law'.

<sup>289</sup> Lord Ashdown, 'What I told Gordon Brown about Afghanistan', *The Spectator* (Coffee House Blog), 15 September 2008, quoted in Foreign Affairs Committee, *Global Security: Afghanistan and Pakistan* (HC 302 2 August 2009) at para 222.

<sup>290</sup> *ibid.*

<sup>291</sup> Foreign Affairs Committee, *The UK's Foreign Policy Approach to Afghanistan and Pakistan* (HC 514 2 March 2011), at para 184.

there in 2001. We conclude that there has been significant ‘mission creep’ in the British deployment to Afghanistan.<sup>292</sup>

#### 5.4. The Consent or Invitation Doctrine

It has also been suggested that the claim that the continuing operations are carried out at the invitation of the Afghan Government cures any legal defects in the military operation arising from the expiry of self-defence as a justification.<sup>293</sup> On the surface this is accurate because use of force in another state, which is at the invitation of that state, does not breach article 2(4) of the UN Charter.<sup>294</sup> Yet as Ryan Williams notes, while this consent doctrine *objectively* affords a legal justification for the conduct of coalition military operations in Afghanistan, in reality it sets a dangerous precedent.<sup>295</sup> This doctrine could allow any state to bring about forcible regime change in another state and then install a puppet government to consent to any future military involvement. Williams also argues that it is problematic to categorise OEF as a typical consent based operation because the ‘occupying forces’ were operating in the country before consent was given.<sup>296</sup> A more orthodox example of a consent based operation might be Kuwait requesting international military assistance after its invasion by Iraq in 1991. The assistance was requested prior to any international operations taking place and the same rulers who requested the assistance remained in power after the operation took place.<sup>297</sup> In contrast to this, the consent from the Karzai government does not bestow retroactive legality and it is certainly clear that the previous Government, deposed by the US, did not consent to such an operation. Thus, while the continuation of OEF may not be a violation of Article 2(7) of the Charter, if the operation is taken as a continuous one from October 2001 then there is still a difficulty in arguing that this operation did not violate Article 2(4).

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<sup>292</sup> Foreign Affairs Committee, *Global Security: Afghanistan and Pakistan* (HC 302 2 August 2009) at para 225.

<sup>293</sup> Answers of John Reid MP Secretary of State for Defence, HC Debates 27 February 2006, vol 443, col 4.

<sup>294</sup> Article 20 of the ILC Articles on State Responsibility states that ‘Valid consent by a state to the commission of a given act by another state precludes the wrongfulness of that act in relation to the former state to the extent that the act remains within the limits of that consent.’

<sup>295</sup> Ryan Williams, ‘Dangerous Precedent: America’s Illegal War in Afghanistan’ (2011-2012) 33 *UPaJIL* 563 2011-2012 at 597.

<sup>296</sup> *ibid* at 598.

<sup>297</sup> The operation in Kuwait was also authorised by the UNSC, so it is arguable that categorising the assistance to Kuwait as a purely consent-based operation is problematic..

Further, whilst invitation by a government bestows a veneer of legitimacy on the operation, this involvement creates a new controversy. If the coalition forces are in Afghanistan to assist the Afghan Government defeat insurgents, then this may redefine the conflict as an internal one (with invited outside assistance), which invites a different application of the laws of armed conflict rather than an international conflict against terrorism.<sup>298</sup> It is very problematic if the distinction between national and international conflict becomes blurred.<sup>299</sup>

## **6. Justifying OEF in the Absence of Legality**

Mindful of the tenuous legal basis for the continuing operation, there is now an increasing mix of justifications that have come to be used interchangeably. It appears necessary to have such a mix available because the on-going mission became a very different one to that envisaged in 2001. It would appear that an aura of legitimacy is needed now more than ever to justify international presence in this long running conflict. In view of this Gray argues that it is no coincidence that from 2005 the UNSC's Resolutions began to refer to the challenges facing the forces in Afghanistan. Resolution 1589 refers to 'the need to tackle the on-going security challenges in Afghanistan, including...terrorist threats.'<sup>300</sup> Resolution 1662 refers to 'the continuing importance of combating increased terrorist attacks caused by the Taliban, Al-Qaida and other extremist groups'.<sup>301</sup> Thus Gray asserts that these resolutions give retrospective legitimacy to the on-going OEF because the UN had now endorsed it.<sup>302</sup> However, she highlights that the legal justification remains the same; self-defence against Al Qaeda and the Taliban. Thus it is questionable that the UNSC accepted this continuing justification of self-defence underpinning a 'global War on Terror' or whether it was ambivalent about OEF given the Afghan Government's consent. In the absence of UNSC public debates on this issue the answer is difficult to determine.

### **6.1. Seeking Legitimacy: Moral Rhetoric**

In order to circumvent the question of legality it is suggested that US and UK political leaders instead engaged the rhetoric of moral legitimacy in order to justify their actions to

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<sup>298</sup> Gray, 'The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA', at 557

<sup>299</sup> *ibid.*

<sup>300</sup> UN Doc S/Res1589(2005)

<sup>301</sup> UN Doc S/Res1662(2006)

<sup>302</sup> *ibid.*

the public. Indeed White concluded that the operation in Afghanistan, although *prima facie* in accordance with international law, was not a straightforward application of the right to individual or collective self-defence,<sup>303</sup> but that the international community's acceptance of this right appeared to stem from the assumption that OEF was a moral war in pursuit of justice in response to outrageous atrocities. This moral narrative was seized upon by politicians with Tony Blair stating in the immediate aftermath of 9/11 that 'the world should stand together against this outrage' and stressing certain beliefs in 'reason, democracy and tolerance' as the 'foundation of our civilised world' which had historically been fought for and defended.<sup>304</sup> He returned to such rhetoric when announcing the commencement of the bombing campaign in Afghanistan on 8<sup>th</sup> October 2001.

So this military action we are undertaking is not for a just cause alone, though this cause is just... We will see this struggle through to the end and to the victory that would mark the victory not of revenge but of justice over the evil of terrorism.<sup>305</sup>

Undoubtedly the questionable right of self-defence was bolstered by the moral outrage occasioned by 9/11. Some states may have been reluctant to criticise the US in the face of the 'for us or against us' rhetoric of George W Bush<sup>306</sup> and White concludes that 'this [again] might be a case where the moral outrage of the atrocity allowed a military response to be mounted that would not normally have been acceptable to the international community.'<sup>307</sup> Privileging of moral rhetoric would effectively render a state's right to use force as subjective and dependent on generating a heightened moral sympathy. While legal arch-positivism may sometimes unpalatably hinder state action, a subjective test by which state conduct is judged by public opinion and media propaganda depicting states as 'good guys' and 'bad guys' is enormously problematic. Such a system is likely to create partiality with some states more successfully defending their interests than others effectively

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<sup>303</sup> Nigel D White, *Democracy Goes to War: British Military Deployments under International Law*, at 195.

<sup>304</sup> HC Debates 14 September 2001, vol 372, col 605.

<sup>305</sup> HC Debates 8 October 2001, vol372, col814.

<sup>306</sup> White, *Democracy Goes to War: British Military Deployments under International Law*, at 199; see also, Nigel D White, 'The Will and Authority of the Security Council after Iraq' (2004) 17 *Leiden Journal of International Law* 645, at 664.

<sup>307</sup> White, *Democracy Goes to War: British Military Deployments under International Law*, at 199.

dismantling the collective security system, equality of states and basic notions arising from the Rule of Law.

### ***6.1.1. Nation Building***

This moral narrative is further buttressed by the deployment of rhetorical tropes of altruism portraying Western actors as benign and charitable.<sup>308</sup> Notions of ‘nation building’ embody such tropes with Afghanistan being furnished ‘with a seamless package of democratic, political, developmental and military assistance in Helmand’ thereby immunising it from being infiltrated by international terrorism.’<sup>309</sup> Yet if the US and UK’s contribution to post-Taliban Afghanistan is merely humanitarian assistance, this could easily be provided by contributing troops to the UNAMA mission or even by humanitarian organisations and so it fails to explain the aims or legal basis of OEF.

### ***6.1.2. Human Rights***

A further theme that epitomises the turn to moral rhetoric as a legitimating force is the reliance on human rights language. Indeed it can be argued that the moral narrative reached its zenith when politicians and the media began to focus on depicting the social and political situation in Afghanistan. The absolute denial of human rights evidenced by the totalitarian rule of the Taliban, coupled with the plight of Afghan women, provided a ready-made trope that could be exploited by the US and UK in order to justify OEF. Furthermore, this narrative also created a safeguarding/threatening binary for the West and the Taliban respectively by offering up Afghan women as victims to be saved.<sup>310</sup>

Yet this rhetoric of nation building and human rights belies the fact that the operations in Afghanistan are radically different to the aims of the initial operation and thus poses difficulties for scholars attempting to legally define the operations in Afghanistan. It allows a space for hegemonic actors to move in a very agile fashion between differing legal ‘opportunities’.

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<sup>308</sup> A detailed analysis of how rhetorical tropes are utilised by politicians and the media to sell OEF and the War on Terror is provided in Chapter 4.

<sup>309</sup> (Then) Secretary of State for Defence, Dr John Reid, quoted in Foreign Affairs Committee, *Global Security: Afghanistan and Pakistan* (HC 302 2 August 2009) at para 218.

<sup>310</sup> The remainder of this thesis focuses on how this heroic narrative was deployed to sell the ‘War on Terror’. For detailed analysis of the machinations of the narrative see Chapter 3.

## 7. Conclusion

This chapter analysed OEF as an exercise in self-defence. It highlighted that although this justification was accepted without obvious question by the international community, such acceptance may have stemmed more from the fact that there was widespread international goodwill towards the US and that many states, although ambivalent about OEF, were reluctant to criticise the operation in light of the ‘with us or against us’ mentality of George W. Bush. It therefore concludes that the justification of self-defence as offered by the US and UK was readily accepted politically, socially and academically, with very little critique in either sphere.<sup>311</sup>

This chapter therefore explored the parameters of self-defence as a legitimating doctrine for the use of force. It highlighted that while the scale and magnitude of the 9/11 attacks meant that they were readily understood to be armed or grave attacks in the Article 51 sense, a problem remained in that it is generally understood that only states can perpetrate armed attacks. The traditional understanding of armed attack appears to have been broadened to include non-state actors and the scope of state responsibility for terrorist acts has been similarly widened. There are also real difficulties in attributing the attack to the state of Afghanistan, yet without such attribution there can be no legal recourse to self-defence. Indeed the initial justification of self-defence for the intervention in Afghanistan was seen by many as beyond reproach. The fact that the ICJ did not take the opportunity in the *DRC v Uganda* case to categorically refute or confirm this has made it further frustrating for legal scholars hoping for a post hoc determination of the law. Since the 9/11 attacks were carried out by private actors, this chapter asserts that they did not constitute an armed attack. By further exploring the temporal limits of self-defence it was additionally established that self-defence can be acceptable as a means of defence against an on-going or imminent attack. Given that the 9/11 attacks were an isolated incident that did not pose an on-going threat, it is difficult to see how OEF is compatible with this understanding of self-defence. As such, this chapter argues that OEF does not benefit from a classic self-defence justification. This chapter also asserted that despite its mainstream popularity pre-

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<sup>311</sup> See further Linderfalk, ‘The Post-9/11 Discourse Revisited-The Self-Image of the International Legal Scientific Discipline’. Linderfalk goes so far as to call the lack of rigorous scholarly critique of OEF ‘poor science’.

emptive self-defence was insufficiently accepted as a legal doctrine to justify the continuation of OEF.

Despite all of the foregoing, it has to be acknowledged that by virtue of the ‘ritual incantation’ of self-defence<sup>312</sup> states have often managed to use Article 51 to sidestep Article 2(4) of the UN Charter. The absence of legality therefore has not always proven problematic for states. Indeed, in the eyes of international lawyers, OEF may well be yet another instance of the world powers acting outside established legal doctrine in self-interest. The interventions in Kosovo, Afghanistan and Iraq evidence Western states being increasingly willing to act outside the UN Charter while paradoxically engaging international law justifications for their actions. The difference between OEF and most other incidences is that OEF initially and apparently attracted widespread support from states throughout the world providing opportunities for assertions that there is new *opinio juris* on the use of force against terrorists.

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<sup>312</sup> Gray, *International Law and the Use of Force*, at 31-33.

## Chapter 2 Perspectives on Women's Human Rights in Afghanistan

### Introduction

As well as fighting terrorism it was claimed that OEF would have the added consequence of liberating Afghan women through removal of the Taliban. Indeed after the Taliban's overthrow Afghan women's lives reportedly improved dramatically. The BBC reported that 'Afghan women had shed their burqas'.<sup>313</sup> The New York Times reported that 'women in Afghanistan are uncovering their faces, looking for jobs, walking happily with female friends on the street and even hosting a news show on Afghan television.'<sup>314</sup> This is not untrue. In Kabul women returned to schools, university and the workplace. The new Afghan Constitution guarantees equality and human rights to men and women with 25% of parliamentary seats guaranteed to women.<sup>315</sup> Music, dancing and lavish weddings have all been re-embraced by Afghans and the city has also seen resurgence in kite flying and a market for Western movies.<sup>316</sup> Many of Kabul's elite have embraced Western hairstyles and clothes, and millions of refugees, many of whom made a successful living in the West, have returned to help rebuild their country.

However, despite the initial optimism there has been stubborn resistance to change from many quarters including the Afghan Parliament, judiciary, clerics and occasionally the Afghan President, and so more than a decade after 9/11 many are questioning whether the OEF-engineered, promised utopia for women actually materialised. This chapter seeks therefore to provide an overview of women's rights in Afghanistan prior to, and during, the Taliban rule, and unpick why the focus has been almost exclusively on the Taliban as the barrier to women's emancipation, viewing the Taliban era in isolation from what went before or came after. It will then consider various legal instruments that are said to have demonstrably improved the situation post-Taliban and question whether they have had a

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<sup>313</sup> BBC News, 'Afghan Women Shed Their Burqas.' (London, 20<sup>th</sup> November 2001 <[http://news.bbc.co.uk/1/hi/world/south\\_asia/1666139.stm](http://news.bbc.co.uk/1/hi/world/south_asia/1666139.stm)> accessed August 2015.

<sup>314</sup> Editorial, 'Liberating the Women of Afghanistan' *New York Times* (New York, 24<sup>th</sup> November 2001). <<http://www.nytimes.com/2001/11/24/opinion/liberating-the-women-of-afghanistan.html>> accessed August 2015.

<sup>315</sup> The Constitution of the Islamic State of Afghanistan, Articles 22 and 83.

<sup>316</sup> James Meek 'Freedom, Joy-and Fear, *The Guardian* (London, 14<sup>th</sup> November 2001) <<http://www.theguardian.com/world/2001/nov/14/afghanistan.terrorism12>> accessed August 2015.

quantifiable effect on ordinary women's lives. In doing so this chapter essentially challenges the dominant narrative that suggests that women's lives have remarkably improved since the fall of the Taliban and that liberating Afghan women was one of the aims of OEF.

Section 1 will provide an overview of rights and status of women in Afghanistan through the twentieth century and demonstrate how religious and cultural traditions predominately governed the Afghan way of life until well into the 20<sup>th</sup> Century. Section 2 then outlines how in response to the Soviet invasion, an armed resistance movement was mobilised and how this marked the start of twenty-five years of civil war in the country. It will also highlight how the outbreak of war seriously curtailed any gains in development and human rights. Section 3 will look at women's rights during the Taliban era. It will outline the Taliban's prohibitions and consider how they affected Afghan women, in particular the women of Kabul, although it ultimately notes that for many women, life under the Taliban was not so different than before. It will then consider the international treaties and covenants that Afghanistan was party to and highlight the rights and guarantees that the Taliban denied Afghan women. Section 4 will consider women's rights in Afghanistan since the fall of the Taliban in 2001. It will highlight the legislative improvements that have guaranteed new rights to women and sought to improve their lives. It will then analyse the current human rights situation for women and describe the myriad of problems facing women and question why legislative programs have failed to change women's lives for the better. This chapter will then conclude that despite a wealth of legislative improvements, everyday life for the majority of Afghan women has changed very little since the days of the Taliban, tempering the claims that the legislative changes enacted as a result of OEF have brought about benefits for Afghani women and ultimately rebutting claims that the 'War on Terror', and OEF in particular, was in any way a war for women.

# 1. The Status of Women in Afghan Culture

## 1.1. A Brief History of Afghanistan

Prior to 1919, Afghanistan as a state did not exist.<sup>317</sup> The borders of modern day Afghanistan were drawn by Britain and Russia following several conflicts between the two empires for control of the territory. These conflicts were known as ‘the Great Game’ and as they had focussed on securing British and Russian interests, the resultant boundary of Afghanistan, which delineated an artificial nation state populated by diverse groups of peoples who lacked a national identity, was described as a ‘cultural as well as physical melting pot’.<sup>318</sup> Indeed the only unifying factor was Islam. In addition to Islam this collection of semi-nomadic tribal people’s lives were governed by age-old customs and codes of honour, which similar to other cultures in the region, were embodied by the tribes’ women who were regarded as the guardians of such honour.<sup>319</sup> This meant that they had to be controlled and protected and the most visible manifestation of this was the practice of Purdah, which insists on separate spaces for men and women and prohibits male and female interaction outside of the family.<sup>320</sup> Men traditionally inhabited the public space with women largely being confined to their homes.

In the 1920s, merely a decade after formal independence from Britain, the Afghan King implemented rapid social reforms intending to modernise the country by introducing a Western legal system and institutions.<sup>321</sup> He also mandated that western style dress was to be worn in the Afghan capital. However, these reforms alienated many Afghans and incited religious leaders to stage a coup, forcing the King to abdicate. Yet in 1933 the King’s cousin Zahir Shah ascended the throne and re-attempted reform, though at a more moderate pace. As such it was not until 1959 that purdah was officially abandoned by the state and women were allowed to attend schools and universities.<sup>322</sup> Even so, outside of the main cities and larger towns very few women received an education as there were no schools for them and most women continued to veil in public. Further, anthropologist

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<sup>317</sup> Louis Dupree, *Afghanistan* (Princeton University Press, Princeton 1973) at xx.

<sup>318</sup> *ibid*, at 5.

<sup>319</sup> *ibid*.

<sup>320</sup> *ibid*, at 531.

<sup>321</sup> *ibid*, at 531.

<sup>322</sup> *ibid*.

Louis Dupree notes how, as the *chadori* was being discarded by women in Kabul and other large cities, rural women who moved from small villages to larger towns adopted it in a mistaken attempt to emulate their urban counterparts.<sup>323</sup>

In 1964 Afghanistan gained a written Constitution that guaranteed women's rights to education and work, and in the capital a liberal secular elite emerged. However, the constitution still maintained that the law was based on Koranic teachings and that Afghanistan was an Islamic state. Life for the majority of poor Afghans who lived in the countryside continued much as it always had, governed by the Islam and traditional tribal customs and honour codes. Women were mainly absent from civic spaces and continued their traditional role as wives and mothers, while dressing much as their ancestors did.

## **1.2. The Concept of the Patriarchal System**

Family structures in Afghanistan centre on a patriarch. He is the head of the family and makes all decisions on behalf of his family.<sup>324</sup> The concept of kinship is also hugely important and so members of an extended family tend to live locally and provide assistance to each other, forming small neighbourhoods of extended family and it is preferable for marriages to take place within this extended family.<sup>325</sup> The importance of the family is so strong that the idea of individual identity does not exist. Instead it is the family and kinship identity that dominates.<sup>326</sup> A person's honour, social status and personal codes of conduct are therefore largely determined by their place and role within the family.<sup>327</sup>

## **1.3. Traditional Gender Relations**

Women see themselves as part of the wider family and as such do not see their needs as separate from that of the family.<sup>328</sup> Elaheh Rostami-Povey describes how traditional gender relations in Afghanistan constitute a complex arrangement whereby women are generally highly respected within their communities.<sup>329</sup> In rural communities women are traditional peace brokers and have a responsibility for managing the family's crops and sometimes

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<sup>323</sup> *ibid*, at 246.

<sup>324</sup> *ibid*, at 181.

<sup>325</sup> Hafizullah Emadi, *Culture and Customs of Afghanistan* (Greenwood Publishing Group, Westport Conn. 2005) at 166.

<sup>326</sup> Dupree, *Afghanistan* at 181.

<sup>327</sup> Emadi, *Culture and Customs of Afghanistan*, at 166.

<sup>328</sup> Rostami-Povey, *Afghan Women: Identity and Invasion*, at 17.

<sup>329</sup> *ibid*.

livestock. Many women are also skilled in carpet weaving or embroidery and so provide extra income by working outside the home. However despite this, women are still regarded as chattels among most tribal communities and are expected to submit to the will of men. Once married, women are expected to live with their husband's family. Further the ancient custom of exchanging young girls to end feuds or as payment for a debt remains ingrained.<sup>330</sup> Society also places a much greater value on boys than girls because they inherit the family's land and wealth, whilst girls are destined to join another family.<sup>331</sup> Indeed Emadi describes how some men even 'tattoo their women with the same mark they put on their animals.'<sup>332</sup>

### ***1.3.1. Segregation***

As the markers of a family's honour, women's behaviour is strictly controlled. Segregation is a manifestation of the honour code, whereby a man is expected to provide and care for his wife and protect her from other men. Strict gender segregation is therefore maintained in towns and cities with separate schools, theatres and bathhouses for women. Women are generally expected to remain in their homes unless they have a legitimate reason to leave and are usually accompanied by a male relative known as a *mahram*.<sup>333</sup> As well as the *mahram* women are also thought to be protected by observing hijab and wearing the *chadari*.<sup>334</sup> However rural women rarely wear the *chadari*, unless they have to travel outside of their villages. Instead different ethnic groups have their own distinctive veils or head coverings that can be pulled across the face if necessary. As well as differences in social norms among different ethnic groups, Afghan women have vastly differing experiences depending on whether they have an urban or rural lifestyle. In most Afghan villages all of the inhabitants are considered family, as most people are loosely inter-related. Many rural women work in agriculture and this is particularly true of poorer women, whose families are less likely to be able to afford to hire labour.<sup>335</sup> Consequently

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<sup>330</sup> *ibid.*

<sup>331</sup> Emadi, *Culture and Customs of Afghanistan*, at 168.

<sup>332</sup> *ibid.*

<sup>333</sup> *ibid* and Rostami-Povey, *Afghan Women: Identity and Invasion*, at 18.

<sup>334</sup> Emadi, *Culture and Customs of Afghanistan*, at 170 and Rostami-Povey, *Afghan Women: Identity and Invasion* at 18.

<sup>335</sup> Jo Grace and Adam Pain, 'Rural Women's Livelihood' in Jennifer Heath and Ashraf Zahedi (eds), *Land of the Unconquerable: The Lives of Contemporary Afghan Women* (University of California Press, California 2011) at 4.

these women have considerable freedom to leave their homes without a chaperone and generally only heavily veil in front of strangers.<sup>336</sup>

#### **1.4. The Socialist Experiment (1970-1989)**

In 1973 after a devastating drought and amid social unrest the former Prime Minister Doud Khan seized power and abolished the monarchy. He attempted to reform the country's economy but was unsuccessful. He was then deposed in a bloody coup staged by the Afghan Communist Party (PDPA).<sup>337</sup> At the height of the Cold War the Afghan state maintained a political allegiance to the USSR so although sovereign and independent, the communist government was keen to replicate the Soviet model and as such encouraged women's participation in the workplace. Although they encouraged women's advancement, statistics show that by 1978 only 8% of women received an income and the vast majority of these were urban professionals.<sup>338</sup> Meanwhile the Afghan literacy rate was only 18.7% for men and less than 3% for women.<sup>339</sup>

## **2. War in Afghanistan**

### **2.1. The Soviet Intervention**

In view of this mass social unrest, even the USSR warned the Afghan government that the country was not ready for rapid socialist reform and advised them to embrace Islam and Afghan culture and reform from within.<sup>340</sup> However, the Afghan government, intent on radical reform, ignored this advice and mass discontent ensued. Worried about a destabilising civil war on its border, the USSR eventually sent troops into Afghanistan in December 1979 and installed a puppet communist government. This incensed the majority of Afghans who were opposed to 'foreign invaders' on their land.<sup>341</sup>

Despite its earlier position, one of the new government's many decrees was to ensure equal rights of men and women and remove the 'unjust patriarchal feudalistic relations between

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<sup>336</sup> Dupree, 'Afghan Women under the Taliban', at 160-163.

<sup>337</sup> CountryWatch, 'Political Conditions' [2013] Afghanistan Country Review 15, at 10.

<sup>338</sup> P.R. Blood, 'Afghanistan: A Country Study' (2004) available at <<http://countrystudies.us/Afghanistan/58.htm>> accessed August 2015.

<sup>339</sup> *ibid.*

<sup>340</sup> Tim Bird and Alex Marshall, *Afghanistan: How the West Lost Its Way* (Yale University Press, London 2011), at 32.

<sup>341</sup> CountryWatch, 'Political Conditions', at 11.

husband and wife.<sup>342</sup> The practise of bride price—paying money to the bride’s family as compensation – was banned. Another decree sought to regulate the age of marriage and to enhance the social status of women. The government also insisted on teaching boys and girls together in the newly built schools.<sup>343</sup> Such changes challenged the traditional customs and relations at the heart of Afghan society. According to historian Henry Bradsher, the decree actually set back the development of women’s rights by inadvertently stirring resentment of rural males.<sup>344</sup> Furthermore, while the communists publicly championed women’s rights, privately they did little to further women’s emancipation.<sup>345</sup> Although the new government quickly scrapped some of the more controversial policies and agreed to segregate school pupils and even make girls’ education voluntary, this was not enough to subdue the resentment. Small-scale hostility quickly morphed into mass uprising, generating armed resistance movements.<sup>346</sup> These resistance fighters became known as the Mujahideen and were covertly funded by the USA, Pakistan, Saudi Arabia and China. The Mujahideen were soon involved in a brutal war of resistance against the Soviets.

### ***2.1.1. The Soviet War and Emergence of the Mujahideen***

Any gains in women’s rights were quickly lost as fighting drove people from their homes and society disintegrated.<sup>347</sup> Sima Samar notes that ‘what little development was taking place in rural regions came to a complete halt because of the fighting.’<sup>348</sup> Millions escaped abroad or became internally displaced.<sup>349</sup> ‘Medical professionals, along with others in the educated classes, fled the country, leaving women who, to this day, have never seen a doctor in their entire lives.’<sup>350</sup> Vast refugee camps were established in Pakistan. Bradsher notes that for many rural Afghan women, life in exile initially offered greater freedom than they had previously experienced. However for educated urban women, life in the camps

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<sup>342</sup> Henry S. Bradsher, *Afghan Communism and Soviet Intervention* (1st edn, Oxford University Press, Oxford 1999), at 45.

<sup>343</sup> *ibid.*

<sup>344</sup> *ibid.*

<sup>345</sup> *ibid.*, at 122.

<sup>346</sup> Chris Johnson, *Afghanistan: An Oxfam Country Profile* (Oxfam 2004), at 18.

<sup>347</sup> Nassim Jawad, ‘Afghanistan: A Nation of Minorities’ (Minority Rights Group International, London, 1992).

<sup>348</sup> Sima Samar, ‘The Hidden War against Women’ in Jennifer Heath and Ashraf Zahedi (eds), *Land of the Unconquerable: The Lives of Contemporary Afghan Women* (California University Press, California 2011), at 2

<sup>349</sup> Jawad, ‘Afghanistan: A Nation of Minorities’, at 19.

<sup>350</sup> Samar, ‘The Hidden War against Women’, at 2.

was restrictive and regressive.<sup>351</sup> This would be further compounded by the fact that many Afghans were aware that, exiled from their homelands, Afghan culture would fade and so many Afghan men sought to impose a strict interpretation of Afghan traditional life on all women in the refugee camps. Bradsher describes how men dominated the camps while ‘women were forced into unwanted seclusion and isolation as the war’s threat to Afghan customs caused some men to become insistent upon observing them.’<sup>352</sup>

### ***2.1.2. Soviet Withdrawal***

Meanwhile in 1988 the UN oversaw an agreement, known as the Geneva Accords, between Afghanistan, Pakistan, USSR and the US, which provided for an end to the proxy war in Afghanistan. The USSR had been keen to withdraw from Afghanistan as early as 1982 when it became clear that it could not subdue Afghanistan by force.<sup>353</sup> Not wanting to create a power vacuum on their exit, the Soviets spent years refining an exit plan that would leave a strong government with financial backing. However, partly due to oversight and partly due to their status as non-state actors, the Mujahideen fighters had not been party to the UN peace agreement and so they continued to fight the Soviet-backed government, which held out mainly thanks to Soviet aid and weapons, but also in part because ordinary people feared what would happen if the Mujahideen won.<sup>354</sup> According to Bradsher, the worst worries were that Mujahideen Commander Gulbuddin Hekmatyar<sup>355</sup> would attempt to realise his vision of a pure Islamic state that would see women forcibly returned to their homes.<sup>356</sup> The number of refugees fleeing the country rose dramatically. By 1990 there were 6.3 million Afghans in exile, mainly in Pakistan and Iran.<sup>357</sup> In Pakistan the UN assisted in setting up makeshift refugee camps for 3 million people who were mainly ethnic Pashtuns. Lack of opportunity and integration meant that as these

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<sup>351</sup> Bradsher, *Afghan Communism and Soviet Intervention*, at 180.

<sup>352</sup> *ibid.*

<sup>353</sup> CountryWatch, ‘Political Conditions’, at 11.

<sup>354</sup> Bradsher, *Afghan Communism and Soviet Intervention*, at 338.

<sup>355</sup> Gulbuddin Hekmatyar was identified by Pakistani intelligence and the CIA as a leading commander who would serve their purposes. He was praised by Pakistani intelligence as the ‘toughest and most vigorous of all the alliance leaders’. In fact Hekmatyar was already known to the west; he had gained a reputation in the 1970s as an engineering student at Kabul University who regularly threw acid in the faces of unveiled female students.

<sup>356</sup> Bradsher, *Afghan Communism and Soviet Intervention*.

<sup>357</sup> Rashid, *Taliban: The Story of the Afghan Warlords*.

camps became permanent settlements they provided the perfect breeding ground for radicalised fighters.<sup>358</sup>

## **2.2 Mujahideen Rule and all out Civil War (1992-1997)**

In 1992 the Mujahideen forces surrounded Kabul and after intensive fighting, the capital and the Soviet backed government fell. Kabul, which had previously mostly escaped the war with the Soviets, was decimated by the Mujahideen who, having ousted the last vestige of communist government, quickly fractured as a force, warring among themselves for the spoils.<sup>359</sup> Vying for control, the Mujahideen commanders immediately sought to impose more traditional structures and norms in Kabul in an effort both to curry favour with Islamic clerics, but also to ‘cleanse’ the city from communist rule. Afghan scholar Hafizullah Emadi writes that a major feature of the Islamic regime was its ‘concerted effort to eliminate every vestige of modernity and secular development associated with past regimes.’<sup>360</sup> He cites a Mujahideen general who reportedly said that:

It would be better for the Mujahideen to raze Kabul and rebuild it in the image of their version of Islam. If that meant the death of many of the one million people living in Kabul, so be it...They were communists, or at least sympathisers, otherwise why would they have stayed in the city during Najibullah’s rule.<sup>361</sup>

As such, instead of rebuilding war-torn infrastructure and civic institutions, the Islamic warriors imposed their vision of an Islamic society and forced people to abide by their rulings.<sup>362</sup> They quickly issued an edict requiring women to cover themselves and advised them to stay at home.<sup>363</sup> Understanding that the key to controlling the country was to control women, who traditionally symbolised national honour, the leaders sought to control women’s activities in the name of Islam. It was soon announced that all Government

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<sup>358</sup> *ibid.*

<sup>359</sup> CountryWatch, ‘Political Conditions’, at 11.

<sup>360</sup> Hafizullah Emadi, *Dynamics of Political Development in Afghanistan: The British, Russian, and American Invasions* (Palgrave Macmillan, Basingstoke 2010), at 170.

<sup>361</sup> *ibid.*

<sup>362</sup> *ibid.*, at 176.

<sup>363</sup> Bird and Marshall, *Afghanistan: How the West Lost Its Way*.

departments had to sack their female employees and girls' schools were closed. The regime declared such establishments as 'no different from whorehouses'.<sup>364</sup>

### *2.2.1. Violence and Corruption*

Drawing on her extensive fieldwork in Afghanistan, anthropologist and leading Afghanistan scholar Nancy Dupree describes how during the Mujahideen reign violence against women was common and universally acknowledged.<sup>365</sup> Abductions, forced marriage, rape and trafficking in boys and girls became a hallmark of the Mujahideen rulers. Women were frightened to leave their homes due to the unstable security situation.<sup>366</sup>

Young immature Mujahideen who had grown up on the battlefield under the influence of conservative leaders marvelled at the unveiled Afghan female newsreaders on TV, concluded they must be promiscuous, and – Kalashnikovs at the ready – waylaid the ladies at the studio gate saying, 'Tonight you are mine'. Several former TV celebrities [told] how relieved they were when the Rabbani government finally put a ban on female TV appearances, an act denounced by Westerners as being discriminatory to women.<sup>367</sup>

Rather than attempting to alleviate the problems of the people, the commanders instead sought to consolidate their own power. 'Warring factions seized men and women of rival groups as well as non-combatant hostages, and raped and mutilated their captives.'<sup>368</sup> Those same Islamic fundamentalists who had been hailed as freedom fighters in the 1980s by the West destroyed the country's infrastructure and 'transformed Afghanistan into a wasteland.'<sup>369</sup> Despite UN attempts to secure a ceasefire the fighting continued and spread

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<sup>364</sup> Emadi, *Dynamics of Political Development in Afghanistan: The British, Russian, and American Invasions*, at 176.

<sup>365</sup> Dupree, 'Afghan Women under the Taliban', at 147.

<sup>366</sup> Rostami-Povey, *Afghan Women: Identity and Invasion*, at 35.

<sup>367</sup> Dupree, 'Afghan Women under the Taliban', at 150.

<sup>368</sup> Emadi, *Dynamics of Political Development in Afghanistan: The British, Russian, and American Invasions*, at 175.

<sup>369</sup> *ibid*, at 175.

to Kabul, which had largely escaped unscathed during the Soviet occupation.<sup>370</sup> Although Afghanistan had always been a conservative Islamic country, it increasingly galled people to witness the blatant hypocrisy of the Mujahideen leaders. They imposed harsh sanctions and strict codes promoting observance with Islam whilst becoming embroiled in corruption and drug smuggling and enabling a violent lawless society. The leaders consolidated their positions and the civil war increasingly took on an ethnic dimension with each of the leaders holding power in a separate region of the country which reflected the ethnic demography. UN plans to repair even basic infrastructure were thwarted due to lack of funds and the lack of security.<sup>371</sup> This ruthless and lawless governance of Afghanistan left many Afghans disillusioned and precipitated the exodus of a further 2 million refugees. In 1994 the UN began an annual appeal for funds to provide food aid in Afghanistan, although these appeals generally failed to generate even half of the funds requested.<sup>372</sup> Meanwhile the Mujahideen fighters, who had initially been cheered as heroes, quickly plummeted in the estimation of local people with some denouncing them as ‘worse than the Russians’.<sup>373</sup>

### **3. The Emergence of the Taliban**

In the midst of this chaos, a new faction known as the Taliban emerged, largely unnoticed. The word Talib referred to the madrassa students who had largely been educated in refugee camps in Pakistan.<sup>374</sup> Many were orphans who had grown up in male-only environments, with very little knowledge of the world outside of the madrassas which delivered a puritanical version of Islam.<sup>375</sup> Indeed, Emadi highlights that ‘institutions that aided refugees and orphanages were funded by rich Arab states such as Saudi Arabia and

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<sup>370</sup> SC Res 1076 (1996) (UN Doc S/RES 1077) called on all Afghan parties to end hostilities and engage in a political dialogue aimed at achieving national reconciliation, but this had little effect. For a brief analysis of the UN’s involvement see further <<http://www.un.org/News/dh/latest/afghan/un-afghan-history.shtml#1990s>> accessed August 2015.

<sup>371</sup> *ibid.*

<sup>372</sup> *ibid.*

<sup>373</sup> Bird and Marshall, *Afghanistan: How the West Lost Its Way*, at 34.

<sup>374</sup> CountryWatch, ‘Political Conditions’, at 12.

<sup>375</sup> Carol Mann, ‘Models and Realities of Afghan Womanhood: A Retrospective and Prospect’ (Gender Equality and Development Section, Social and Human Sciences Sector, UNESCO as part of the programmatic work on “the role of culture and social institutions”, July 2005), at 9 and also Rashid, *Taliban: The Story of the Afghan Warlords*, at 23.

Kuwait, and these countries played an instrumental role in recruiting fighters for the cause of Islamic fundamentalism.<sup>376</sup>

The Taliban movement is reputed to have emerged as a counterweight to the excesses and lawlessness of the Mujahideen, which many Afghans thought had become corrupt and immoral.<sup>377</sup> After 15 years of war, civil society and the rule of law were almost non-existent in Afghanistan. Infrastructure and government had largely been destroyed and people retreated into their ethnic and familial communities where they forged alliances in order to survive. The discipline and piety of the Taliban offered a welcome change from the corruption and lawlessness that had preceded. Indeed local folklore tells that Taliban leader Mullah Omar was catapulted to prominence after he pursued a group of Mujahideen who had abducted and brutally raped two young girls. He and his fighters gained local respect after they rescued the girls and punished the perpetrators.<sup>378</sup> From then on the Taliban rank-and-file members came to regard Omar as ‘a saint chosen by God for his piety to deliver the people from the misery of a fratricidal war that had destroyed Afghanistan.’<sup>379</sup>

In the South of the country word of the Taliban’s creed and victories against local warlords spread. People called on the Taliban to police their villages and punish the corrupt local commanders. In this way, Ahmed Rashid describes Omar as something of a ‘Robin Hood figure’ who opposed the powerful and helped the poor. It is therefore understandable how the Taliban legend spread and support was quickly forthcoming especially since they did not charge for their services and refused to take bribes.<sup>380</sup> Instead they pledged to eradicate corruption and re-instil civic values and promote sharia law. Therefore many ordinary people initially welcomed the movement because ‘after eighteen years of armed conflict there was such a desperate longing for stability and peace that for some people almost any

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<sup>376</sup> Emadi, *Dynamics of Political Development in Afghanistan: The British, Russian, and American Invasions*, at 178.

<sup>377</sup> Rostami-Povey, *Afghan Women: Identity and Invasion*, at 23.

<sup>378</sup> Rashid, *Taliban: The Story of the Afghan Warlords*, at 25.

<sup>379</sup> Emadi, *Dynamics of Political Development in Afghanistan: The British, Russian, and American Invasions*, at 179.

<sup>380</sup> Johnson, *Afghanistan: An Oxfam Country Profile*, at 26.

price was worth paying for some basic security.<sup>381</sup> By 2001 the Taliban had pushed out and defeated many of the Mujahideen commanders and controlled almost 90% of Afghanistan, successfully disarmed much of the population and controlled and taxed the opium trade.<sup>382</sup> Despite remaining at war with United Front/Northern Alliance,<sup>383</sup> who held the northern and eastern parts of the country, relative stability prevailed under the Taliban. Barnett Rubin noted during a trip to Afghanistan in 1996 that the contrast between the relative normalcy and security in the Taliban controlled areas compared to those under Mujahideen rule was striking.<sup>384</sup>

### 3.1. Understanding the Taliban

In Western discourse the Taliban era has become synonymous with the obliteration of women's rights in Afghanistan. Headlines describing a strict social code more reminiscent of biblical times, alongside brutal footage showing macabre and grotesque executions of women shrouded in fabric generated mass condemnation from human rights and women's organisations.<sup>385</sup> However outside of the NGOs the international community was largely silent regarding the Taliban's operations.<sup>386</sup> It was not until 9/11 that any sustained international attention was paid to the Taliban regime. However, perhaps in order to familiarise the public with this organisation the media focussed on a homogenised and clichéd depiction of the Taliban. There were remarkably few attempts to explain the varied factors that had also contributed to the horrific conditions in which many Afghans lived. Conditions such as two decades of war, a rugged mountainous landscape, and an insular and traditional population who continued to live a rural agrarian lifestyle were often absent

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<sup>381</sup> *ibid.* See also Human Rights Watch, "The "Ten-Dollar Talib" and Women's Rights: Afghan Women and the Risks of Reintegration and Reconciliation" (HRW, 2010), at 19.

<sup>382</sup> Rostami-Povey, *Afghan Women: Identity and Invasion*, at 23.

<sup>383</sup> CountryWatch, 'Political Conditions', at 13.

<sup>384</sup> Barnett R. Rubin, *Afghanistan from the Cold War through the War on Terror* (Oxford University Press, Oxford 2013), at 12.

<sup>385</sup> Amnesty International reported on 13 March 1998, that women were being flogged for adultery in weekly sentencing demonstrations at Kabul Stadium. The report also documents some of the executions carried out by the Taliban. See Amnesty International, 'Afghanistan: Flagrant Abuse of the Right to Life and Dignity' (Amnesty International, April 1998). See also Jason Burke 'Half an Hour After the Executions, Kabul Stadium Opens For Football', *Independent* (London, 15<sup>th</sup> August 1998); RAWA 'Taliban Publicly Execute Women (17 November 1999) <<http://www.rawa.org/murder-w.htm>> accessed August 2015.

<sup>386</sup> In 1984 the then UN Human Rights Commission expressed concern at the human rights situation in Afghanistan and appointed a Special Rapporteur for Human Rights in Afghanistan to report on the situation. The Special Rapporteur repeatedly expressed concern at the human rights situation throughout both the Mujahideen era and the Taliban era. The Special Rapporteur's mandate continued until 2005 whereupon it was subsumed within UNAMA.

from media reports on Afghanistan. The fact that the Taliban had grass roots support from many Afghans was also rarely explored and instead only a one-dimensional picture of the Taliban as brutal fanatics oppressing a country was offered.

### ***3.1.1. Understanding the Taliban's Beliefs***

While the Taliban's decrees and attitudes towards women were especially restrictive, the Taliban's ideology by no means existed in a vacuum. While the Taliban was successful in implementing a virtual gender apartheid that horrified the developed world, the beliefs and views underpinning this system were widely shared by many ordinary Afghans. According to Nancy Dupree, 'Afghan society is consistent in its innate belief in male superiority...The Taliban [were] reinforcing the patriarchal norms wrapped in the mantle of Islam.'<sup>387</sup>

The Taliban are Pashtuns and as such adhere to the Pashtunwali, the Pashtun social code that regulates the lives of the Pashtun people.<sup>388</sup> According to Rashid the 'line between Pashtunwali and Sharia law has always been blurred for the Pashtuns'<sup>389</sup> and as such, while much of what the Taliban preached was a fundamental interpretation of Islam, it was also a version of Pashtunwali that they were 'determined to impose on other ethnic groups by force.'<sup>390</sup> It was this code that traditionally saw women in the south of Afghanistan, Kandahar in particular, wear long flowing robes known as *chadori*. In these southern provinces where many Taliban were from, women were always veiled and never attended school perhaps, as Rashid wryly notes, because there were none.<sup>391</sup> However, while Pashtunwali was practised to varying degrees across the Pashtun provinces it has never governed the lives of the other ethnic groups in Afghanistan. According to Christine Aziz, Hazara and Tajik women have always had more freedom than Pashtun women.<sup>392</sup>

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<sup>387</sup> Dupree, 'Afghan Women under the Taliban', at 163.

<sup>388</sup> As well as regulating social conduct, the Pashtunwali covers a broad swathe of issues including inheritance, transactions and criminal justice. For an overview of Pashtunwali justice see M.A. Drumbl, 'Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan' (2003) 42 Columbia Journal of Transnational Law 349.

<sup>389</sup> Rashid, *Taliban: The Story of the Afghan Warlords*, at 112.

<sup>390</sup> Rostami-Povey, *Afghan Women: Identity and Invasion*, at 23.

<sup>391</sup> Rashid, *Taliban: The Story of the Afghan Warlords*, at 110.

<sup>392</sup> Christine Aziz, 'Defiance and Oppression – the Situation of Women in Afghanistan' in Edward Giradet (ed), *The Essential Field Guide to Afghanistan* (Crosslines Essential Media UK, London 1998) Cited in R. Skaine, *The Women of Afghanistan under the Taliban* (McFarland & Company, Jefferson 2002).

As such, it was educated and metropolitan women who were most altered by the Taliban. According to Dupree, nomadic and rural women (who constitute the majority of Afghan women) have been little affected.<sup>393</sup> Drawing on decades of fieldwork in Afghanistan, Dupree concludes that most rural women's ambition is to become a mother and that it is through this and sound household management women can achieve status and personal fulfilment, and as such, they are little concerned with their pre-determined role in life.<sup>394</sup> However urban women, particularly those from Kabul actually faced much tougher restrictions than rural women; being forced to wear the burqa and having their movement outside the home extensively curtailed.<sup>395</sup> Prior to the civil war, Kabul was a semi-modern cosmopolitan city where Afghans from various ethnic backgrounds cohabited peacefully. Women from wealthy middle-class families constituted a liberal elite who wore western dress and worked alongside men in professional level jobs or attended the city's university. These restrictions were then doubly oppressive considering urban women were used to a much more liberal lifestyle than their rural sisters, and so it was these women who bore the 'full brunt of Taliban ire'.<sup>396</sup>

According to Rashid, many of the Taliban's leaders had never been to Kabul, but they planned to administer the city in the same way that they did rural villages.<sup>397</sup> Indeed 'Taliban rule, in one sense, was the forced application of conservative Pashtun village life in Afghanistan's cities.'<sup>398</sup> Many of the Taliban's young militia were 'nurtured in the isolation of ultra-conservative madrassas'<sup>399</sup> and had grown up absent of women and been indoctrinated to think that unveiled women were morally vacuous. According to Dupree, 'they arrive[d] in Kabul fervently imbued with the conviction that as instruments and arbiters of Islamic rectitude their task [was] to rid the city of sinful ways, personified by cosmopolitan Kabuli women.'<sup>400</sup>

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<sup>393</sup> Dupree, 'Afghan Women under the Taliban', at 163.

<sup>394</sup> *ibid*, at 163.

<sup>395</sup> Johnson, *Afghanistan: An Oxfam Country Profile*, at 26.

<sup>396</sup> Dupree, 'Afghan Women under the Taliban'.

<sup>397</sup> Rashid, *Taliban: The Story of the Afghan Warlords*.

<sup>398</sup> Drumbl, 'Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan' at 366.

<sup>399</sup> Dupree, 'Afghan Women under the Taliban', at 150.

<sup>400</sup> *ibid*, at 150.

## 3.2. Taliban Decrees

### 3.2.1. Consequences in the Cities

The Taliban arrived in Kabul in September 1997 having controlled Kandahar and southeast Afghanistan for several years. Within hours of arriving in the city the Taliban had decreed that women were not to work outside of their homes; were not to leave their homes uncovered and girls were not to attend school.<sup>401</sup> The unintended consequences of this were devastating. In Kabul women constituted up to 70% of the city's teachers, 50% of its civil servants, 40% of its doctors and 50% of the students at the University.<sup>402</sup> Preventing women from attending work meant an acute shortage of teachers, so boys' education was also impacted. A study from 2000 found that in Taliban controlled parts of Afghanistan 90% of girls and 75% of boys were not attending school.<sup>403</sup> It also meant that women were effectively denied any medical assistance as it was forbidden for a male doctor to examine a female patient or for women to attend hospitals. According to the Revolutionary Association of the Women of Afghanistan (RAWA) this 'severely curtailed health care access for women'.<sup>404</sup>

Yet the Taliban's edicts did not solely concern women. There were also restrictions placed on men's attire.<sup>405</sup> Men were forbidden to wear 'western' clothes or hairstyles and prohibited from shaving their facial hair. Music, singing and dancing were all prohibited and deemed un-Islamic. Popular Afghan pass-times such as kite flying were also outlawed in an effort to instil a radical and puritanical form of sharia law: what the Taliban decreed as 'true Islam'. The list of prohibitions soon included photography, girls' sports, white socks, make-up, nail polish and high-heeled shoes.<sup>406</sup> The creation of *Amri Bilmarof wa Nahi al-Munkir* (the Department for the Promotion of Virtue and Prevention of Vice)

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<sup>401</sup> For an English translation of Taliban decrees relating to women see Rashid, *Taliban: The Story of the Afghan Warlords* at Appendix 1.

<sup>402</sup> G.C. Giorgi and D. Thomas, 'The Revolutionary Association of the Women of Afghanistan: Lifting the Veil of Feminism in Afghanistan' (2009) available at [http://www.umb.edu/editor\\_uploads/images/kingstonmann/Giorgi.pdf](http://www.umb.edu/editor_uploads/images/kingstonmann/Giorgi.pdf) accessed August 2015, at 14.

<sup>403</sup> *ibid*, at 17.

<sup>404</sup> *ibid*, at 15.

<sup>405</sup> Emadi, *Dynamics of Political Development in Afghanistan: The British, Russian, and American Invasions*, at 182.

<sup>406</sup> Rashid, *Taliban: The Story of the Afghan Warlords* at Appendix 1. A summary of the Taliban's decrees is also available at [Womenaid International <http://www.womenaid.org/humanrights/shadows/talibandecrees.htm>](http://www.womenaid.org/humanrights/shadows/talibandecrees.htm) accessed August 2015.

policed these gender related decrees and meted out corporal punishment to those who violated them.<sup>407</sup> Women were not allowed to drive or even to sit in the front seat of a car. To further prevent women from being seen, even in their own homes, the Taliban insisted that all ground floor windows be painted black.<sup>408</sup>

### ***3.2.2. Unintended Consequences***

As well as the restrictions on women's liberties, the Taliban edicts affected women's health and wellbeing. Women were forbidden from speaking to any man who was not a relative so they were unable to consult a male doctor. An NGO worker in Kabul reported that almost 90% of women in the city were suffering from depression and other mental health problems in part because they were prisoners in their own homes.<sup>409</sup> A further restriction, which had severe negative consequences on women's health, was the Taliban's closure of the women's baths. In cities where there was no running water and most people could not afford fuel to burn in winter, the public bathhouses had provided women with the opportunity to maintain hygiene in a clean and warm environment. When the Taliban closed the bathhouses in Herat, local women fought back and instigated a protest march and demonstration against the closure.<sup>410</sup> The Taliban arrested many of the women and used deadly force to break up the demonstration. All the while the international community remained silent.<sup>411</sup> The effects of the Taliban decrees were felt much more harshly in Kabul and other large urban areas such as Mazer-e sharrif and Herat where the Dari-speaking women had traditionally enjoyed more freedoms than their Pashtun counterparts in Kandahar.<sup>412</sup>

### ***3.2.3. Capturing the world's attention***

However, what shocked the world was the Taliban's absolute insistence on pursuing a 'pure' Islamic state modelled on the society that the Prophet had inhabited. This was seen as a fanatical attempt to transport Afghanistan back to medieval times. This vision of

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<sup>407</sup> Emadi, *Dynamics of Political Development in Afghanistan: The British, Russian, and American Invasions*, at 182.

<sup>408</sup> Rashid, *Taliban: The Story of the Afghan Warlords* at Appendix 1.

<sup>409</sup> Physicians for Human Rights, 'The Taliban's War on Women: A Health and Human Rights Crisis in Afghanistan' (1998).

<sup>410</sup> Commission on Human Rights, 'Final Report on the Situation on Human Rights in Afghanistan' (submitted by Mr Choon-Hyun Paik Special Rapporteur on Afghanistan in Accordance with Commission on Human Rights Resolution 1997/75 (20<sup>th</sup> February 1997) UN Doc E/CN.4/1997/59, at 16.

<sup>411</sup> Rashid, *Taliban: The Story of the Afghan Warlords*, at 113.

<sup>412</sup> Rostami-Povey, *Afghan Women: Identity and Invasion*, at 26.

society was particularly encapsulated in the weekly executions in Kabul's football stadium. Western attention was briefly focussed on Afghanistan when macabre footage of women being stoned to death was smuggled out of the country and aired on foreign news networks.<sup>413</sup> Such images galvanised international women's organisations to mount a sustained campaign against the Taliban. A prominent campaigner for Afghan women's rights during the Taliban era was Hilary Clinton, who spoke out at the UN about the conditions in Afghanistan.

There probably is no more egregious and systematic trampling of fundamental rights of women today than what is happening in Afghanistan under the iron rule of the Taliban...We've all heard, all of us, the stories of women being flogged with metal cables because a bit of ankle would be showing. We've heard of women being taken to hospital after hospital and finally dying because no care could be given because there were no women doctors and no male doctor could be permitted to treat the woman.<sup>414</sup>

Although they had been enforcing their interpretation of Islam on large parts of Afghanistan since 1992, it was only when the Taliban took Kabul and enforced their restrictive edicts that the international community spoke up. The UN Secretary General said that the Taliban restrictions could seriously affect the work of the programs delivered by the UN.<sup>415</sup> The EU Commissioner for Humanitarian Aid, Emma Bonino, accused the Taliban of sending the country 'back to the dark ages',<sup>416</sup> while US Permanent Representative to the UN, Madeleine Albright called the Taliban decrees 'despicable' and 'impossible to justify or defend.'<sup>417</sup>

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<sup>413</sup> See for example 'Beneath the Veil' Dispatches, Channel 4, Hardcash productions. The documentary contains RAWA undercover footage of Taliban executions.

<sup>414</sup> Hilary Rodham Clinton, 'Remarks by First Lady Hilary Rodham Clinton.' United Nations International Women's Day Speech on Women's Rights, New York City, Mar. 4, 1999, cited in Skaine, *The Women of Afghanistan under the Taliban*, at 182.

<sup>415</sup> United Nations, Department of Public Affairs, 'Secretary-General Restates United Nations Policy on Gender Equality in Response to Concerns about Status of Women in Afghanistan' (New York, 8 October 1996).

<sup>416</sup> Rashid Ahmed, 'Taliban Hold Bonino in Hospital Ward' *Daily Telegraph* (30 September 1997).

<sup>417</sup> 'Steven Erlanger, 'In Afghan Refugee Camp, Albright Hammers Taliban' *New York Times* (New York 19 November 1997)

UN agencies and institutions became increasingly concerned with the situation in Afghanistan throughout the 1990s. However, only Pakistan, Saudi Arabia and the United Arab Emirates recognised the Taliban as the legitimate Afghan government and so there was no legitimate government to represent Afghanistan at the UN. UN bodies issued resolutions and reports calling on the Taliban to respect human rights and abide by its international obligations. Afghanistan was party to the International Covenant on Civil and Political Rights (ICCPR),<sup>418</sup> the International Covenant on Economic Social and Cultural Rights (ICESCR),<sup>419</sup> both of 1966, and the Convention Against Torture 1984.<sup>420</sup> Prior to 2003 it had signed but not ratified the 1979 Convention on Elimination of Discrimination against Women (CEDAW). However the Taliban refused to recognise the relevant international legal conventions, recognising only the principles of Sharia.

### **3.3. Legal Standards Denied to Women**

In view of the increasing concern of the UN agencies and NGOs, and in order to evaluate the claims of those who wished to remove the Taliban to further women's human rights, this section examines in detail the human rights standards under the Taliban and the international community's response. The following sections outline the key human rights infringements that excised the international community, and consider how such infringements were framed at the time.

#### ***3.3.1. The Right to Life***

Article 3 of the 1948 Universal Declaration of Human Rights states that 'everyone has the right to life.' This sentiment is also enshrined in Article 6 of the ICCPR.<sup>421</sup> However, under the Taliban women found guilty of committing moral crimes such as fornication or adultery were publically stoned to death.<sup>422</sup> While administering the death penalty is not in violation of international law, the Taliban's medieval methods attracted much outrage due

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<sup>418</sup> International Covenant on Civil and Political Rights (opened for signature 19 December 1966, entered into force 23 March 1976) 999 UNTS 171

<sup>419</sup> International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

<sup>420</sup> Convention Against Torture (opened for signature 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

<sup>421</sup> Article 6(1) of the ICCPR states that: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

<sup>422</sup> UN General Assembly, 'Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives-Situation of Human Rights in Afghanistan' (16 October 1997) UN Doc A/52/493, at 15.

to the suffering caused.<sup>423</sup> International legal consensus is that states are to work towards abolition of the death penalty<sup>424</sup> and the ICCPR encourages states to do so.<sup>425</sup> While Afghanistan is not party to the Second Optional Protocol of the ICCPR (which mandates abolition of the death penalty), the Convention decrees that while states are encouraged to abolish the death penalty, where it is presently retained, it may only be used for the most serious crimes.<sup>426</sup> The ‘most serious crimes’ are described as ‘intentional crimes with lethal or other extremely grave consequences.’<sup>427</sup> It is difficult to see how adultery would fit this description and so the focus on this punishment is merited and understandable. Although men were also punished for moral crimes under the Taliban, it was women that were particularly affected. Mere suspicion of sexual relations could often put women at risk of death. According to Choong-Hyun Paik, Special Rapporteur of the Commission on Human Rights, a woman was stoned for adultery in Laghman in 1997 after reportedly attempting to leave the province with a man who was not her husband. The Special Rapporteur was told that only women tended to be stoned in such situations and he expressed concern.<sup>428</sup>

### ***3.3.2. Freedom of Movement and Association***

Under the Taliban, Afghan women were confined to the home and if they ventured out unaccompanied or unsuitably dressed then they were beaten and humiliated by the Department for the Promotion of Virtue and Prevention of Vice’s religious police. Women had no rights of association or any right to form groups, clubs or societies. They could not associate in large groups or participate in group activities. According to a Taliban official, the only place for a woman was ‘in her husband’s house and in the graveyard.’<sup>429</sup>

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<sup>423</sup> Footage of the weekly executions in Kabul stadium was smuggled out of Afghanistan by women’s rights activists and is generally considered the catalyst for the for campaign against gender apartheid in Afghanistan. The use of this footage to mobilise Western feminists is discussed further infra in Chapter 3, section 4.2.

<sup>424</sup> R.K.M. Smith, *Textbook on International Human Rights* (Oxford University Press, USA 2007) at 197.

<sup>425</sup> Article 6(6) of the ICCPR states that: Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

<sup>426</sup> Article 6(2) of the ICCPR states that: In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

<sup>427</sup> See ECOSOC Res 1984/50 ‘Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’ (25 May 1984) UN Doc E/1984/50, Annex, para 1. See also UN Commission on Human Rights Res 2003/67 (24 April 2003) UN Doc E/CN.4/2003/135, para 4(d).

<sup>428</sup> *ibid.*

<sup>429</sup> Jan Goodwin, ‘Buried Alive: Afghan Women under the Taliban’ (1998) 7 *On the Issues* 3.

Furthermore, the Taliban ruthlessly enforced the sanctions on women's attire. According to the Department Responsible for the Promotion of Virtue and Prevention of Vice, the only acceptable covering was deemed to be the *chadori* because 'all other forms of hijab were foreign imports into Afghan culture'.<sup>430</sup> As such the Taliban returned Kabul to the days prior to 1959 when the government had announced the end of mandatory seclusion and wearing of the veil.

UN Special rapporteurs consistently expressed concern at the violations of basic human rights in Afghanistan. It was repeatedly highlighted that Afghanistan was party to the ICCPR and ICESCR.<sup>431</sup> Article 12 of the ICCPR states that everyone shall have the right to liberty of movement and Article 22 of the same convention guarantees freedom of association. Article 17 further states that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'<sup>432</sup> The Commission on Human Rights repeatedly noted that such violations particularly affected women.<sup>433</sup>

Yet, despite international condemnation, the Taliban claimed that such restrictions actually restored women's rights and they insisted that they alone 'protect[ed] human rights and liberties in Afghanistan.'<sup>434</sup> They also argued that they had eradicated the 'miserable living conditions under which [their] women were living' and had 'restored women's safety, dignity and freedom.'<sup>435</sup> In respect of the dress restrictions, while the burqa was quite alien to the women of Kabul, Dupree notes that the majority of them were willing to wear it if it allowed them to continue to work or go about their business.<sup>436</sup> However, in a bizarre development, Mr. Choong-Hyun Paik, the UN Special Rapporteur on Human Rights in

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<sup>430</sup> Dupree, 'Afghan Women under the Taliban', at 152.

<sup>431</sup> Commission on Human Rights, 'Integration of the Human Rights of Women and the Gender Perspective: Violence against Women' (Submitted by Ms Radhika Coomaraswamy Special Rapporteur on Violence Against Women in accordance with Commission on Human Rights Res 1997/44 13 March 2000) UN Doc E/CN.4/2000/68/Add.4, at 5.

<sup>432</sup> ICCPR, Article 17.

<sup>433</sup> Commission on Human Rights Res 1998/70 (21 April 1998) UN Doc E/CN.4/1998/70; Commission on Human Rights, 'Final Report on the Situation of Human Rights in Afghanistan' (20 February 1997) UN Doc E/CN.4/1997/59, at para 61; Commission on Human Rights 'Situation of Human Rights in Afghanistan' (Report of the Secretary General 21 April 1998) UN Doc E/CN.4/1998/71, at 8.

<sup>434</sup> Taliban representative to the UN, General Hakeem Mujahid, quoted in Goodwin, 'Buried Alive: Afghan Women under the Taliban'.

<sup>435</sup> *ibid.*

<sup>436</sup> Dupree, 'Afghan Women under the Taliban', at 156.

Afghanistan, reported that sexual harassment had actually increased in Kabul since the Taliban had forced women to wear the garment. He had been informed that some men perceived the burqa to be ‘provocative’ and as such reported that an increasing number of women were subjected to ‘indecent proposals’ at bus stops while wearing the garment.<sup>437</sup>

### ***3.3.3. The Right to Work***

The right to work is enshrined in Article 6 of the International Covenant on Economic, Social Cultural Rights (ICESCR) 1966. The same convention binds the parties to guarantee these rights equally for men and women.<sup>438</sup> Yet hours after the Taliban edicts, female civil servants were initially suspended and told their salaries would continue to be paid, however after receiving one month’s pay the women’s salaries were never paid again.<sup>439</sup> This prohibition on women working brought considerable hardship to many women in Afghanistan, particularly for those living in urban centres and those heading households. Afghanistan’s on-going civil war had created thousands of widows, many of who were displaced and removed from extended family and therefore social safety nets. An inability to work meant that many of them faced an impossible struggle to survive. When pressed on the plight of Kabul’s 30,000 widows the Taliban were reported to have questioned why NGOs and the international community continually focussed on minor issues, stating that the widows were not a priority in a country devastated by decades of war.<sup>440</sup> Nevertheless, following considerable pressure from the international community, in 1999 the Taliban relaxed the prohibition for ‘needy’ widows who were allowed to seek work in the health sector. However, such limited opportunities were few, which meant that the majority of widows in Kabul were still dependent on international aid agencies for survival. This led to the hitherto unheard of situation of beggars on Kabul’s streets. Women were also reported to have turned to prostitution to survive, something that the Taliban strenuously denied, having previously claimed that they had eradicated vice and prostitution from Afghanistan.<sup>441</sup>

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<sup>437</sup> Commission on Human Rights ‘Situation of Human Rights in Afghanistan’ (Report of the Secretary General 21 April 1998) UN Doc E/CN.4/1998/71, at 8.

<sup>438</sup> ICESCR, Article 3.

<sup>439</sup> Commission on Human Rights, ‘Final Report on the Situation of Human Rights in Afghanistan’ (20 February 1997) UN Doc E/CN.4/1997/59, at 17.

<sup>440</sup> Editorial ‘Aid Agencies for Taliban Compromise on Women Rights’, *The Frontier Post* (Pakistan 9 October 1996).

<sup>441</sup> Skaine, *The Women of Afghanistan under the Taliban*, at 69.

### **3.3.4. The Right to Health**

Article 12 of the ICESCR guarantees the right to the ‘enjoyment of the highest attainable standard of physical and mental health’ and denotes that the steps taken should include those necessary for ‘the creation of conditions which would assure to all medical service and medical attention in the event of sickness.’

UN statistics showed that in the 1990s Afghanistan had the highest maternal mortality rate in the world.<sup>442</sup> There were over 16,000 maternal deaths each year and less than 15% of deliveries were attended by a trained midwife.<sup>443</sup> Initially female health workers were banned and male doctors were forbidden from seeing female patients. The only hospital open to women was a run-down hospital on the outskirts of Kabul, which lacked sanitation and infrastructure. After a visit in 1997, the UN Special Rapporteur for Human Rights, Mr Choon Hyun Paik, reported that the hospital functioned solely thanks to international aid and received no support from the Taliban.<sup>444</sup> Eventually after continued pressure, the Taliban issued a set of rules that allowed women to work in health care provided they were adequately clothed, segregated and travelled with an escort.<sup>445</sup> The rules were also relaxed to allow women to be examined by male doctors provided both parties were clothed in Islamic dress, the woman was accompanied by a male chaperone and the doctor only saw the affected area of the patient.<sup>446</sup> Women’s wards were also created in other hospitals.

However the UN increasingly reported on the dire health situation in Afghanistan. At 44, life expectancy was one of the lowest in the world.<sup>447</sup> 25% of all children died before their fifth birthday, many from preventable and treatable diseases such as diarrhoea or

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<sup>442</sup> Commission on Human Rights ‘Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women’ (Submitted by Ms Radhika Coomaraswamy Special Rapporteur on Violence Against Women in accordance with Commission on Human Rights Res 1997/44 13 March 2000) UN Doc E/CN.4/2000/68/Add.4, at 8.

<sup>443</sup> Commission on Human Rights, ‘Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World (Submitted by Mr Kamal Hussain Special Rapporteur on Afghanistan in accordance with UN Commission on Human Rights Res 2000/18 9 March 2001) UN Doc E/CN.4/2001/43.

<sup>444</sup> Commission on Human Rights, ‘Final Report on the Situation of Human Rights in Afghanistan’ (20 February 1997) UN Doc E/CN.4/1997/59, at 25.

<sup>445</sup> Dupree, ‘Afghan Women under the Taliban’, at 156.

<sup>446</sup> *ibid*, at 156.

<sup>447</sup> UNDP Country Development Indicators 1995 available at [http://hdr.undp.org/sites/default/files/reports/256/hdr\\_1995\\_en\\_complete\\_nostats.pdf](http://hdr.undp.org/sites/default/files/reports/256/hdr_1995_en_complete_nostats.pdf) accessed August 2015.

measles.<sup>448</sup> Many women reported being unable to access medical care due to the distance involved, while many more could not afford treatment or even the transport to a medical facility.<sup>449</sup> Physicians for Human Rights reported that some women were reluctant to seek health care for fear of being beaten or arrested by the Taliban, while others were unable to do so because they could not afford to buy a burqa, which would enable them to go outside.<sup>450</sup> Another serious health issue facing Afghan women was the severe impact on their mental health. Decades of war, anarchy and corruption had brought violence and destruction. The war had left hundreds of thousands of widows and orphans who mostly faced a life of destitution. The Taliban's harsh restrictions virtually imprisoned women in their homes, depriving them of support or social interaction. As such, 94% of women in Kabul were reported to be suffering from depression.<sup>451</sup> The Taliban's edicts restricting women's lives, as well as the difficulties posed by war meant that many women suffered intolerably.

### ***3.3.5. The Right to Education***

Article 13 of the ICESCR recognises the right of everyone to an education. Again this right applies equally to men and women. However, according to a 1996 UNICEF report Afghanistan had some of the worst education indicators in the world.<sup>452</sup> When pressed by the United Nations and international aid organisations the Taliban consistently replied that it considered it an Islamic duty to provide education for all, including women. However the regime stated that such education would only be provided in a manner consistent with Islamic principles, which meant separate facilities were required for boys and girls. As these were currently unavailable and with the security situation perilous, the Taliban concluded that women's education must be suspended until such time as these

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<sup>448</sup> UNICEF, *The State of the World's Children* (2000) <<http://www.unicef.org/sowc00/contents.htm>> accessed August 2015.

<sup>449</sup> UNHCR Global Movement for Children Afghanistan Working Group, 'Lost Chances: The Changing Situation of Children in Afghanistan, 1990-2000' (2001), at 12

<sup>450</sup> Physicians for Human Rights, *The Taliban's War on Women: A Health and Human Rights Crisis in Afghanistan* <<http://www.physiciansforhumanrights.org/library/reports/talibans-war-on-women-1998.html>> accessed August 2015.

<sup>451</sup> *ibid* at 50

<sup>452</sup> UNICEF, *The State of the World's Children* (1996) <<http://www.unicef.org/sowc96/contents.htm>> accessed August 2015.

requirements could be achieved. The Taliban assured the international community that such measures were only temporary.<sup>453</sup>

When there was no improvement in the situation after a year the international aid agencies began to challenge the Taliban. In 1995 UNICEF announced that it was suspending assistance to programs where girls were excluded from education. UNICEF justified this action by citing its commitment to both the UN Convention on the Rights of the Child and CEDAW stating that the Taliban was in breach of its obligations to provide education and not to discriminate.<sup>454</sup> According to Dupree, of all the restrictions placed on women by the Taliban, denial of education was what most concerned the international community.<sup>455</sup>

After considerable pressure from the international community and a demand from local people, the Taliban announced in 2000 that it would provide schools for girls under 10. These schools were run by the Ministry of Religious Affairs rather than the ministry of Education and the main curriculum involved Koranic study.<sup>456</sup> The Taliban consistently refused to respond to questions as to when they would provide secondary or tertiary education for women. In 2000 the only non-primary education available to women was nursing training. The regime claimed that women were also being trained as doctors, although this was queried by Radhika Coomaraswamy the UN Special Rapporteur on Violence Against Women, who highlighted that it would be difficult to train women as doctors if they had not received a secondary education.<sup>457</sup>

Meanwhile, despite prohibiting millions of girls from attending school, Taliban leaders openly admitted to the Special Rapporteur that they educated their own daughters in Pakistan. They also told her that ‘if there had been no schools in the country...Afghanistan would not be in such a mess.’<sup>458</sup> They also claimed that allowing women choice to attend

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<sup>453</sup> William Maley, *Fundamentalism Reborn? Afghanistan and the Taliban* (William Maley ed, NYU Press, New York 1998), at 146.

<sup>454</sup> *ibid.* See also UNICEF ‘Most of Afghanistan’s Children are Unschooled’ (29 December 1998) UN Doc CF/DOC/PR/1998/69.

<sup>455</sup> Dupree, ‘Afghan Women under the Taliban’, at 153.

<sup>456</sup> Commission on Human Rights ‘Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women’ UN Doc E/CN.4/2000/68/Add.4, at 7.

<sup>457</sup> *ibid.*

<sup>458</sup> GA, ‘Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives-Situation of Human Rights in Afghanistan’ (16 October 1997) UN Doc A/52/493, at para 76.

school would lead to a fragmentation of their movement because their supporters would become disillusioned with a leadership that had compromised its principles. And ‘so the oppression of women became a benchmark for the Taliban’s Islamic radicalism, their aim to ‘cleanse’ society and to keep the morale of their troops high.’<sup>459</sup>

The international community consistently called on the Taliban to protect human rights and end gender discrimination in Afghanistan. The UN General Assembly passed several resolutions reminding the Taliban that Afghanistan was party to several human rights treaties and urging all interested parties to respect human rights.<sup>460</sup> However, as well as Taliban decrees, the Afghan population was suffering the devastation of two decades of war with infrastructure decimated. Sanctions were also adopted by the UNSC against the Taliban in 1999, though this was due to the Taliban’s support for terrorists rather than its behaviour towards women. The sanctions were targeted against individuals and although there is no evidence to suggest that they led to hardship in the same way as the sanctions against Iraq did, Verdirame still calls them ‘unwise’.<sup>461</sup>

#### **4. Women’s Rights Since the Fall of the Taliban**

In December 2001, the initial weeks after the Taliban defeat, there was much optimism and celebration but awareness that Afghanistan would need assistance and guidance in order to move forward. The UN hastily organised a conference in Bonn and invited all of Afghanistan’s major stakeholders, though purposely excluded the Taliban. The Bonn Agreement was signed on the 5<sup>th</sup> December 2001 and provided a blueprint towards democracy. The Agreement provided for the immediate transfer of powers and of sovereignty to an interim authority that consisted of the interim administration governed by a President; a Supreme Court and an independent Commission charged with summoning an emergency *Loya Jirga*. The Bonn Agreement further defined the legal framework and was to act as a ‘sort of transitional constitution’<sup>462</sup> for the country. The Agreement was

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<sup>459</sup> Rashid, *Taliban: The Story of the Afghan Warlords*, at 111.

<sup>460</sup> See GA Res 54/185 (1999) UN Doc A/RES/54/185.

<sup>461</sup> Guglielmo Verdirame, ‘Testing the Effectiveness of International Norms: UN Humanitarian Assistance and Sexual Apartheid in Afghanistan’ (2001) 23 Human Rights Quarterly 733.

<sup>462</sup> Deledda, ‘Afghanistan—the End of the Bonn Process’, at 14.

endorsed by the UNSC in early December 2001<sup>463</sup> and the General Assembly a week later.<sup>464</sup>

In the initial months and years after the fall of the Taliban there was general optimism that life for the Afghan people would steadily improve. This optimism extended to the field of women's rights; with the international community citing various planned constitutional and legislative changes that would reverse the Taliban's prohibitions on the status of women. A significant measure of the success of the new regime concerns the legal status and protection of women and their capacity to enforce such rights. In order to analyse the current situation for women in Afghanistan the next section will consider the legislative improvements since 2001 with a view to exploring whether such optimism was justified.

#### **4.1. The Current Legislative Position**

##### ***4.1.1. The 2004 Afghan Constitution***

This 2004 constitution provides the primary legal source for Afghanistan. It guarantees equality before the law to men and women. Article 22 states that: 'Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited. The Citizens of Afghanistan – whether men or women – have equal rights and duties before the law.'<sup>465</sup> Article 7 requires the Government of Afghanistan to observe, protect and implement human rights. The Constitution also requires the Government to observe the United Nations Charter, international treaties and human rights conventions that Afghanistan has ratified.<sup>466</sup> However, it is closely modelled on the 1964 Constitution, which provided that when judges could find no provision in the Constitution or written law to resolve a case, they were required to follow the basic principles of sharia to render a decision in the best possible way.<sup>467</sup> The 2004 Constitution contains a similar provision that Antonella Deledda considers to be anachronistic in any modern constitution.

The control over the legitimacy of laws, bestowed to the Supreme Court, is referred to the principles of Islam and not anymore to the Constitution as the

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<sup>463</sup> UNSC Res 1383(2001) UN Doc S/RES/1383.

<sup>464</sup> GA Res 65/220 (2001) UN Doc A/RES/65/220.

<sup>465</sup> The Constitution of Afghanistan, Article 22.

<sup>466</sup> The Constitution of Afghanistan, Article 7.

<sup>467</sup> Barnett R. Rubin, 'Crafting a Constitution for Afghanistan' (2004) 15 Journal of Democracy 5 at 8.

draft constitutional Commission proposed. Article 3, which rules the compliance of all laws with the principles of the sacred religion of Islam, becomes the key to interpreting most of the constitutional rules, de facto considering sharia, although never mentioning it, as the primary source of law. On this specific aspect, the Constitution of 2004 makes a step back compared to the Constitution of 1964, which considered sharia as a subsidiary source of law.<sup>468</sup>

At the initial drafting process the international community insisted that while the constitution was free to declare Afghanistan an Islamic state, any explicit reference to sharia law would be frowned upon.<sup>469</sup> Rubin notes that there was intense negotiation between the various Afghan parties involved in the drafting.<sup>470</sup> As part of the negotiated deal the Islamists<sup>471</sup> conceded their demand to have the constitution cite sharia as a limit on Afghanistan's international human rights obligations and also their demand that the provision on gender equality be qualified according to sharia. However, in return for these concessions the Islamists were successful in enshrining in Article 3 the provision that no law can contradict Islam's beliefs and provisions. This may prove to be a continued headache for Afghanistan's reformists as Article 21 of the Constitution grants powers to the Supreme Court to review the constitutionality of all Afghan legislation.<sup>472</sup> As such Rubin notes that it is inevitable that conflicts will arise due to the constitution's protection of international human rights norms alongside the declaration that no law can contradict the tenets of Islam. He also concedes that the solution to such a minefield will likely be shaped by political rather than purely interpretative considerations.<sup>473</sup>

It was notable that the Islamists failed to enshrine a demand that Afghanistan's president must be male, nor did they object to the provision requiring at least a quarter of lower-

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<sup>468</sup> Deledda, 'Afghanistan—the End of the Bonn Process', at 159.

<sup>469</sup> Rubin, 'Crafting a Constitution for Afghanistan', at 14.

<sup>470</sup> *ibid.*

<sup>471</sup> Rubin describes the four affiliations of those taking part in the Bonn Conference; the Northern Alliance group (who received the most support and funding from the US); the Rome Group consisting mostly of exiles living in the West and supporters of the former monarch; the Peshawar group and the Cyprus group, both so called after the places where they had met. The Pashtun led group in the NA included many radical Islamists. See *ibid.*

<sup>472</sup> J.Alexander Thier, 'The Making of a Constitution in Afghanistan' (2006) 51 *NYL School Law Review* 557.

<sup>473</sup> Rubin, 'Crafting a Constitution for Afghanistan', at 15.

house seats and 16% of upper-house seats be filled by women.<sup>474</sup> Although, as Deledda points out ‘the gap between the text adopted and the standards shared by the Western community is still big.’<sup>475</sup> While Alexander Thier concludes that the Afghan Constitution is merely ‘aspirational’ and ‘does not reflect the political realities of this physically and politically shattered nation.’<sup>476</sup>

#### ***4.1.2. Convention on Elimination of Discrimination against Women (CEDAW)***

Afghanistan signed CEDAW in 1980; however the democratically elected Karzai Government did not ratify it until March 2003. Afghanistan entered no reservations but it is not party to the 1999 Optional Protocol, which means there is no option for Afghans to refer a complaint to the CEDAW Committee or for the Committee to conduct independent enquiries. Article 2 of the Convention states that: ‘States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.’ CEDAW obliges states to submit a report to the Secretary General on measures it has taken to implement the Convention. Afghanistan was due to submit an initial report by 2004 and thereafter a report every 4 years. However, it has failed to provide any reports so far. In its 2010 Annual Report, the CEDAW Committee noted its concern regarding the late submission of Afghanistan’s national report and encouraged the state to seek technical assistance from the UN in order to meet its obligation.<sup>477</sup>

#### ***4.1.3. The Afghan Independent Human Rights Commission (AIHRC)***

The 2001 Bonn Agreement provided that the interim administration would establish an independent human rights commission with the assistance of the UN. Its responsibilities would include human rights monitoring, investigation of violations of human rights, and development of domestic human rights institutions. The Agreement also provided that the

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<sup>474</sup> *ibid.*

<sup>475</sup> Deledda, ‘Afghanistan—the End of the Bonn Process’, at 158.

<sup>476</sup> Thier, ‘The Making of a Constitution in Afghanistan’.

<sup>477</sup> ‘Decision 45/IV: Statement of the Committee on the Elimination of Discrimination against Women on the Inclusion of Afghan women in the Process of Peacebuilding, Security and Reconstruction in Afghanistan, Annex III of the Report of the Committee on the Elimination of Discrimination against Women (Forty-fifth Session 18 January-5 February) UN Doc A/65/38, at 134.

interim administration could, with the assistance of the United Nations, establish any other commissions to review matters not covered in the agreement.<sup>478</sup>

Under Presidential Decree of the Interim Administration, the Human Rights Commission was created on 6<sup>th</sup> June 2002. The Commission was codified in law in the Afghan Constitution, and it was charged with the task of monitoring human rights. The Constitution provides for the rights of individual complaints to the Commission and charges it with assisting individuals in defending their rights.<sup>479</sup>

The structure, objectives and mandate of the Commission are further set out in The Law on Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission of May 2005. Article 5 of this law states that the aims of the commission are: monitoring the situation of human rights in the country; promoting and protecting human rights; monitoring the situation of and people's access to their fundamental rights and freedoms; investigating and verifying cases of human rights violations; and taking measures for the improvement and promotion of the human rights situation in the country. The Commission consists of 11 members who are each appointed by the President and is headed by Dr Sima Samar. There are currently four female commissioners. The members of the Commission are leading Afghan human rights activists and many have law degrees or have worked extensively for NGOs. Some of the Commissioners were educated at universities in the USA, Egypt and Japan while Qudria Yazdanparast received her law degree from Kabul University.<sup>480</sup> The Commission operates at both a central and regional level and since its creation the AIHRC has trained over 200,000 individuals and held nearly 7000 workshops on human rights around the country.<sup>481</sup> The Commission also reported receiving 13,389 complaints of human rights violations and has addressed 12,555 of these cases.<sup>482</sup>

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<sup>478</sup> Bonn Agreement Section III (c) 6.

<sup>479</sup> The Constitution of Afghanistan, Article 58.

<sup>480</sup> For further account see <<http://www.aihrc.org.af/home/members>>.

<sup>481</sup> Human Rights Council, 'Afghanistan' (National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1 24 February 2009) UN Doc A/HRC/WG.6/5/AFG/1, at 6.

<sup>482</sup> *ibid.*

UN High Commissioner for Human Rights Louise Arbour stated that the AIHRC was an effective and key national partner, but she also expressed certain concerns.<sup>483</sup> She noted that the requirement that the Head of the Commission receive a vote of confidence from the Lower House of the Parliament before being appointed threatened the independence and effectiveness of the Commission.<sup>484</sup> Furthermore, she noted that the Afghan Government has allocated no funds to run the Commission, which is currently funded, solely by donor countries – although this at least guarantees its existence. In addition to this, various NGOs have raised concern that the Commission is unable to operate effectively outside Kabul and has no means of enforcing its decisions.<sup>485</sup>

#### ***4.1.4. The Ministry of Women’s Affairs (MOWA)***

The Ministry of Women’s Affairs was established according to provisions in the Bonn Agreement. The MOWA has the responsibility for implementation of political and social policy of the government in order to secure and expand legal rights of women and ensure the rule of law in their lives.<sup>486</sup>

The first (interim) Minister for Women’s Affairs was Dr Sima Samar, a prominent and outspoken human rights activist. Dr Samar gained a reputation for providing girls’ schools and medical advice in the Afghan refugee camps in Pakistan during the Taliban era. Unfortunately Dr Samar chose not to accept the permanent position in the elected government after she received public death threats and was charged with blasphemy after it was alleged she told a Canadian journalist that she did not agree with sharia law. This allegation was widely reported in the Afghan media and resulted in calls for her to be punished and even death threats. The charges were only dropped after Dr Samar complained to President Karzai. Although the court cited lack of evidence to pursue the case, the Deputy Chief Justice was reported to have said: ‘maybe if we get stronger evidence, we will reopen the case’, while the Chief Justice of Afghanistan was quoted as

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<sup>483</sup>Human Rights Council Working Group on the Universal Periodic Review, ‘Afghanistan’ (Report) (9 March 2009) UN Doc A/HRC/WG.6/5/AFG/2.

<sup>484</sup> Human Rights Council ‘Report of the High Commissioner for Human Rights on the Situation of Human Rights in Afghanistan and on the Achievement of Technical Assistance in the Field’ (21 February 2008) UN Doc A/HRC/7/27’, at 17.

<sup>485</sup> Human Rights Watch, ‘All Our Hopes Are Crushed: Violence and Repression in Western Afghanistan’ (HRW Vol 14 No 7 (c) 2002) at 7, Human Rights Watch, ‘Afghanistan’s Bonn Agreement One Year Later: A Catalog of Missed Opportunities’ (HRW World Report 2001, 2002) at 8.

<sup>486</sup> Ministry of Women’s Affairs Website <<http://mowa.gov.af/en/page/1332>>.

saying that Dr Samar had made ‘inappropriate statements’ and as such it was the view of the Supreme Court that she could not hold an official position in government.<sup>487</sup> According to LaShawn R. Jefferson, Executive Director of the Women’s Rights Division of Human Rights Watch; ‘The blasphemy charge against Dr Samar is part of a larger pattern of threats and intimidation directed at legitimate representatives in Afghanistan – and especially women...It seems that in Afghanistan, female leaders who stand up to warlords are threatened.’<sup>488</sup> The blasphemy charge was eventually dropped and Dr Samar instead took up the post of head of the AIHRC. However, such an incident highlights the real issues regarding separation of power in Afghanistan.

While MOWA is tasked with improving women’s lives in Afghanistan, in reality it is often side-lined and has not always received its allocation of the Afghan budget, making it reliant on foreign donors or international women’s organisations to raise funds. This seriously curtails its effectiveness and limits what it can achieve. It was also some time after the creation of the Ministry before it was given an office and allocated staff: the leaders of the administration making clear that the MOWA was not a priority for the Government.<sup>489</sup> Some Afghan Government employees have even questioned the need for the Ministry at all, while Ministry employees working in the provinces have reported that their male colleagues do not treat them with respect.<sup>490</sup> The Current Minister for Women’s Affairs is the only female Minister in the Afghan Cabinet.

#### ***4.1.5. National Action Plan for the Women of Afghanistan (NAPWA)***

In 2007 the Afghan Government set out a nationwide framework to improve the lives of women. The vision of the NAPWA is that: ‘Afghanistan will be a peaceful and progressive country where women and men enjoy security, equal rights and opportunities in all aspects

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<sup>487</sup> See Human Rights Watch, ‘Afghanistan: Former Women’s Minister Intimidated’ (Press Release 26 June 2002) <<http://www.hrw.org/news/2002/06/25/afghanistan-former-womens-minister-intimidated>> accessed August 2015. It was widely reported in the Western media that her refusal of the position was linked to the threats she had received. See Carlotta Gall, ‘Afghan Cabinet Sworn in Despite Some Ill Omens’ *New York Times* (25 June 2002).

<sup>488</sup> Human Rights Watch, ‘Afghanistan: Former Women’s Minister Intimidated’.

<sup>489</sup> Angela EV King, ‘United Nations and Afghanistan’ in Sunita Mehta (ed) *Women for Afghan Women* (Palgrave Macmillan New York 2002), at 148.

<sup>490</sup> UNAMA and OHCHR, ‘Silence Is Violence: End the Abuse of Women in Afghanistan’ (Kabul 2009), at 16.

of life.<sup>491</sup> The action plan sets out a ten-year framework (2007-2017) for the Afghan government to tackle the many problems and injustices facing women. It recognises that women's education must be a priority for the administration, while changing attitudes among Afghans will be necessary for women to achieve full legal potential. However, the plan acknowledges that currently, 'The women of Afghanistan are among the worst off in the world, both in comparison to Afghan men and with women of most countries. Their situation is particularly poor in the areas of health, deprivation of rights, protection against violence, economic productivity, education and literacy, and public participation.'<sup>492</sup>

While NGOs and foreign governments welcomed this framework, in reality there have been few attempts to implement it, nor have additional funds been allocated. While it would seem that the MOWA would be easily placed to manage the implementation of this framework, the Women's Ministry has been effectively sidelined and there has been little outside pressure put on the Afghan Government to actively implement it. Instead Action Aid reports that it lies dormant and has called on NGOs and the US and UK to press the Afghan Government to implement the plan.<sup>493</sup>

#### ***4.1.6. The Elimination of Violence Against Women Law (EVAW)***

The President adopted this law in July 2009 after years of lobbying by women's rights activists. The law provides the legal fulfilment of the Afghan Constitution's pledge of gender equality. It defines 22 different forms of violence against women as crimes and includes: rape; forced marriage; abuse; *baad*,<sup>494</sup> marriage of minors; denial of the right to education and harassment or persecution. The law provides punishments for those found guilty of committing such acts and requires the Afghan National Police to assist victims, investigate crimes and deal with them according to the law.<sup>495</sup> The very existence of this legislation is momentous. It establishes a wide range of acts of violence against women as crimes and designates rape as a crime under Afghan law for the first time. However, the law does not clearly distinguish between rape and consensual sex outside marriage (*Zina*). Article 3.3 of the law defines rape as 'perpetrating adultery or pederasty with an adult or

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<sup>491</sup> National Action Plan for the Women of Afghanistan, Chapter II (1).

<sup>492</sup> National Action Plan for the Women of Afghanistan, Overview.

<sup>493</sup> Action Aid, 'A Just Peace? The Legacy of War for the Women of Afghanistan' (Action Aid, London, 2011) at 4.

<sup>494</sup> The custom of exchanging young girls in lieu of payment of a debt.

<sup>495</sup> See EVAW Law, Articles 7 and 13.

underage woman under duress or attack to the chastity and honour of a woman.’<sup>496</sup> Although civic groups have tried to remove the concept of ‘adultery’ from the definition of rape, there is strong opposition from conservative parliamentarians as there is a general unwillingness to introduce or even acknowledge the concept of marital rape.

This law also prohibited pardons and the mitigation of sentences of those convicted under it,<sup>497</sup> but the Supreme Court annulled this provision in July 2011 as it was found to be in conflict with the Constitutional prerogative of Presidential pardon.<sup>498</sup> There are also provisions in the EAW law that contradict the Afghan penal code and it is likely that law enforcement officials will still allow the penal code to take precedence over this legislation. While the legislation itself represents a significant achievement for women’s rights in Afghanistan, it remains to be seen whether it will be fully embraced by police officers, prosecutors and judges.<sup>499</sup> In the first year of the law, a UNAMA report<sup>500</sup> found that most incidents of violence against women were still unreported. It also found that in many regions, police and prosecutors continued to refer incidents of violence against women to traditional mediation and dispute resolution that failed to adequately protect the rights of women.<sup>501</sup>

#### ***4.1.7. Achievements in Literacy and Education and the Workplace***

Under the Taliban, women and girls were prohibited from receiving an education or leaving their homes. Article 43 of the Afghan Constitution guarantees free education to all Afghan citizens until they graduate from university and states that primary education is compulsory until grade nine. Under the new administration there has been a massive uptake of education by women and girls. Human Rights Watch reported that the majority

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<sup>496</sup> EAW Law. See also Human Rights Watch, “‘We Have the Promises of the World’ Women’s Rights in Afghanistan” (HRW, 2009), at 46.

<sup>497</sup> EAW Law, Article 42.

<sup>498</sup> Supreme Court Approval 27 July 2011. ‘[...] With regard to a query about article 42 of the EAW law that creates problems for the implementation of presidential decrees pardoning and reducing penalties, the High Council of the Supreme Court clarifies that pardoning and reducing the penalties of prisoners is one of the constitutional competencies of the President, who can implement this in any way. Hence this article of the EAW law contradicts Afghanistan’s Constitution. As a law cannot exceed the Constitution, therefore, it is annulled and inapplicable.’ Quoted in UNAMA and OHCHR, ‘A Long Way to Go: Implementation of the Elimination of Violence against Women Law in Afghanistan’ (Kabul 2013) at 6.

<sup>499</sup> Human Rights Watch, “‘We Have the Promises of the World’ Women’s Rights in Afghanistan” Women’s Rights in Afghanistan’, at 46.

<sup>500</sup> UNAMA, A Long Way to Go: Implementation of the Elimination of Violence against Women Law in Afghanistan.

<sup>501</sup> *ibid* at 2.

of Afghans want their daughters to receive an education.<sup>502</sup> Kabul University is once again admitting female students who are taught alongside their male counterparts.

Furthermore Article 48 of the Constitution upholds the right of all Afghans to work and to choose their occupation. Since the fall of the Taliban women have returned to such diverse professions as medicine, engineering, police work, the legal profession, journalism and politics.<sup>503</sup> Yet, while all Taliban decrees have been officially rescinded, most women still wear the burqa when out in public because the change in the law has not necessarily changed public attitudes.

#### **4.2. Problems**

Despite the legislative improvements there are still many obstacles facing Afghan women and legal provisions have not brought about the changes many had hoped. According to the 2011 UN Human Development Report, Afghanistan is 172<sup>nd</sup> of 187 Countries in the Human Development Index while the same report's Gender Development Index lists the country even lower.<sup>504</sup> Literacy is only 28% (12.6% female)<sup>505</sup> and in rural areas it is estimated that 90% of women are illiterate.<sup>506</sup> Afghanistan continues to have the worst maternal mortality rate in the world,<sup>507</sup> while women's life expectancy is lower than men's in a country where life expectancy is only 44.<sup>508</sup>

As early as 2002 NGOs were warning that women's lives had changed little despite the euphoric rhetoric of 2001. Over a decade later they continue to voice the same concerns. Human Rights Watch documented how women still faced severe restrictions with Taliban officials being replaced by those who held very similar negative attitudes towards

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<sup>502</sup> Human Rights Watch, "'We Have the Promises of the World' Women's Rights in Afghanistan", at 78.

<sup>503</sup> Commission on the Status of Women, 'Discrimination Against Women and Girls in Afghanistan: Report of the Secretary-General' (2002) UN Doc E/CN.6/2002/5.

<sup>504</sup> See UN Development Program, 'Sustainability and Equity: A Better Future for All' (Human Development Report 2011) at 141.

<sup>505</sup> See UN Development Program, 'Bridging Modernity and Tradition – the Rule of Law and the Search for Justice' (Afghanistan Human Development Report 2007).

<sup>506</sup> UNAMA 'Education for All, Global Action Week' (Press Conference 20 April 2009) <<http://unama.unmissions.org/Default.aspx?tabid=1761&ctl=Details&mid=1892&ItemID=3584>> accessed August 2015.

<sup>507</sup> See UN Development Program, 'Sustainability and Equity: A Better Future for All' at 141.

<sup>508</sup> UNAMA and OHCHR, 'Silence Is Violence: End the Abuse of Women in Afghanistan.'

women.<sup>509</sup> Human Rights Watch noted how, even in Kabul, a reconfigured Department for the Promotion of Virtue and Protection from Vice squad was again operating (and continues to operate).<sup>510</sup> The Human Rights Watch report, based on extensive interviews with Afghan civilians, concluded that neither the US nor the UN was making human rights a priority and while many Afghans had expected the US and its allies to stand up to the warlords, their failure to do so meant that many Afghans were left angry and disillusioned.<sup>511</sup>

In addition to this the report highlighted a number of problems for Afghan women and articulated that for many women their situation was effectively no different than under the Taliban. Examples given were that Northern Alliance troops were warning women to wear the burqa, women attempting to take part in the *Loya Jirga* process were being openly threatened, and in many rural areas Taliban decrees still remained in force. Women in Kabul were prevented from protesting<sup>512</sup> and were beaten for not wearing appropriate attire.<sup>513</sup> Further, despite huge enthusiasm for education, another NGO report concluded that the opportunity for female primary education was only 3%.<sup>514</sup> Five years after the fall of the Taliban Afghanistan remained unstable, while ‘violence attributed to the remnants of the Taliban intensified in 2006 as compared with the previous few years, suggesting that the Islamic extremist faction that had once ruled Afghanistan was making a comeback.’<sup>515</sup>

More than a decade has now passed and according to UN organs neither the security situation nor the human rights situation for women has improved. UNAMA reports that

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<sup>509</sup> Human Rights Watch, ‘The “Ten-Dollar Talib” and Women’s Rights: Afghan Women and the Risks of Reintegration and Reconciliation’.

<sup>510</sup> This has been renamed the department of ‘Islamic Teaching’ and is operated by the Ministry of Justice. See Human Rights Watch ‘Taking Cover: Women in Post-Taliban Afghanistan’ (Briefing Paper May 2002) <<http://hrw.org/backgrounder/wrd/afghan-women-2k2.htm>>; Allen Pizzey, ‘Afghan Women Wary of Vice and Virtue’ CBS News (8 October 2002) <<http://www.Cbsnews.com/stories/2002/10/07/eveningnews/main524589.shtml>> accessed August 2015; Lucy Morgan Edwards, ‘Why Burqas Still Stifle Afghan Women’ *The Daily Telegraph*, (London, 2<sup>nd</sup> January 2003).

<sup>511</sup> Human Rights Watch, ‘“We Want to Live as Humans”: Repression of Women and Girls in Western Afghanistan’ (HRW 2002).

<sup>512</sup> *ibid.* See also King, *United Nations and Afghanistan*, at 151.

<sup>513</sup> *ibid.*, at 7.

<sup>514</sup> Womankind Worldwide, ‘Taking Stock: Afghan Women and Girls Six Months On’ (Womankind Worldwide 2002).

<sup>515</sup> CountryWatch, ‘Political Conditions’, at 37.

violence is a significant reality for many Afghan women and that those who try to seek justice risk further violence. It concludes that:

Despite the hopes expressed nearly eight years ago, the rights and aspirations of Afghan women, and the men who support them, remain largely unfulfilled. The vast majority of Afghan women suffer a significant human rights deficit; for them, human rights are values, standards, and entitlements that exist only in theory and at times, not even on paper.<sup>516</sup>

UNAMA and the OHCHR consider violence an everyday fact of life for many Afghan women.<sup>517</sup> The country was denounced as the ‘most dangerous place in the world to be born a woman’.<sup>518</sup> In 2011 Action Aid surveyed Afghan women and reported that they are predominantly worried about the security situation and whether any gains in their rights will be traded away to secure a political settlement.<sup>519</sup> Female MPs regularly receive death threats and report hostility even from government officials to their presence in the workforce.<sup>520</sup> Women who speak out in public against gender discrimination have been intimidated and even killed.<sup>521</sup> A leading member of the Northern Alliance was quoted on national radio as saying that: ‘We know now that the women are not wearing the hijab, and looks (sic) what’s happening – there’s cancer and AIDS everywhere in Afghanistan.’<sup>522</sup> While President Karzai himself signed a law which allows for the re-establishment of the vice and virtue squad throughout the country.

The remainder of this section discusses the most commonly cited problems faced by Afghan women in order to highlight how structural discrimination is still entrenched and

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<sup>516</sup> UNAMA and OHCHR, ‘Silence Is Violence: End the Abuse of Women in Afghanistan’, at 3.

<sup>517</sup> *ibid.*

<sup>518</sup> Owen Bowcott, ‘Afghanistan Worst Place in the World, but India Top Five’ *The Guardian* (London 14 June 2011)

<sup>519</sup> Action Aid, ‘A Just Peace? The Legacy of War for the Women of Afghanistan’, at 5.

<sup>520</sup> See Clancy Chassay, ‘Acid Attacks and Rape: Growing Threat to Women Who Oppose Traditional Order’ *The Guardian* (London, 22nd November, 2008) MP Shukria Barakzai reported regular death threats, but was given no security protection from the Afghan government.

<sup>521</sup> Bowcott, ‘Afghanistan Worst Place in the World, but India Top Five’.

<sup>522</sup> Quil Lawrence, ‘For Young Afghans, History Lessons Lost?’ National Public Radio (8 September 2011) <<http://www.npr.org/2011/09/08/1402599788/for-young-afghans-history-lessons-lost>> accessed August 2015.

how any attempt by even a small minority of educated women to subvert this is met with threats of violence.

#### ***4.2.1. Attacks on Women in Public Life***

In 2010 Human Rights Watch reported that women's freedoms had been steadily eroded as the insurgency took hold.<sup>523</sup> The report documents how attacks on women who work outside the home and the use of 'night letters' (which threaten women with murder, violence or public humiliation) have diminished the number of women working, while many women report being too frightened to remain in their jobs.<sup>524</sup> In 2006 women represented 31% of the civil service. However, by 2009 that figure had dropped to 21.4%.<sup>525</sup> The Institute on Religion and Public Policy reported that women's representation in the Government is dwindling, as exemplified by President Karzai's 2006 removal of 3 female cabinet members.<sup>526</sup> Karzai explained this by stating that 'the Parliamentary elections had shown that "[women's] place was secured" so that representation in the cabinet was no longer necessary.'<sup>527</sup>

Another Taliban strategy that has impacted on women's freedom has been attacks on girls' schools and on individual girls in education. A Human Rights Council draft resolution noted 'with sadness and deep concern those who have been threatened or intimidated into not attending school and harmed while attending school' and urged 'all parties in Afghanistan to take appropriate measures to protect children and uphold their rights.'<sup>528</sup> Attacks on schoolgirls are increasingly common, so much so that many parents have chosen to remove their daughters from school completely.<sup>529</sup>

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<sup>523</sup> Human Rights Watch, 'The "Ten-Dollar Talib" and Women's Rights: Afghan Women and the Risks of Reintegration and Reconciliation'.

<sup>524</sup> *ibid*, at 27.

<sup>525</sup> Human Rights Watch, "'We Have the Promises of the World" Women's Rights in Afghanistan, at 15.

<sup>526</sup> Institute on Religion and Public Policy 'Religious Freedom in Afghanistan' (Submission to the UN Universal Periodic Review May 2009) <[http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/AF/IRPP\\_AFG\\_UPR\\_S5\\_2009\\_InstituteonReligionandPublicPolicy.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/AF/IRPP_AFG_UPR_S5_2009_InstituteonReligionandPublicPolicy.pdf)>.

<sup>527</sup> Anne Brodsky, 'Centuries of Threat, Centuries of Resistance' in Jennifer Heath and Ashraf Zahedi (eds), *Land of the Unconquerable: The Lives of Contemporary Afghan Women* (California University Press, California 2011), at 7.

<sup>528</sup> Human Rights Council draft resolution addressing attacks on school children in Afghanistan, UN Doc A/HRC/14/L.7.

<sup>529</sup> Human Rights Watch, 'The "Ten-Dollar Talib" and Women's Rights: Afghan Women and the Risks of Reintegration and Reconciliation', at 30-33.

Human Rights Watch further reported that there has been a campaign to silence women in politics. On 12<sup>th</sup> April 2009 Sitara Achakzai, a prominent Afghan human rights activist and local councillor, was murdered. The Taliban claimed responsibility for her death, but no one has been charged or prosecuted for her murder.<sup>530</sup> In September 2008, Malalai Kakar, the former Police Commander in Kandahar was murdered. This too has gone unpunished, as has the murder of Zakia Zaki, director and owner of Afghan Peace Radio. A senior Government official stated that the government knew who was responsible for Zaki's death, but did not have the power to arrest the perpetrator because of that person's political connections.<sup>531</sup> He also said that: 'These people could have been arrested years ago, but now the President is dependent on these people. Warlords and criminals are too strong in that area.'<sup>532</sup> The UN Human Rights Council concluded that such impunity remains a major impediment to the re-establishment of the rule of law and respect for human rights. It notes that the reconciliation process has 'sent mixed messages about the Government's commitment to providing accountability for serious international crimes and violations of human rights.'<sup>533</sup>

In 2006, Safia Amanjan, head of the Department of Women's Affairs in Kandahar was assassinated by two men. The Taliban claimed responsibility for the killing and two men were eventually jailed.<sup>534</sup> Additionally many Afghan women in prominent public positions report being targeted with death threats. They also report receiving little or no support or security from their superiors.<sup>535</sup> Indeed many women say that sometimes even their superiors agree that they should not be working outside their homes, while some have been told that they are responsible for any threats they received because they had drawn attention to themselves.<sup>536</sup> NGOs worry that the few gains made since the removal of the Taliban will be rolled back unless women can be assured of their safety in the workplace and have called on all parties to respect the rule of law.

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<sup>530</sup> Human Rights Watch, "'We Have the Promises of the World' Women's Rights in Afghanistan', at 4.

<sup>531</sup> Human Rights Watch interview with senior government official who requested anonymity, Kabul, May 29, 2008.

<sup>532</sup> *ibid.*

<sup>533</sup> Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Afghanistan and on the Achievements of Technical Assistance in the Field of Human Rights' (19 January 2011) UN Doc A/HRC/16/67.

<sup>534</sup> Kim Sengupta, 'Women Who Took on the Taliban-and Lost' *The Independent* (London 5 October 2008).

<sup>535</sup> Hayat Alvi, 'Women in Afghanistan: A Human Rights Tragedy Ten Years after 9/11' (Human Rights and Human Welfare Working Paper No 66 2011).

<sup>536</sup> Human Rights Watch, "'We Have the Promises of the World' Women's Rights in Afghanistan', at 22.

More worryingly, in 2012 video footage emerged which showed the Taliban executing a woman for adultery in a village north of Kabul resurrecting ‘the dark chapter of modern Afghan history.’<sup>537</sup>

#### ***4.2.2. Failure of Afghan Institutions***

Many of these problems are attributed to a weakness in the constitutional guarantees for women, as well as the lack of enforcement. The Afghan constitution has been described as containing many obstacles to stable and effective governance.<sup>538</sup> Furthermore, some insurgent groups even cite the new constitution as a barrier to reconciliation.<sup>539</sup> Amidst this, the Afghan Government is seen as increasingly weak and corrupt.<sup>540</sup> It exercises very little authority outside Kabul and in order to stay in office it requires the support of regional warlords. Much of this support is bought with money or traded for high-level positions in government.<sup>541</sup>

##### ***4.2.2.1. The Justice System***

As a consequence of weak institutions Afghanistan’s criminal justice system has been described as ‘deeply flawed’<sup>542</sup> and in a ‘catastrophic state of disrepair’.<sup>543</sup> In 2002 President Karzai appointed Fazl Hadi Shinwari to the role of Chief Justice of the Supreme Court. This astonished most observers, as the Chief Justice was required to be under 60 and educated in all sources of Afghan law, religious and secular. Shinwari was thought to be in his 80s and had no formal training in law. Shinwari was a known ally of the fundamental Islamists and immediately appointed his political allies to the Court, even ‘expanding the number of Supreme Court judges from nine to 137.’<sup>544</sup> In 2003 a report on

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<sup>537</sup> CountryWatch, ‘Political Conditions’, at 105.

<sup>538</sup> Rubin, ‘Crafting a Constitution for Afghanistan’, at 18.

<sup>539</sup> UNAMA and OHCHR, ‘Silence Is Violence: End the Abuse of Women in Afghanistan’.

<sup>540</sup> Greg Miller and Ernesto Londono, ‘US Officials Say Karzai Aides Are Derailing Corruption Cases Involving Elite’ *The Washington Post* (Washington 28 June 2010); Jon Boone, ‘Wikileaks Cables Portray Hamid Karzai as Corrupt and Erratic’ *The Guardian* (London 2 December 2010); Lianne Gutcher, ‘Afghanistan’s Anti-Corruption Efforts Thwarted at Every Turn’ *The Guardian* (London 19 July 2011).

<sup>541</sup> Editorial ‘Bribes: Not a Cure for Corruption’ *The Economist* (New York 17 September 2009).

<sup>542</sup> Human Rights Council, ‘Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development’ (Report of the Special Rapporteur Philip Alston on Extrajudicial, Summary and Arbitrary Killings 29 May 2008) UN Doc A/HRC/8/3 Add 6, at 5.

<sup>543</sup> International Crisis Group, ‘Reforming Afghanistan’s Broken Judiciary’ (ICG Asia Report No 195 2010).

<sup>544</sup> International Crisis Group, ‘Afghanistan: Judicial Reform and Transitional Justice’ (ICG Asia Report No 45 2003).

judicial reform highlighted that none of the members of the Supreme Court whose education could be verified possessed a secular law degree,<sup>545</sup> while the majority of ordinary jurists inherited by the new regime were educated in sharia schools or Pakistani madrassas.<sup>546</sup> Such actions stoked fears that ‘the judicial system [had] been taken over by hard-liners before the Afghan people ... had a chance to express their will in a democratic process’.<sup>547</sup>

Indeed, Deledda notes that reforming the judiciary has been particularly difficult due to the burden created by the plethora of intellectuals who fled Afghanistan during the war.<sup>548</sup> She further reports how even an influx of western educated jurists has failed to alleviate the problem, as they are totally uninformed of the local situation.<sup>549</sup> Such a low quality judiciary has resulted in some instances where judges have failed to acknowledge civil legislation and instead have adjudicated cases using only sharia principles. In 2002 the Chief Justice of Afghanistan issued a number of rulings which appeared to be based on a mixture of sharia and local tribal law and were described as ‘deeply troubling from a human rights perspective.’<sup>550</sup> In 2010 the Afghan Supreme Court issued guidance, relying on Article 130 of the Afghan Constitution, which in effect criminalised ‘running away’. Clearly these incidents are problematic for women in Afghanistan as legislative protection for women is useless unless it can be applied and enforced in court. As such, according to the UN Human Rights Council, difficulties in interpreting Afghanistan’s new penal system coupled with the judiciary’s lack of independence are resulting in a ‘climate of impunity’.<sup>551</sup>

Furthermore, the UN High Commissioner for Human Rights, Navanethem Pillay, noted that there is still persistent prejudice against women who choose to consult lawyers rather than using the traditional customary methods<sup>552</sup> and she further noted that even judges

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<sup>545</sup> *ibid.*

<sup>546</sup> Deledda, ‘Afghanistan—the End of the Bonn Process’, at 161.

<sup>547</sup> International Crisis Group, ‘Afghanistan: Judicial Reform and Transitional Justice’

<sup>548</sup> Deledda, ‘Afghanistan—the End of the Bonn Process’, at 161.

<sup>549</sup> *ibid.*

<sup>550</sup> Drumbl, ‘Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan’ at 367.

<sup>551</sup> Human Rights Council, ‘Afghanistan’ (Summary Prepared by the OHCHR in Accordance with Paragraph 15 (C) of the Annex to Human Rights Council Res 5/1 2009) UN Doc A/HRC/WG.6/5/AFG/3, at 5.

<sup>552</sup> *ibid.*, at 3.

have a biased attitude towards women seeking justice through the formal legal system.<sup>553</sup> The Afghan Women's Network reported that it was not uncommon for judges, prosecutors and the police to refer women with sexual abuse complaints back to the informal dispute resolutions councils in their community.<sup>554</sup> The denial of justice to Afghan women is consistently cited as a barrier to Afghanistan's adherence to the rule of law.<sup>555</sup> The International Crisis Group notes that 'in its desperation to find quick fix solutions, the international community, and the US in particular, has begun to look to the informal justice sector as a means to an undefined end.'<sup>556</sup> In 2010 the Afghan parliament attempted to legitimise the informal courts, but there was an outcry by activists who were supported by some parliamentarians.<sup>557</sup> The International Crisis Group warns against such a solution, describing how it is problematic for many reasons, not least because 'the exclusion of women from these informal judicial councils poses serious problems for the state's constitutional obligation to defend the principle of equality under the law.'<sup>558</sup> However, in their Shadow Report to the CEDAW Committee, the Afghan Women's Network recommended that the UN and international stakeholders involve the religious leaders and scholars more when attempting to implement reform. They highlight that, as Afghanistan is an Islamic country, such leaders are in fact part of the state apparatus and so their support is necessary and their influence invaluable. Thus, it has been suggested that informal methods of dispute resolution may have a role to play in Afghanistan's justice system if they can provide greater access to women and more accountability.

NGOs have instead called for properly trained judges and prosecutors, who are independent and for those corrupt senior figures to be removed from their posts.<sup>559</sup> The International Crisis Group has stated that the Afghan government must do more to ensure legal practitioners understand enough about the law to ensure its fair application.<sup>560</sup> While Amnesty International reported that Afghans lack confidence in the formal justice

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<sup>553</sup> *ibid.*

<sup>554</sup> Afghan Women's Network, 'Afghanistan CEDAW Shadow (NGO) Report 2012' at 8.

<sup>555</sup> Zarin Hamid, 'UNSCR 1325-Afghan Monitoring Report' (Afghan Women's Network, Kabul 2012); United States Institute of Peace 'Establishing the Rule of Law in Afghanistan' (USIP, Washington 2004).

<sup>556</sup> International Crisis Group, 'Reforming Afghanistan's Broken Judiciary'.

<sup>557</sup> Hamid, 'UNSCR 1325-Afghan Monitoring Report' at 3.

<sup>558</sup> *ibid.*

<sup>559</sup> Human Rights Watch, 'Afghanistan' (submissions to the UN Universal Periodic Review 2008) at 3.

<sup>560</sup> International Crisis Group, 'Reforming Afghanistan's Broken Judiciary'.

institutions and regard them as slow, ineffective and often corrupt.<sup>561</sup> The UN High Commissioner for Human Rights, Louise Arbour, reported that corruption, insecurity and inadequacy of legal and regulatory frameworks severely undermine executive, judicial and law enforcement institutions.<sup>562</sup> She also noted complaints concerning failure by the police to investigate crimes or act impartially and independently.

#### **4.2.2.2. Warlords**

Human Rights Watch concluded that the single biggest problem facing Afghanistan was the warlords.<sup>563</sup> To ordinary Afghans these were the very same Mujahideen who had nearly destroyed Kabul wreaking terrible devastation on Afghan civilians when they seized power in 1992. Nevertheless, Western media depicts these men as progressive civic leaders and even the Bonn Agreement expresses ‘appreciation’ to them for their ‘major role in the struggle against terrorism and oppression’.<sup>564</sup> This is despite human rights organisations calling for some of them to be tried as war criminals.<sup>565</sup> However, President Karzai dismissed this and any other talk of transitional justice as ‘a luxury the country [could] not afford’.<sup>566</sup> This pragmatism extended to the passing of the National Reconciliation, General Amnesty and National Stability Law in 2009.<sup>567</sup> The ‘amnesty law’ was spearheaded by those members of the Afghan parliament who had commanded forces during the civil war. The legislation was rushed through parliament to thwart any attempts at prosecution for war crimes or criminal offences. The legislation goes further than any traditional amnesty and is not contingent on any testimony or repudiation of violence. The

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<sup>561</sup> Amnesty International, ‘Afghanistan’ (submission to the UN Universal Periodic Review 2008) <[http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/AF/AI\\_AFG\\_UPR\\_S5\\_2009\\_AmnestyInternational.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/AF/AI_AFG_UPR_S5_2009_AmnestyInternational.pdf)>, at 5.

<sup>562</sup> Human Rights Council ‘Report of the High Commissioner for Human Rights on the Situation of Human Rights in Afghanistan and on the Achievement of Technical Assistance in the Field’ (21 February 2008) UN Doc A/HRC/7/27, at 13.

<sup>563</sup> Human Rights Watch, ‘Afghanistan: Return of the Warlords’ (2002) at 1; Human Rights Watch, ‘Afghanistan’s Bonn Agreement One Year Later: A Catalog of Missed Opportunities’, at 2.

<sup>564</sup> See the Bonn Agreement, Introduction.

<sup>565</sup> Human Rights Watch, ‘Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan’s Legacy of Impunity Human Rights’ (HRW 2005).

<sup>566</sup> International Crisis Group, ‘Afghanistan: Judicial Reform and Transitional Justice’.

<sup>567</sup> The English version of the law is available at <<http://aan-afghanistan.com/index.asp?id=665>> accessed August 2015.

Afghan Women's Network describe this law as 'almost a blanket amnesty for crimes in exchange for reconciliation with the current insurgents and warlords.'<sup>568</sup>

Jones notes that: 'Most Afghans surveyed between 2002 and 2004 by the Afghan Independent Human Rights Commission thought the leaders of the Mujahideen were war criminals who should be brought to justice (75 percent) and removed from public office (90 per cent).'<sup>569</sup> Human Rights Watch went so far as to state that the country had regressed to the days of endemic military feudalism, which the Taliban had in fact effectively ended by almost unifying the country. Instead these feudal and familial rivalries were reignited by the US in its short-term strategy to rout the Taliban. According to Mark Drumbl, 'Afghanistan's progress toward a post-conflict society is at best halting and may in fact be stagnant. Afghanistan is increasingly splintered into fiefdoms run by local strongmen.'<sup>570</sup> Regional and local commanders, many of who still receive arms, money and political support from the US filled the vacuum created by the expulsion of the Taliban. This created insecurity which in turn allowed human rights abuses to continue unchecked.

NGOs have also documented how these local commanders regularly abuse the human rights of Afghans living under their control. Such is the power of the warlords that it is impossible for the transitional administration to establish any authority beyond Kabul. Human Rights Watch was particularly critical of the US decision to rely on these warlords to provide security outside of Kabul. The decision to engage the services of tribal warlords appears more disconcerting given US awareness of the background of many of these men. Anders Fange calls the decision to engage them a 'fundamental mistake' and highlights how giving them vast sums of money and supporting their elevated positions laid the basis for 'a weak constitutional, political and administrative system which resulted in increased corruption, the growth of the drugs industry and the violations of rights of individuals.'<sup>571</sup>

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<sup>568</sup> Afghan Women's Network, 'Afghanistan CEDAW Shadow (NGO) Report 2012' (AWN, Kabul 2013) at 6.

<sup>569</sup> Ann Jones, 'Remember the Women?' in Nick Turse (ed), *The Case for Withdrawal from Afghanistan* (Verso, London 2010), at 99.

<sup>570</sup> Drumbl, 'Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan' 362.

<sup>571</sup> Anders Fange, 'The State of the Afghan State' (Afghanistan Analysts Network 2010), at 3.

Thus, as Jones notes: ‘From the point of view of women today, America’s friends and America’s enemies in Afghanistan are the same kind of guys.’<sup>572</sup>

#### ***4.2.3. Discriminatory Views on Women***

What Western analysts and commentators often failed to grasp was that any of the Mujahideen warlords who entered government held similar views about women as their Taliban predecessors.<sup>573</sup> Even President Karzai was accused of pandering to conservative factions to the detriment of women’s rights.<sup>574</sup> In May 2008 Karzai pardoned two rapists who had only served two years of their eleven-year sentences. It was reported that the men had strong political links.<sup>575</sup> In February 2009 the Afghan Parliament passed the Shia Personal Status Law.<sup>576</sup> The purpose of this law was to regulate the domestic affairs of the Afghan Shia minority. It requires women to gain their husband’s permission to leave the home and was criticised for sanctioning marital rape as it allowed men to withdraw support from their wives if they refused sexual intercourse. Human Rights Watch described this law as being ‘riddled with Taliban style misogyny.’<sup>577</sup> It was passed before the 2009 Presidential election when Hamid Karzai was seeking the support of powerful Shia clerics. The UN Special Rapporteur for Religious Freedom reported to the Human Rights Council that there were serious concerns that the law violated the human rights of minority Shia women and girls, was in breach of Afghanistan’s national and international obligations, and would further entrench discrimination and violence against women, girls and members of religious minorities. The Rapporteur’s summary listed a number of serious human rights concerns:

- The law makes it impossible for Shia wives to inherit houses and land from their husband’s, even though husbands may inherit from their wives
- Only men are allowed guardianship rights
- A female virgin, whatever age she may be, is treated as a legal minor and requires the consent of her “guardian” to enter into marriage

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<sup>572</sup> Jones, ‘Remember the Women?’, at 99.

<sup>573</sup> Human Rights Watch, ‘The “Ten-Dollar Talib” and Women’s Rights: Afghan Women and the Risks of Reintegration and Reconciliation’.

<sup>574</sup> Human Rights Watch, ‘“We Have the Promises of the World” Women’s Rights in Afghanistan’.

<sup>575</sup> *ibid*, at 36.

<sup>576</sup> The Shia personal status law is published in the country’s official Gazette (Gazette 988) in Pashtu and Dari. There is no official English translation.

<sup>577</sup> *ibid*, at 3.

- The law effectively condones the denial of maintenance by a husband to his wife if she refuses his sexual demands or what he perceives to be his “conjugal rights”;
- A woman’s mobility, including the right to leave her house, continues to be potentially restricted to varying degrees, depending on the interpretations given to the qualifications in the provision, which refer to “legitimate purposes” and “to the extent that local customs allows”.<sup>578</sup>

Moreover, as Jones notes ‘it generally treats women as property, and it considers rape of women or minors outside marriage as a property crime, requiring restitution to be made to the owner, usually the father or husband, rather than a crime against the victim.’<sup>579</sup> In view of this, Afghan women and the Kabul based Afghan women’s group RAWA mounted a sustained national and international campaign to shame President Karzai and the Afghan Parliament into abandoning this legislation.<sup>580</sup> Around two hundred ordinary Afghan women demonstrated in Kabul and handed in a petition to the Afghan parliament calling for the law to be scrapped.<sup>581</sup> The law was condemned by many in the international community, including leaders from the UK, France, Canada and the USA. President Obama called the law ‘abhorrent’ and NATO joined the condemnation.<sup>582</sup> NATO Secretary General Jaap de Hoop Scheffer said:

We are there to defend universal values and when I see, at the moment, a law threatening to come into effect, which fundamentally violates women’s rights and human rights, that worries me.<sup>583</sup>

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<sup>578</sup> Human Rights Council, ‘Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Janangir’ (16 February 2010) UN Doc A/HRC/13/40/Add.1.

<sup>579</sup> Jones, ‘Remember the Women?’, at 101. See also Jerome Starkey, ‘Afghan Leader Accused of Bid to “Legalise Rape”’ *The Independent* (London 31 March 2009).

<sup>580</sup> For updates on the RAWA campaign see <<http://www.rawa.org/temp/runews/2010/03/25/afghanistan-human-rights-under-pressure.html>> accessed August 2015.

<sup>581</sup> Dexter Filkins, ‘Afghan Women Protest New Law on Home Life’ *New York Times* (New York 15 April 2009)

<sup>582</sup> Human Rights Watch, ‘“We Have the Promises of the World” Women’s Rights in Afghanistan’, at 3.

<sup>583</sup> ‘New Afghan Law Worries NATO Chief’ BBC News (3 April 2009) <[http://news.bbc.co.uk/1/hi/world/south\\_asia/7981340.stm](http://news.bbc.co.uk/1/hi/world/south_asia/7981340.stm)> accessed August 2015.

President Karzai did eventually bow to international pressure and agreed to have the law reviewed, however a month before the Presidential election he issued an amended version of the law which was virtually identical.<sup>584</sup>

Furthermore, the Afghan Parliament has displayed hostility towards women's rights and attempted to weaken the EVAW law. While the law was being scrutinised by Parliament, prominent figures such as Addul Rasul Sayyaf, chair of the Parliamentary International Relations Committee and a notorious warlord, advocated removing many of the provisions in the law.<sup>585</sup> He argued that the provisions on child marriage should be brought into line with his interpretation of Sharia rendering it permissible for a child to marry once she has started menstruating or has no legal guardian. He also suggested that Sharia allowed a husband or father to use violence against his wife or daughter as a form of discipline.<sup>586</sup>

#### ***4.2.4. Harmful Traditional Practices***

Human rights reports often note the prominent role that culture and tradition play in Afghanistan. The pre-Islamic tribal code of Pashtunwali, which governs the lives of the Pashtuns, is one example. This code places a high emphasis on the concept of 'honour'. Afghan women's honour is tied heavily to notions of chastity, servility and loyalty. The practice of purdah is still maintained and women are expected to remain in the home effectively separated from the public sphere.

Under the honour code and in Islamic law a woman is shamed if she commits *zina*. *Zina* refers to sexual intercourse outside of marriage, but the term is loosely used and any unorthodox interactions with the opposite sex could lay a woman open to accusations of *zina*. The merest hint of *zina* is one that women are to be protected from at all costs. Under the Afghan penal code committing *zina*, or even intention to commit *zina*, is a crime. Therefore, women or young girls who have left abusive husbands or families and sought

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<sup>584</sup> The legal age that girls can be married was raised from nine to sixteen and the clause prohibiting women from leaving their homes unaccompanied was amended to allow them to leave for 'legal' purposes – generally understood to mean attending work or attending a medical facility. An unofficial English translation of the legislation and amendments was prepared by the United States Agency for International Development (USAID) and is available from <<http://www.unhcr.org/refworld/docid/4a24ed5b2.html>>. See also Ben Farmer, 'Afghanistan Revises Marriage Law but Women Still Expected to Submit to Sexual Intercourse' *The Telegraph* (London 9 July 2009).

<sup>585</sup> Human Rights Watch, "'We Have the Promises of the World' Women's Rights in Afghanistan', at 46.

<sup>586</sup> *ibid.*

shelter in the women's refuges, or those who have been raped have sometimes found themselves imprisoned.<sup>587</sup> Indeed a survey by the Women and Children Legal Research Foundation found that most women in Afghan prisons were imprisoned for 'moral' crimes.<sup>588</sup> A 2007 UNDOC report contained similar results.<sup>589</sup> The UN Secretary General noted that the 'criminalization of women who have been victims of gender-based violence and gender discrimination in the application of customary law continues to be a major concern.'<sup>590</sup>

Other harmful traditional practices, which still pervade Afghan society, are the concept of '*baad*' and '*baadal*'. *Baadal* is the mutual exchange of girls in marriage while *baad* refers to giving away a woman or girl as compensation for a crime or a debt and essentially renders women as slaves. The UN and several NGOs have reported consistently since 2001 that the practice of *baadal* and *baad* are still widespread and severely impact on women's rights.<sup>591</sup> Technically *baad* is now illegal, but it is still commonly practised in several regions of the country, including Kabul.<sup>592</sup> Many women support the concept of *baadal*, however it is estimated that 30 per cent of such marriages involve minors.<sup>593</sup> A report by the Max Planck Institute illustrates a typical *baadal* agreement:

An 80-year-old father married his eight-year-old daughter to a man aged 50. In exchange, the father married the 14-year-old girl of that man. Neither girl had reached her age of puberty.<sup>594</sup>

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<sup>587</sup> Jon Boone, 'Afghan Woman Jailed after Being Raped Is Freed after Two Years in Kabul Prison' *The Guardian* (London 14 December 2011).

<sup>588</sup> Women and Children Legal Research Foundation, 'Women's Access to Justice – Problems and Challenges' (WCLRF 2008), at 33.

<sup>589</sup> UN Office on Drugs and Crime, 'Afghanistan: Female Prisoners and Their Social Reintegration' (UNODC Vienna 2007)

<sup>590</sup> UNSC AND UNGA, 'The Situation in Afghanistan and the Implications for Peace and Security' (Report of the Secretary General 23 September 2008) UN Doc A/63/372, S/2008/617, at para 52.

<sup>591</sup> See Human Rights Watch, "'We Have the Promises of the World'" Women's Rights in Afghanistan'; Amnesty International, 'No One Listens and No One Treats Us as Humans: Justice Denied to Women' (AI 2003); UNAMA and OHCHR, 'Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan' (2010).

<sup>592</sup> Landinfo Country of Origin Information Centre, 'Afghanistan: Marriage Report' (Landinfo Oslo 2011) at 13.

<sup>593</sup> Women and Children Legal Research Foundation (2008) 'Early Marriage in Afghanistan' (WCLRF Kabul 2008).

<sup>594</sup> Max Planck Institute, 'Family Structures and Family Law in Afghanistan' (Max Planck Institute Hamburg 2005) at 17.

The report further notes that ‘The Department of Women’s Affairs sent representatives to talk to the men, but the men replied by saying “that is not your business.”’<sup>595</sup>

Any attempt to question traditional practices is often met with hostility and accusations of denigrating Islam, however, the version of Islam practised in Afghanistan is that preached by the powerful and conservative mullahs, many of whom are illiterate. Even an Islamic education often involves rote learning of the Koran. Many of the practises and traditions adhered to are actually pre-Islamic.<sup>596</sup> The UNAMA report highlights that in *Sharia* law, consent from both parties is a basic requirement for a marriage to be considered valid. It notes that:

Exchange of women without their consent and without the required mahr (dowry given to the woman), is prohibited. Abdullah Ibn Umar (companion of the Prophet) said that Allah's Messenger prohibited Shighar, which means it is forbidden for a man to give his daughter in marriage on the condition that another man gives his own daughter to him in marriage, without dowry... Exchange marriages thus undermine the principles of consent and mahr (dowry). The Sharia principle that it is unlawful to “forcibly inherit a woman” means that both the practice of baad, and exchange marriages are contrary to Islam.<sup>597</sup>

#### ***4.2.5. Physical barriers to Education***

The Afghan Constitution now guarantees the right to education and states that the government must ‘devise and implement effective programs for balancing and promoting education for women.’<sup>598</sup> Furthermore, CEDAW requires Afghanistan to take all appropriate measures to eliminate discrimination against women in order to ensure equal rights in education.<sup>599</sup> Access to education has vastly improved since the fall of the Taliban. In 2002 there were fewer than one million children enrolled in school and by 2008 the number had exceeded six million. However the greatest increase has been in boys’ education. The original target for girls’ enrolment set out in the Afghan Compact was

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<sup>595</sup> *ibid.*

<sup>596</sup> Louis Dupree, *Afghanistan*, (Princeton University Press, 1973), at 104.

<sup>597</sup> UNAMA and OHCHR, ‘*Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan*’ (2010) at 17.

<sup>598</sup> The Constitution of Afghanistan, Article 17.

<sup>599</sup> The Convention on Elimination of Discrimination against Women, Article 2, at 10.

revised downward from the boys' target of 75%. However, even the revised target is far from being met.<sup>600</sup> There are many reasons why girls' school uptake has not been high as hoped. UNIFEM estimates that only 19% of Afghan schools are designated girls' schools.<sup>601</sup>

While it is recognised that educating girls is key to Afghanistan's future development, this is made especially difficult when the majority of girls are still married before reaching the age of 16, despite this being illegal.<sup>602</sup> Notwithstanding a Presidential Decree guaranteeing married girls' right to attend school, the Ministry of Education reinstated a policy directive ordering schools to separate married girls from other students and provide separate classrooms for them. There is no such policy for married boys. Such a policy only pushes girls out of school as strained resources mean schools are unlikely to have the accommodation or teachers available to separately educate married girls.<sup>603</sup> Western commentators might cynically conclude that the purpose of such decrees is to allow the Afghan authorities to indirectly force girls from education without inciting the condemnation that a Taliban style blanket ban on female secondary education might. While it might also be inferred that the solution to such edicts are to offer money or resources, as Western charities have often discovered, such edicts often have grassroots support.<sup>604</sup>

## 5. Conclusion

The promise to bring democracy, human rights and the rule of law to Afghanistan meant that expectations of the country's future without the Taliban were unrealistically raised. It appears that the optimistic rhetoric of the Western media did not reflect the reality, which has been far different from the one promised by the US and its allies. International Human rights organisations have been particularly scathing of the failures of the Afghan

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<sup>600</sup> Human Rights Watch, "'We Have the Promises of the World' Women's Rights in Afghanistan', at 76.

<sup>601</sup> UNIFEM, 'The Situation of Women in Afghanistan' (Afghanistan Fact Sheet 2008).

<sup>602</sup> Human Rights Council, 'Afghanistan' (Summary Prepared by the OHCHR in Accordance with Paragraph 15 (C) of the Annex to Human Rights Council Res 5/1 2009) UN Doc A/HRC/WG.6/5/AFG/3, at 6.

<sup>603</sup> Editorial, 'Marriage Spells the End of Learning' *The Guardian* (London 29 November 2003).

<sup>604</sup> See Dexter Filkins 'Saving the World's Women: A School Bus for Shamsia' *New York Times* (New York 17 August 2009) where the author describes how, after publishing an article about acid attacks on school girls, Americans donated \$25000 to help the girls. When the author travelled to the school to donate a school bus and offer plastic surgery the offers were rebuffed. Simply offering a bus to prevent Afghan girls being attacked by acid did not provide a working solution as many parents were ultimately persuaded that their daughters were not worth educating.

Government to protect women from gross human rights violations. As early as 2003 Amnesty International was suggesting that the Afghan Government was too weak and ineffectual to offer protection to the country's women and children.<sup>605</sup> In its summary of stakeholder submissions for universal periodic review, the Human Rights Council cites the International Centre for Transitional Justice's conclusion that 'the Afghan Government and its international partners seem to accept that many government officials are alleged perpetrators of war crimes and have known links to armed groups and the drugs trade.'<sup>606</sup> Yet despite these warnings the US and its allies focussed attention on the Taliban and paid little concern to the practises of the Afghan Government or improving the conditions on the ground. Indeed a 2009 Human Rights Watch report highlighted that 'women have not been a central priority for the government or for international donors, whose focus is primarily on the armed conflict rather than the broader concept of civilian security and rule of law.'<sup>607</sup>

As regards women's rights it does not appear that there was ever any sustained attempt on any of the key actors' parts to put in place measures that would adequately address the patriarchal conditions under which many Afghan women live. Indeed, in 2011 the UN High Commissioner for Human Rights, Navanethem Pillay, reported to the Human Rights Council that 'on going human rights problems in Afghanistan have not been effectively addressed.'<sup>608</sup>

It would appear that the international approach to Afghanistan was based on the assumption that eradicating the Taliban would eradicate the systematic denial of women's rights and that any replacement regime would be emancipatory for women. Yet, as this chapter has demonstrated, such an assumption was misplaced given that much of the structural discrimination against women already existed. The ruling political factions are just as ideologically hostile to women's participation in the workplace or education or even

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<sup>605</sup> Amnesty International, 'No One Listens and No One Treats Us as Humans: Justice Denied to Women'.

<sup>606</sup> Human Rights Council, 'Afghanistan' (Summary Prepared by the OHCHR in Accordance with Paragraph 15 (C) of the Annex to Human Rights Council Res 5/1 2009) UN Doc A/HRC/WG.6/5/AFG/3, at 5.

<sup>607</sup> Human Rights Watch, "'We Have the Promises of the World" Women's Rights in Afghanistan', at 3.

<sup>608</sup> Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Afghanistan and on the Achievements of Technical Assistance in the Field of Human Rights' (19 January 2011) UN Doc A/HRC/16/67, at 4.

in public life as their Taliban predecessors.<sup>609</sup> More worryingly, the small gains witnessed in the immediate aftermath of the removal of the Taliban appear to be increasingly diminished. Despite the passing of several laws and social codes mandating equality and proscribing violence and discrimination against women, mainstream opinion reflects hostility to the implementation of these laws.

As such it is notable that the US and its allies continued for several years to link the aims of OEF with the liberation of Afghan women. Many NGOs had observed as early as 2002 that the plans being pursued by the Western military were not premised on overturning the structural discrimination against women and questioned how achievable change would actually be. According to Drumbl the ‘judicialization of systemic human rights abuses in Afghanistan, in particular gender crimes, involves much more than a straightforward legal or administrative exercise.’<sup>610</sup>

In view of this, it is therefore difficult to endorse the proposition that the ‘War on Terror’ was also a war for women’s rights. Not only has the intervention in Afghanistan failed to bring about lasting change in the position and treatment of women, it appears that improving women’s rights was not especially a priority for the US administration. As such, the positioning in the Western media of the war in Afghanistan as a war of liberation for Afghan women is highly problematic. The following chapter therefore interrogates the motivations for this positioning and also the casting of the Taliban as the sole barrier to Afghan women’s emancipation.

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<sup>609</sup> Human Rights Watch, ‘“We Have the Promises of the World” Women’s Rights in Afghanistan’, at 3.

<sup>610</sup> Drumbl, ‘Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan’, at 387.

**PART II:**  
**THEORISING THE AFGHAN ALIBI**

## Chapter 3 The Heroic Narrative

### Introduction

The 9/11 attacks and the resulting ‘War on Terror’ were explained within a familiar heroic narrative in which the US and its Western allies were positioned as rescue figures, at once extracting justice on behalf of the American people, but also as archetypal heroes saving Afghan women from evil men. Such a narrative is familiar and attractive to the Western audience as it recalls childhood fairytales. This chapter aims to both highlight and critique the operation of this heroic narrative, and argue that it was used to simplify and propagandise the ‘War on Terror’ and engages with the critical legal scholarship that seeks to expose the narrative framing of military intervention. This chapter will outline the political narratives that served to influence the perception of international intervention in Afghanistan and in doing so helped to encourage support for this action despite its potential illegality. Section 1 argues that the heroic, or rescue, narrative has roots in the classical theory of ‘just war’ and demonstrates how OEF invokes a modern interpretation of just war theory as a way of generating support for war. Section 2 then turns to the heroic narrative specifically. It engages with the critical scholarship of Anne Orford to outline the requirements for the heroic narrative to successfully operate, and demonstrates how these conditions were constructed after the 9/11 attacks. This section will also explain how the heroic narrative came to influence critical discussion of the intervention in Afghanistan outlining how such framing was endorsed and replicated almost universally in the media.

The remaining sections of this chapter engage in a critique of the heroic narrative. Section 3 offers an explanation of the attraction of the heroic narrative as a lens through which to view intervention. It utilises the work of critical scholars, particularly Third World and post-colonial feminist scholars, to attempt to delve beneath this narrative and determine whether the military offensives that subscribe to this narrative can in fact be said to be about rescuing the victims. It further engages with the work of critical theorists to argue that, far from rescuing victims, such military offensives usually serve to marginalise and silence the very people on whose behalf the offensive was said to be mounted. Section 4 outlines the consequences of this narrative, and looks specifically at the effect it has had on Afghan women and, drawing on the conclusions of the previous chapter, seeks to expose

the gap between this rhetoric and the reality for Afghan women. Finally Section 5 utilises Third World Approaches to International Law (TWAIL) to critically evaluate the wider theoretical ramifications of this narrative.<sup>611</sup> It demonstrates how the heroic narrative is an evolution of the colonial protection narratives that operated to justify and legitimise colonialism, and outlines how recourse to such a narrative is problematic in international law. It also explores the relationship between feminism and the military intervention war machine, highlighting how the language of women's rights has served as a shibboleth for military action, yet noting that such action has rarely given effect to feminist aims. As such, this section cautions against the feminist endorsement of military action. This chapter ultimately concludes that the familiarity and enduring appeal of the heroic narrative allows it to dominate legal and political discourse, effectively silencing other narratives. While this allows Western leaders to garner support for military offensives, such narrow framing effectively reaffirms an imperialist doctrine within international law and co-opts the language of women's rights while simultaneously silencing those women for whom the war is supposedly being fought.

## 1. The Heroic Narrative

According to Shelley Wright international law would be meaningless without narrative.<sup>612</sup> She writes that 'we cannot imagine what we cannot tell as a story'.<sup>613</sup> As such, this chapter seeks to explore the stories that have been told to legitimate the war in Afghanistan with a view to uncovering the complex realities that work to underpin military interventions in foreign states. Anne Orford asserts that such military intervention is legitimated through the retelling of stories that detail the human rights violations and suffering of oppressed people.<sup>614</sup> At the heart of these 'fairy stories of human rights' lies a 'hapless victim', a villain and a hero.<sup>615</sup> Orford claims that central to the operation of these narratives is their 'ordering effect'; the regulation of relationships between groups, which secures the boundary between the civilised international community and its others.<sup>616</sup>

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<sup>611</sup> Mutua and Anghie, 'What Is Twail?'

<sup>612</sup> Shelly Wright, 'The Horizon of Becoming: Culture, Gender and History after September 11' (2002) 71 *Nordic Journal of International Law* 215, at 233.

<sup>613</sup> *ibid*

<sup>614</sup> Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*.

<sup>615</sup> Chandler, *From Kosovo to Kabul and Beyond: Human Rights and International Intervention*.

<sup>616</sup> Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*, at 187.

Orford and others outline how this heroic narrative underpins international intervention by presenting rogue states, ‘despotic dictators’ and ‘fanatical terrorists’ as threats to the existing world order.<sup>617</sup> This creates a credible call to arms where military intervention is then considered necessary to remove this threat, restore the existing order and save the victims of this disorder. The narrative commences with a disruption of the established symbolic order. The key to its operation is the identification of a hero, or ‘white knight’, with whom the spectator is invited to identify, and then the ascribing of radicalised or feminised characters that serve as a background and foil to the actions of the hero.<sup>618</sup> The attraction of this narrative is that it reimagines childhood fairy tales in which the (masculine) hero saves the (feminine) victim from a metaphorical evil. As critical scholars have noted, it is powerfully seductive, both for its happy ending and for the deeply rooted power relations that it reaffirms and reasserts.<sup>619</sup> Indeed Fredric Jameson states that heroic narratives (like many others) transcend fiction and permeate our entire culture.<sup>620</sup> As such, in the human rights and humanitarian project it is often argued that the heroic narrative works to attract public support for military deployments by allowing ordinary people to invest in the myth that they are saving people, when in fact the evidence suggests the contrary.<sup>621</sup>

The idea that human rights and humanitarianism is grounded in familiar stereotypical narratives of victims, villains and heroes is not new.<sup>622</sup> As noted, and discussed subsequently, it finds its natural home in the just war doctrine. Makau Mutua argues that such a narrative lies at the heart of the human rights project.<sup>623</sup> He writes that it is a

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<sup>617</sup> Orford, ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’; Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*; Chandler, *From Kosovo to Kabul and Beyond: Human Rights and International Intervention*; Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’

<sup>618</sup> Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*.

<sup>619</sup> The attractiveness of the heroic narrative is discussed further in section 3.

<sup>620</sup> Fredric Jameson, *The Political Unconscious: Narrative as a Socially Symbolic Act* (Cornell University Press, Ithaca 1982).

<sup>621</sup> Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*.

<sup>622</sup> See David Kennedy, ‘International Human Rights Movement: Part of the Problem?’ (2002) 15 *Harvard Human Rights Journal* 101; Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*; Chandler, *From Kosovo to Kabul and Beyond: Human Rights and International Intervention*; Ratna Kapur, ‘Human Rights in the 21st Century: Take a Walk on the Dark Side’ (2006) 28 *Sydney Law Review* 664; Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’.

<sup>623</sup> Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’, at 201.

damning metaphor that ‘depicts an epochal contest pitting savages, on the one hand, against victims and saviours on the other.’<sup>624</sup> Meanwhile post-colonial scholarship has established that the arguments espoused by the colonial powers to defend their subjugation of Third World countries were often grounded in this narrative.<sup>625</sup> In international law this narrative operates as what Anghie and Chimni refer to as the ‘civilising mission’,<sup>626</sup> or the idea of ‘white men saving brown women from brown men.’<sup>627</sup> That is to say, Western states saving Third World women from Third World men.

### **1.1. The Heroic Narrative as an Evolution of the ‘Just War’ Doctrine.**

The just war doctrine as a moral legitimization of war was first conceived by the Greeks and has much of its roots in the theory of natural law.<sup>628</sup> One of the earliest and most famous remarks on the just war is from Aristotle’s *Politics*, in which he remarks that a war that is subject to the law of nature is a just war.<sup>629</sup> The doctrine as envisaged by the classical philosophers had no legal or political theory behind it<sup>630</sup> however, as Nussbaum notes, it was formalized by the Romans into a valid legal doctrine, although its main function remained as providing a moral legitimization for warfare.<sup>631</sup> Early Christian writers used the theory of just war to forge a compromise between the Christian tradition that viewed war as immoral and the pragmatic needs of medieval peoples to wage war. These ideas were then substantiated and codified by Thomas Aquinas in his *Summa Theologiae*,<sup>632</sup> which in turn influenced the modern understanding of just war.<sup>633</sup>

Despite the waning influence of natural law during the Enlightenment, the just war doctrine as conceptualised by Aquinas remained and was incorporated into international

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<sup>624</sup> *ibid.*

<sup>625</sup> Jasmine Zine, ‘Between Orientalism and Fundamentalism: Muslim Women and Feminist Engagement’ in Krista Hunt and Kim Rygiel (eds), (*En*) *Gendering the War on Terror: War Stories and Camouflaged Politics* (Ashgate Publishing Company, London 2006); Anthony Anghie and Bhupinder S. Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’ (2003) 2 *Chinese Journal of International Law* 77.

<sup>626</sup> Anghie and Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’, at 85.

<sup>627</sup> Spivak, ‘Can the Subaltern Speak?’

<sup>628</sup> Simon Chesterman and Ian Brownlie, *Just War or Just Peace?: Humanitarian Intervention and International Law* (Oxford University Press, Oxford 2001).

<sup>629</sup> Aristotle, *The Politics* (Trevor J. Saunders ed, T Sinclair tr, Penguin Books, London 1981) at 3.

<sup>630</sup> Arthur Nussbaum, ‘Just War: A Legal Concept?’ (1943) 42 *Michigan Law Review* 453.

<sup>631</sup> *ibid.*

<sup>632</sup> William Benton, *The Summa Theologica of Saint Thomas Aquinas* (University of Chicago 1952).

<sup>633</sup> Chesterman and Brownlie, *Just War or Just Peace?: Humanitarian Intervention and International Law*.

law by Grotius.<sup>634</sup> His seminal work *De Jure Belli ac Pacis* provided the first modern account of the just war doctrine in international law<sup>635</sup> and it has remained a major influence on Western jurisprudence throughout the Enlightenment period and well into the twentieth century.<sup>636</sup> Grotius reasoned that a war was just if it was fought in order to protect people or to fight evil.

So we do not doubt that wars are justly waged against those who act with impiety towards their parents;...against those who feed on human flesh...and against those who practise piracy...Regarding such barbarians, wild beasts rather than men, one may rightly say...that war against them was sanctioned by nature.<sup>637</sup>

Grotius also wrote that men should respect God, but interestingly he stopped short of advocating that wars fought to convert non-Christians, i.e. the crusades, could ever be just, reasoning that Christ himself was said to desire that no one was to receive his divine law through fear for his life.<sup>638</sup> Although, somewhat contradictorily, he also wrote that: ‘those who establish with divine honours the worship of evil spirits, whom they know to be such, or of personified vices or of men whose lives were filled with crimes’ are to be considered wicked, and as such, deserving of punishment.<sup>639</sup> Thereby suggesting that war against an infidel could sometimes be justified, because such people were barbarians.

Thus, even the carefully reasoned opinions of Grotius, which offered much more restraint and respect for the legal reasoning, still drew on just war notions rooted in subjectivity. Indeed, it is difficult to conceive of a just war doctrine that is not entirely subjective,

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<sup>634</sup> See Joachim Von Elbe, ‘The Evolution of the Concept of the Just War in International Law’ (1939) 33 *The American Journal of International Law* 665; Coleman Phillipson, ‘Introduction’ in Alberico Gentili, *De Jure Belli (1612) Classics of International Law*, vol 2 (J.C. Rolfe tr, Clarendon Press 1933).

<sup>635</sup> Hugo Grotius, *The Law of War and Peace: De Jure Belli Ac Pacis Libri Tres* (Francis W. Kelsey and Arthur E.R Boak trs, Bobbs-Merrill, Indianapolis 1962).

<sup>636</sup> See Chesterman and Brownlie, *Just War or Just Peace?: Humanitarian Intervention and International Law*.

<sup>637</sup> Stephen Neff, *Hugo Grotius on the Law of War and Peace Student Edition* (Cambridge Books Online) at 285.

<sup>638</sup> *ibid*, at 290.

<sup>639</sup> *ibid*, at 289.

therefore leading Douzinas to describe it as one of the ‘hardest moral mazes’.<sup>640</sup> It was therefore this inability of international law to define objective requirements by which a just war could be judged that led in part to its abandonment as a legal principle.<sup>641</sup> This, coupled with the rise of legal positivism and the sanctifying of state sovereignty, meant a departure from invoking morality as a legitimating standard. Instead international law recognised the absolute power of sovereign states and with it the idea that they could determine their own justifications for going to war, which no longer had to be just.<sup>642</sup>

However, whilst it could be claimed that just war theory was abandoned by legal scholars in favour of positivistic justifications for war, the moral ideology of the just war tradition endures and is enjoying a revival. This is noted by Simon Chesterman who argues that the moral ideology of waging war to protect the innocent has remained and has influenced the creation of the doctrine of Responsibility to Protect (R2P), which sought to create a normative framework for humanitarian intervention.<sup>643</sup> Tsagourias also argues that the requirements for humanitarian intervention are merely ‘refinements of the just war theory.’<sup>644</sup>

Humanitarian intervention and R2P doctrine have received much attention from scholars in the last two decades.<sup>645</sup> Much has been written of how, rather than heralding the new world

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<sup>640</sup> Costas Douzinas, ‘Postmodern Just Wars: Kosovo, Afghanistan and the New World Order’ in J. Strawson (ed), *Law after Ground Zero* (Routledge Cavendish 2002).

<sup>641</sup> Chesterman and Brownlie, *Just War or Just Peace?: Humanitarian Intervention and International Law*.

<sup>642</sup> Inspired by Hobbes, Christian Wolff is credited with being the first to distinguish between positivist international law and natural law. He is followed by Vattel who likewise rejects Grotius’ endorsement of just law theory. See *ibid*.

<sup>643</sup> Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge University Press, Cambridge 2005).

<sup>644</sup> Nikolaos K. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester University Press, Manchester 2000) at 73.

<sup>645</sup> See for example: Fernando R. Teson, ‘The Liberal Case for Humanitarian Intervention’ FSU College of Law, Public Research Paper 39 (Florida State University College of Law, November 2001); Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, Oxford 2000); Louis Henkin, ‘Kosovo and the Law of “Humanitarian Intervention”’ (1999) 93 (4) AJIL 824; Jonathan Charney, ‘Anticipatory Humanitarian Intervention in Kosovo’ 32 Vanderbilt Journal of Transnational Law 1231 (1999); S Neil MacFarlane, Carolin Thielking & Thomas Weiss ‘The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?’ (2004) 25 (5) Third World Quarterly 977; Gareth Evans and Mohammed Sahnoun, ‘The Responsibility to Protect’ (November-December 2002) 81 Foreign Affairs 99; Nicholas Wheeler and Frazer Egereton, ‘The Responsibility to Protect: “Precious Commitment” or a Promise Unfulfilled?’ (2009) 1 Global Responsibility to Protect 114; F Megret, ‘Beyond the ‘Salvation’ Paradigm: Responsibility to Protect (Others) vs the Power of Protecting Oneself’ (2009) 40 Security Dialogue 575

order, the end of the Cold War has created a climate whereby ethnic and religious tensions frequently spill into regional or civil conflicts that are often focused on civilian populations. Reports of war crimes, violence, and ethnic cleansing against innocent civilians have meant calls for an international response to halt such violence. In less than fifty years the public conception of militarism has radically shifted from viewing war as a last resort, so much so that 'war is no longer the prerogative of international criminals, but the first resort of the righteous.'<sup>646</sup>

### ***1.1.1. The 'War On Terror' – The New Just War?***

The 'War on Terror' is perfectly framed to appeal to notions of just war. It invokes images of helpless Afghan women, terrorized by a barbarous regime. However, unlike general situations of humanitarian intervention, such as Kosovo, Somalia or East Timor, the linking of the Taliban's barbarous regime to terrorism, and particularly terrorism directed against the US, resulted in a moral obligation for the West to fight this new evil *and* to protect innocents. As such, Lawler argues that the 'War on Terror' resurrects not only the ideology of the just war, but of the good war in that it not only purports to be a war fought to protect innocent civilians, but a war the West is actually morally obligated to fight.<sup>647</sup> Thus American legal scholar George Falk described OEF as 'the first just war since WWI.'<sup>648</sup> As such, the just war paradigm, by encapsulating the 'War on Terror', in effect lays the foundations for the wider heroic narrative to take root, as it firmly positions the Western allies as just and righteous, therefore elevating the hero character. Critical legal scholars also highlight how such a narrative revisits, and is rooted in, just war theory.<sup>649</sup> Certainly George Bush's recourse to the language of Christian theology, initially calling the quest against the terrorists a 'crusade' and advocating that God was on the side of America, mirrored the religious invocations of the Middle Ages.<sup>650</sup>

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<sup>646</sup> Helen Dexter, 'The "New War" on Terror, Cosmopolitanism and the "Just War" Revival' (2008) 43 *Government and Opposition* 55, at 58.

<sup>647</sup> Peter Lawler, 'The "Good War" after September 11' (2002) 37 *Government and Opposition* 151.

<sup>648</sup> Tickner, 'Feminist Perspectives on 9/11'; Richard Falk, 'Defining a Just War' *The Nation* (29th October, 2001).

<sup>649</sup> Costas Douzinas, 'Postmodern Just Wars and the New World Order' (2006) 5 *Journal of Human Rights* 355.

<sup>650</sup> See George W. Bush, 'Remarks on Arrival at the White House and an Exchange With Reporters' 37 *WCPD* 1322 (16 September 2001).

However, whilst the return of the just war doctrine has re-introduced a moral discourse concerning recourse to war, which has been welcomed by some parties, it is still subject to the same limitations due to its lack of objective criteria, that saw its abandonment by Enlightenment scholars. The current incarnation relies on the same claims to morality, but frames them in the language of human rights and humanitarianism. This turn from religious obligation to secular humanism has proven spectacularly effective, so much so that Denike writes that it ‘has served up a “just cause” for postmodernity’s wars.’<sup>651</sup>

Nevertheless, the use of the just war doctrine as a legitimating narrative is troubling because it remains an entirely subjective doctrine that tells us little about the objective merits of war. Thus the remainder of this chapter seeks to explore how offering human rights and humanitarianism as the just cause serves to legitimate military action. Since this new incarnation of just war is premised on benign rescue motivations rather than religious observance, it is clear that the heroic narrative as an ideological framework offers insight into how these just causes come to legitimate intervention.

## **2. The Operation of the Heroic Narrative in the ‘War on Terror’**

By utilising Orford’s approach, this section will demonstrate how in 2001 the Bush administration and Western media in general promulgated this familiar heroic narrative that provided a ‘conventionalizing idealization of American women and men, a propagandistic demonization of Muslim men and a sentimentalization of Muslim women’.<sup>652</sup> The effect of which was to garner support for the ‘War on Terror’ and OEF in Afghanistan in particular.

### **2.1. Constructing a Crisis**

The 9/11 attacks on the World Trade Centre and the Pentagon shocked the consciousness of the Western world. In the immediate aftermath of the attacks journalists and social commentators reflected the predominant mood of fear and mused on America’s loss of

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<sup>651</sup> Margaret Denike, ‘The Human Rights of Others: Sovereignty, Legitimacy and “Just Causes” for the “War on Terror”’ (2008) 23 *Hypatia* 95.

<sup>652</sup> Lorber, ‘Presidential Address: Heroes, Warriors, and Burqas: A Feminist Sociologist's Reflections on September 11’ at 379.

innocence.<sup>653</sup> Academic scholarship similarly centred on the idea that 9/11 was so momentous an incident that what was to follow could only logically be a new and more fearsome world order.<sup>654</sup> However, with the benefit of distance it is necessary to question why 9/11 was so unequivocally seen to alter the existing global order. While the terror attacks were heinous and unprecedented in the scale of lives lost, attacks on America were not in fact unheard of or unimaginable.<sup>655</sup>

Arguably, it is the narrative construction of 9/11 in popular culture that characterised it as an act of war. Many scholars demonstrate how Bush began to construct the familiar narrative even as the events of 9/11 were still unfolding.<sup>656</sup> Linguistics scholar Sandra Silverstein notes that in his first address to the American people President Bush merely referred to the incident as an ‘attack’.<sup>657</sup> However she describes how this ‘attack’ quickly morphed into an ‘act of war’ and highlights how Bush immediately began to draw on the rhetoric of Pearl Harbour to conceptualise 9/11 as an outbreak of war.<sup>658</sup> By the evening of September 11<sup>th</sup> the attacks were ‘no longer two airplanes crashing into the WTC – but ‘attacks on *our way of life*’,<sup>659</sup> the gravity of such an audacious threat meaning that a military response, rather than a civic one could be the only answer.

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<sup>653</sup> Jack Holland, ‘From September 11th, 2001 to 9-11: From Void to Crisis’ (2009) 3 *International Political Sociology* 275. See also Chapter 5, in which the promotion of fear is discussed as a deliberate method with which to construct a crisis.

<sup>654</sup> See for example: Cassese, ‘Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law’; Thomas Franck, ‘Terrorism and the Right of Self-Defense’; Arai-Takahashi ‘Shifting Boundaries of the Right of Self Defence: Appraising the Impact of September 11 Attacks on Jus Ad Bellum’ 36 *The International Lawyer* (2002) 4, 1081; Beard, ‘America’s New War on Terror: The Case for Self-Defence Under International Law’ 25 *Harvard Journal of Law and Public Policy* (2001-2002) 2 559; Bonafede ‘Here, There and Everywhere: Assessing the Proportionality Doctrine and US uses of force in Response to Terrorism After the September 11 Attacks’ 88 *Cornell Law Review* (2002-2003) 1, 155; Brown ‘Use of Force Against terrorism After September 11<sup>th</sup>: State Responsibility, Self-Defense and Other Responses’ 11 *Cardozo Journal of International and Comparative Law* (2003) 1, 1; Byers ‘Terrorism, the Use of Force and International Law After 11 September’; Greenwood ‘International Law and the Pre-Emptive use of Force: Afghanistan, Al Qaeda, and Iraq’; Quinivet ‘The Legality of the Use of Force by the United States and the United Kingdom Against Afghanistan’ 6 *Austrian Review of International and European Law* (2001), 205.

<sup>655</sup> See Chapter 5 in which the difference in the language describing the 9/11 attacks compared to previous terrorist attacks on the World Trade Centre is highlighted.

<sup>656</sup> Holland, ‘From September 11th, 2001 to 9-11: From Void to Crisis’; Holland, *Selling the War on Terror: Foreign Policy Discourses after 9/11*; Richard Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism* (Manchester University Press, Manchester 2005). Chapter 4 outlines how particular rhetorical tropes were utilised in order to frame military action within the heroic narrative.

<sup>657</sup> Sandra Silverstein, *War of Words: Language, Politics and 9/11* (Psychology Press, Oxford 2002).

<sup>658</sup> The central argument of this thesis is that the 9/11 attacks were purposely rhetorically constructed as acts of war in order to legitimate a military response to criminal acts of private individuals. Chapter 4 outlines how this key transformation of tragic terrorist acts into ‘armed attacks’ took place.

<sup>659</sup> Silverstein, *War of Words: Language, Politics and 9/11* at 6.

### *2.1.1. Invoking the War Paradigm*

Transforming the terrorist attacks into acts of war allowed the authorities to invoke the crisis paradigm, disrupt the symbolic order, suspend normality and position war as the logical response.<sup>660</sup> In the immediate aftermath of 9/11 the talk was of retribution, avenging the victims and preparing to make war, all of which ‘blurred the line between justice and revenge’.<sup>661</sup> Indeed, it is telling that in the weeks and months following the attacks many notable American legal scholars agreed with Bush’s choice of language; Ruth Wedgwood arguing that ‘the scope of the damage caused on September 11<sup>th</sup> makes the language of war seem apropos.’<sup>662</sup>

However ‘recourse to the language of “war” to characterise the attacks and the response to them, was not, self-evident or inevitable.’<sup>663</sup> Indeed as was highlighted in Chapter 1 many legal scholars argued against characterising the attacks as an ‘armed attack’ and instead called for them to be treated as crimes dealt with by the justice system.<sup>664</sup> Despite an overwhelming volume of scholarly opinion concluding that the US was entitled to use force, some (mainly non US based) scholars cautioned against succumbing to this view.<sup>665</sup> In the weeks after the commencement of OEF, Georges Abi-Saab cautioned against viewing 9/11 as ‘unique and conceptually unpredictable’<sup>666</sup> and argued that the existing legal mechanisms should be well able to deal with the situation. Similarly Georgio Gaja, Jordan Paust and Alain Pellet all maintained that as there had been no change in the law, 9/11 was not an armed attack, and so force was not the appropriate response.<sup>667</sup> Yet despite

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<sup>660</sup> Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*.

<sup>661</sup> Frederic Mégret, ‘“War”? Legal Semantics and the Move to Violence’ (2002) 13 *European Journal of International Law* 361.

<sup>662</sup> Ruth Wedgwood, ‘After September 11th’ (2001) 36 *New England Law Review* 725. Wedgwood made these remarks in her Keynote speech at the annual International Law and Policy Conference at New England Law School on 9 November 2001.

<sup>663</sup> Anghie, *Imperialism, Sovereignty, and the Making of International Law* 274.

<sup>664</sup> See Chapter 1, section 2.2.4. See further Cassese, ‘Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law’; Georges Abi-Saab, ‘The Proper Role of International Law in Combating Terrorism’ (2002) 1 *Chinese Journal of International Law* 305; Murphy, ‘Terrorism and the Concept of Armed Attack in Article 51 of the UN Charter’; Alain Pellet, ‘No, This Is Not War!’ *European Journal of International Law* <[http://www.ejil.org/forum\\_WTC/ny-pellet.html](http://www.ejil.org/forum_WTC/ny-pellet.html)>.

<sup>665</sup> Abi-Saab, ‘The Proper Role of International Law in Combating Terrorism’; Paust, ‘Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond’; Gaja, ‘In What Sense Was there an “Armed Attack”?’; Pellet, ‘No, This Is Not War!’

<sup>666</sup> Abi-Saab, ‘The Proper Role of International Law in Combating Terrorism’.

<sup>667</sup> Paust, ‘Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond’; Gaja, ‘In What Sense Was there an “Armed Attack”?’; Pellet, ‘No, This Is Not War!’

such protestations, the situation was ultimately framed in a way that made a military response appear logical and natural perhaps because ‘the war paradigm is a powerfully evocative rubric, with ancient and accreted associations.’<sup>668</sup>

Thus, by invoking the war paradigm, President Bush invited ordinary Americans to enter into a familiar world where US military superiority could be utilised to quash any further threat. Americans were recast from feminised victims to masculine defenders.<sup>669</sup> Frederic Mégret also suggests the appeal of the war paradigm lay in its simplicity and certainty when compared against the complexity of legal bureaucracy. He argues that ‘war’ allows action to be taken regardless of legal responsibility or complicity and thus allows scores to be settled on the basis of power.<sup>670</sup>

### ***2.1.2. War as Mere Rhetoric***

Accordingly, it is suggested that the rhetoric of war was employed deliberately in order to grant America the freedom to avenge the victims and obliterate the perpetrators without being bound by civil and judicial limitations<sup>671</sup> because as Mégret notes, adopting the language of ‘war’ removes the need for legal constraint and also ‘stifle[s] any debate over its own existence.’<sup>672</sup> This is also the conclusion of McGoldrick who opines that recourse to the language of war was in fact a ‘rhetorical flourish: an extravagant metaphor blocking responsible thought about a serious problem.’<sup>673</sup> However feminist scholarship, while agreeing with the above, also suggests that the war paradigm was attractive because it subscribed to masculine stereotypes of military strength and prowess as representing power.<sup>674</sup> Consequently it is argued that turning to the language of war post 9/11 belied a fear of victimisation and feminisation or as Cynthia Enloe suggested; ‘the male politician’s angst over not appearing “manly”’.<sup>675</sup>

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<sup>668</sup> Tawia Ansah, ‘War: Rhetoric & (and) Norm-Creation in Response to Terror’ (2002) 43 *Virginia Journal of International Law* 797, at 808.

<sup>669</sup> Iris Marion Young, ‘The Logic of Masculinist Protection: Reflections on the Current Security State’ (2003) 29 *Signs* 1.

<sup>670</sup> Mégret, ‘“War”? Legal Semantics and the Move to Violence’ at 378.

<sup>671</sup> Pellet, ‘No, This Is Not War!’

<sup>672</sup> Mégret, ‘“War”? Legal Semantics and the Move to Violence’, at 387.

<sup>673</sup> McGoldrick, *From ‘9-11’ to the ‘Iraq War 2003’: International Law in an Age of Complexity*.

<sup>674</sup> Cynthia Enloe, *The Curious Feminist: Searching for Women in a New Age of Empire* (University of California Press, Berkley 2004); Enloe, *Bananas, Beaches & Bases: Making Feminist Sense of International Politics*; Goldstein, *War and Gender*.

<sup>675</sup> Enloe, *The Curious Feminist: Searching for Women in a New Age of Empire*, at 125.

Nevertheless, even if recourse to the language of war serves a purely symbolic purpose, Tawia Ansah argues that the acceptance of such language as ‘natural’ and unavoidable can have a ‘profound impact on how the law’s intervention is shaped.’<sup>676</sup> Indeed as military historian Michael Howard argues, utilising the term ‘war’ has dangerous consequences: ‘To declare one is at war is immediately to create a war psychosis that may be totally counter-productive for the objective being sought.’<sup>677</sup> Therefore it is not wrong to suggest that such a rhetorical display has ‘consequences for the domestic judicial response to terror.’<sup>678</sup>

In view of this, it is suggested that war, rhetorical or actual, provides a framework that quells any criticism of inaction and simultaneously seeks to justify the very crisis that it presumes to create. As such, critical scholars are correct to be wary and highlight the effects of this paradigm. Such scholarship already tells us that ‘the language of “crisis” has become ubiquitous in international law and politics’<sup>679</sup> and that continued portrayal of events as crises is skewing our perception of international peace and security.<sup>680</sup> Again, Orford tells us that, during events like 9/11, straightforward images of ostensible chaos are used to legitimise a military response and ‘in that way, simplistic military action or economic solutions to complex problems are made possible.’<sup>681</sup> Therefore, in order to manufacture the ‘crisis’ from which the heroic narrative stems, it is argued that the US administration adopted the language of war, and the catchphrase of the ‘War on Terror’ in order to signify in the strongest and clearest terms that 9/11 was a disruption to the established order, which necessitated an aggressive military response. Establishing this crisis by resorting to hyperbole therefore presents the necessity of military force, which could then be explained as humanitarian since the ensuing narrative painted the military in a heroic light for both solving the crisis and also saving innocent victims.

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<sup>676</sup> Ansah, ‘War: Rhetoric & (and) Norm-Creation in Response to Terror’, at 799.

<sup>677</sup> Michael Howard, ‘What’s in a Name? How to Fight Terrorism’ January 2002 Foreign Affairs 8.

<sup>678</sup> Ansah, ‘War: Rhetoric & (and) Norm-Creation in Response to Terror’, at 808.

<sup>679</sup> Dianne Otto, ‘Remapping Crisis through a Feminist Lens’ in Sari Kouvo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (Hart, London 2011), at 75.

<sup>680</sup> Hilary Charlesworth, ‘International Law: A Discipline of Crisis’ 65 *The Modern Law Review* 377.

<sup>681</sup> Anne Orford, ‘The Politics of Collective Security’ (1995) 17 *Michigan Journal of International Law* 373, at 13.

## 2.2. Constructing the Hero

The second requirement for the enactment of the heroic narrative is the existence of a readily identifiable heroic figure.<sup>682</sup> This section demonstrates how the US military came to be situated in this role. It was much commented upon that, in the days and weeks following 9/11, the US President invited Hollywood executives to a meeting where the need to communicate the aims of the 'War on Terror' to the American public was emphasised and their assistance invoked.<sup>683</sup> Hollywood and the media then saturated America in nostalgic stories of good versus evil where the 'all-American' hero triumphs over his enemies.<sup>684</sup> Thus, America reacquainted itself with the heroes of childhood, which foreshadowed the celebration of the new hero: ordinary American men who protect the nation; soldiers, fire fighters, police officers and construction workers. These ordinary Americans were depicted as heroes through repeated reference to their courage and valour.<sup>685</sup>

### 2.2.1. The Return of Masculinity

The casting of the US military as heroic was further evidenced by the supposed return of 'traditional masculinity' as a normative hegemonic ideology in the wake of 9/11.<sup>686</sup> This masculinity was one which relied on mythological 'male' attributes such as courage, strength, toughness, stoicism and the rejection of the soft or feminine. It was in fact a 'hypermasculinity' that postulated that these attributes were necessary to protect women who had been ascribed the role of victims constructed through their 'passive femininity'.<sup>687</sup> Indeed, Charlesworth and Chinkin note that 'the only consistent coverage of women in the

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<sup>682</sup> Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*.

<sup>683</sup> Matthew Alford, 'Why Not a Propaganda Model for Hollywood?' in Philip Hammond (ed), *Screens of Terror: Representations of War and Terrorism in Film and Television since 9/11* (Arima Publishing, Bury St Edmunds 2011).

<sup>684</sup> Faludi, *The Terror Dream: What 9/11 Revealed About America*, at 6. The trope of the American hero is discussed infra at section 2.2.1 and 2.2.2.

<sup>685</sup> *ibid*; Mead, 'Manhood, Mourning and the American Romance' in Birkenstein Jeff, Froula Anna and Randell Karen (eds), *Reframing 9/11: Film, Popular Culture and the 'War on Terror'* (Continuum, London 2010).

<sup>686</sup> Patricia Leigh Brown, 'Ideas & Trends; Heavy Lifting Required; the Return of the Manly Men' *New York Times* (New York, 26th October, 2001); Faludi, *The Terror Dream: What 9/11 Revealed About America*; Maureen Dowd, 'Liberties; Hunks and Brutes' *New York Times* (New York, 28 November 2001); Peggy Noonan, 'Welcome Back, Duke: From the Ashes of Sept. 11 Arise the Manly Virtues.' *The Wall Street Journal* <<http://online.wsj.com/news/articles/SB122451174798650085>>.

<sup>687</sup> Shepherd, 'Veiled References: Constructions of Gender in the Bush Administration Discourse on the Attacks on Afghanistan Post-9/11' at 25. See also Cynthia Weber, 'Flying Planes Can Be Dangerous' (2002) 31 *Millennium-Journal of International Studies* 129, where Weber notes that hypermasculinity complements hyperfemininity and that they are not possible without the other.

first two months after the attacks concerned victims of the disaster, particularly the widows of men killed, and those women themselves killed by the hijackers.<sup>688</sup> Krista Hunt argues that ‘this casting of north American women as passive, and in need of protection, contributes to justifications for a violent American response.’<sup>689</sup> Indeed it is well established that invoking this trope of masculinity creates a justification for increasing militarisation domestically and internationally.<sup>690</sup>

Accordingly, as evidence of this return to a strong ‘masculine’ state, many commentators cited those who argued that in the post 9/11 world traditional gender roles should be embraced as male strength had proved a necessity,<sup>691</sup> while numerous press reports fixated on the fact that Osama bin Laden had taunted the West for becoming feminised and weak.<sup>692</sup> It appeared that in letting itself get soft, America had lost the ability to defend itself. This was alluded to by Helene Cixous, who wrote that the destruction of the Twin Towers was analogous to castration.<sup>693</sup> Therefore, in order to strike back against the terrorists America needed to reassert its ‘masculinity’.

However, in some ways this machismo obsession was similar to that seen during the Reagan era when, according to Susan Jeffords, ‘hard bodies’ like Reagan’s own came to define politics.<sup>694</sup> These hard bodies personified strength, aggression and determination and were seen in South America and in the fight against communism. They came to represent the epitome of the nation itself and were in stark contrast to the ‘weakened... even feminine’ years of the previous administration.<sup>695</sup> Likewise it could be argued that the Bush Administration encouraged this trope of masculinity as a strategic ideological fiction designed to differentiate it from the perceived weaknesses of the Clinton era.

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<sup>688</sup> Charlesworth and Chinkin, ‘Sex, Gender, and September 11’ (2002) 96 *The American Journal of International Law* 600, at 601.

<sup>689</sup> Krista Hunt, ‘The Strategic Co-Optation of Women’s Rights’ (2002) 4 *International Feminist Journal of Politics* 116, at 117.

<sup>690</sup> Enloe, *The Curious Feminist: Searching for Women in a New Age of Empire* and Enloe, *Bananas, Beaches & Bases: Making Feminist Sense of International Politics*.

<sup>691</sup> Laura Goodstein, ‘Fallwell: Blame Abortionists, Feminists and Gays’. *The Guardian*, (London, 19 September 2001); Noonan, ‘Welcome Back, Duke: From the Ashes of Sept. 11 Arise the Manly Virtues.’

<sup>692</sup> John Burns, ‘A Nation Challenged: The Wanted Man’ *New York Times* (New York, 8 October 2001).

<sup>693</sup> Helene Cixous, ‘The Towers: Les Tours’ (2002) 28 *Signs* 431, at 431.

<sup>694</sup> Susan Jeffords, *Hard Bodies: Hollywood Masculinity in the Reagan Era* (Rutgers University Press, New Jersey 1994), at 25.

<sup>695</sup> *ibid.*

### 2.2.2. *The Protector*

Consequently, the leader of these ‘masculine’ men was President Bush himself who was depicted as the archetypical western sheriff protecting his people from the outlaws.<sup>696</sup> This contemporary re-imagining of the traditional fairy tale narrative is one that holds appeal for many Americans. Indeed Mead argues that the western is America’s founding myth, which needs to be continually retold;<sup>697</sup> while Buchanan and Johnson write that the narrative of ‘frontier justice’ is deeply embedded within American Presidential discourse.<sup>698</sup> As such, Bush was frequently depicted in frontier ‘folkisms’ calculated to reassure the public and portray him as a capable leader.<sup>699</sup> He called for Osama bin Laden ‘Dead or Alive’,<sup>700</sup> and posited the US as the ‘reluctant gunslinger forced by circumstances to resort to violence.’<sup>701</sup> Indeed Bush epitomised this characterisation when he challenged the world: ‘if you are not with us then you are with the terrorists.’<sup>702</sup> Such uncompromising language ultimately allowed the US Administration to render what was a complicated geo-political crisis into a simplistic Manichean showdown between the ‘good guys’ and the ‘bad guys’. Accepting its role as protector and defender, America would have no choice but to reluctantly pursue the bad guys in order to protect its citizens, unequivocally situating itself as the rescuer.

Thus the familiar heroic narrative was constructed around the military intervention in Afghanistan by firmly positioning military masculinity as the saviour of Western civilisation. Such is the attraction of this characterisation that it is difficult to displace. Even while criticising the masculinisation and gendering of 9/11, Tickner notes that there

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<sup>696</sup> Faludi, *The Terror Dream: What 9/11 Revealed About America*.

<sup>697</sup> Mead, ‘Manhood, Mourning and the American Romance’.

<sup>698</sup> Ruth Buchanan and Rebecca Johnson, ‘The Unforgiven Sources of International Law: Nation-Building, Violence, and Gender in the West (Ern)’ in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart, Oxford 2005), at 141.

<sup>699</sup> Stacy Takacs, ‘The Contemporary Politics of the Western Form: Bush, Saving Jessica Lynch and Deadwood’ in Jeff Birkenstein, Anna Froula and Karen Randell (eds), *Reframing 9/11: Film, Popular Culture and the “War on Terror”* (Continuum, London 2010), at 153.

<sup>700</sup> Bush is actually accredited as saying ‘I want justice, and there’s an old poster out West, I recall, that says, “Wanted: Dead or Alive.”’ But this was widely reported in the media as Bush calling for Bin Laden ‘Dead or Alive’. See Toby Harnden, ‘Bin Laden is Wanted Dead or Alive says Bush’ *The Telegraph* (London, 18 September 2001).

<sup>701</sup> Takacs, ‘The Contemporary Politics of the Western Form: Bush, Saving Jessica Lynch and Deadwood’, at 153.

<sup>702</sup> George W. Bush, ‘Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11’ 37 1347 (20 September 2001).

is ‘something reassuring about “our men” protecting us from “other men”.’<sup>703</sup> Furthermore, so long as America is positioned as the chivalrous protector and the terrorists as the evildoers then there is no room for criticism or alternative discourse. ‘To criticize the rhetoric is to be heartless’,<sup>704</sup> as such, according to Cynthia Enloe, ‘since September 11, publicly criticizing militarization has been widely viewed as an “unpatriotic” act, as an act of disloyalty.’<sup>705</sup>

### 2.3. Constructing the Other

The final requirement necessary to the operation of the heroic narrative is the construction of the ‘other’ – the character who allows the hero to prevail. Once the US was firmly positioned as the heroic ‘masculine’ entity, it became necessary to fill the roles of villain and victim because such characters are interdependent in completing the narrative.<sup>706</sup> However, while the casting of the hero proved unproblematic it was somewhat more difficult to cast the villain. As Chapter 1 noted, in the early days after 9/11, the US Government claimed that Osama bin Laden and the terrorist organisation Al Qaeda were most likely responsible for the attack.<sup>707</sup> However, rather than mount an offensive solely against Al Qaeda (or pursue them through criminal channels) the US made clear that it would also pursue the Taliban *de facto* Government of Afghanistan that was reportedly sheltering bin Laden and Al Qaeda terrorists. This was despite little evidence existing that linked the Taliban to the actual 9/11 attacks.<sup>708</sup> The US appeared to be aware that a military offensive mounted solely against Al Qaeda would have no basis in international law. Therefore, the US went to extreme effort to attribute international responsibility for 9/11 to the Taliban (and therefore the state of Afghanistan) as well as Al Qaeda.<sup>709</sup> Perhaps for this reason, in most Western mainstream media the Taliban and Al Qaeda came to be seen as synonymous. Indeed, William Pfaff argued that Afghanistan and the Taliban had

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<sup>703</sup> Tickner, ‘Feminist Perspectives on 9/11’ 339.

<sup>704</sup> Ileana Porras, ‘On Terrorism: Reflections on Violence and the Outlaw’ (1994) Utah Law Review 119.

<sup>705</sup> Enloe, *The Curious Feminist: Searching for Women in a New Age of Empire*. This can also be seen in the naming of anti-terror legislation passed in the weeks after 9/11 as the USA PATRIOT Act 2001.

<sup>706</sup> Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’.

<sup>707</sup> See UK Government ‘Responsibility for the Terrorist Atrocities in the United States, 11 September 2001’ (Press Release, 4 October 2001).

<sup>708</sup> See *supra* Chapter 1, section 1 and note 68.

<sup>709</sup> See Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the Security Council, UN Doc S/2001/946 (7 October 2001) which states that the US has commenced measures ‘against Al Qaeda terrorist training camps *and military installations of the Taliban regime in Afghanistan.*’

‘been substituted for terrorism, because Afghanistan [was] accessible to military power, and terrorism [was] not.’<sup>710</sup>

### ***2.3.1. The Villain***

Consequently, in the ‘War on Terror’ narrative both the Taliban and Al Qaeda were portrayed as wicked men and as barbarous savages. President Bush initially stated that ‘barbarians had declared war on America’.<sup>711</sup> He was also quick to describe the ‘War on Terror’ as a war of ‘good versus evil’<sup>712</sup> and frequently referred to the perpetrators as ‘evil doers’,<sup>713</sup> calling them an enemy that ‘preys on innocent and unsuspecting people.’<sup>714</sup> Ileana Porras suggests that depictions such as this transform the villain ‘from an ordinary deviant into a frightening “foreign” barbaric beast at the same time that extra-normal means are called for to fight terrorism.’<sup>715</sup>

In exploring the characterisations within the heroic narrative, critical legal theorists Johnstone and Buchanan tell us that in classic American westerns, the villains are either the Native American population or outlaws who act with impunity, usually demonstrated by acts of extreme violence or cruelty perpetrated against women.<sup>716</sup> The Native Americans are portrayed as savage, filthy, and barbarous brown men who are untrustworthy, brutal and disloyal.<sup>717</sup> They are usually portrayed as fighting for a lost cause and are incapable of reason or rational thinking.<sup>718</sup> Similarly the outlaws are wicked men who are usually murders or rapists and abuse those who are weaker than them.<sup>719</sup> It is clear that such exaggerated depictions provide clear cues to the audience as to whom they should identify with and whom they should vilify. Invoking such binary depictions also subscribes

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<sup>710</sup> William Pfaff, ‘The War on Terror Turns into a War on Afghanistan’ *International Herald Tribune*, November 3, 2001 quoted in Derek Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq* (Blackwell Publishing, Malden MA 2004).

<sup>711</sup> George W. Bush, ‘Remarks in a meeting with the National Security Team and an exchange with reporters at Camp David, Maryland’ 37 WCPD 1319 (15 September 2001).

<sup>712</sup> George W. Bush, ‘Remarks Following a Meeting With the National Security Team’ 37 WCPD 1302 (12 September 2001).

<sup>713</sup> George W. Bush, ‘Remarks Following a Meeting With Congressional Leaders and an Exchange With Reporters’ 37 WCPD 1342 (19 September 2001).

<sup>714</sup> George W. Bush, ‘Remarks Following a Meeting With the National Security Team’.

<sup>715</sup> Porras, ‘On Terrorism: Reflections on Violence and the Outlaw’.

<sup>716</sup> Buchanan and Johnson, ‘The Unforgiven Sources of International Law: Nation-Building, Violence, and Gender in the West (Ern)’.

<sup>717</sup> *ibid.*

<sup>718</sup> *ibid.*

<sup>719</sup> *ibid.*

to German philosopher Carl Schmitt's argument that the fundamental principle of politics is the distinction between 'us' and 'them': the sharper the distinction, the greater chance of success.<sup>720</sup> Such a binary juxtaposition was constructed around the 'War on Terror'. Feminist communication studies theorist Dana Cloud argues that widely circulated images of both Afghans and Americans were used to construct binary oppositions of the self and other in order to further generate support for the 'War on Terror'.<sup>721</sup> She discusses a photo essay from Time Magazine<sup>722</sup> entitled 'From Shadow to Light' and notes how the 'swift oscillation establishes a fundamental difference between heroic, white, rational U.S men on the one hand, and scruffy Al Qaeda fighters, represented variously as irrational militants, as savages in the desert, or as hopeless nomads.'<sup>723</sup>

A further purpose of the villain characterisation is that, by constructing his enemies as 'evil' Bush was able to desensitise the public to the destruction of fellow humans. Such language purposely stifles discussion of alternative reactions.<sup>724</sup> This construction of the enemy as non-human is done to exploit our perception of others because: 'If certain lives are not perceivable as lives, and this includes sentient beings who are not human, then the moral prohibition against violence will only be selectively applied.'<sup>725</sup> Moreover this demonization also serves to bolster 'civilised' society's sense of its own identity through juxtaposing its moral superiority with the immorality of demons and madmen. Thus, as Foucault recounts 'men were men because they were not monsters.'<sup>726</sup> Explaining this juxtaposition, Johnson and Buchanan argue that in the heroic narrative the villain is endowed with traits that are binary opposites of those possessed by the hero.<sup>727</sup> This is 'designed to bring relief to "us" while bringing "them" into relief; at once therapeutic and a

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<sup>720</sup> On Schmitt's political theology, see Heinrich Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy* (University of Chicago Press, Chicago 1998) cited in Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq*, at 49.

<sup>721</sup> Cloud, "'To Veil the Threat of Terror': Afghan Women and the Clash of Civilizations in the Imagery of the US War on Terrorism'.

<sup>722</sup> 'From Shadow to Light', Time Magazine (9 September 2002).

<sup>723</sup> Cloud, "'To Veil the Threat of Terror': Afghan Women and the Clash of Civilizations in the Imagery of the US War on Terrorism', at 291.

<sup>724</sup> Jonathan Anderson, 'The Rhetorical Impact of Evil on Public Policy' (2006) 37 Administration & Society 719.

<sup>725</sup> Butler, *Frames of War: When Is Life Grievable*, at 51.

<sup>726</sup> Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* (Routledge, London 2001).

<sup>727</sup> Buchanan and Johnson, 'The Unforgiven Sources of International Law: Nation-Building, Violence, and Gender in the West (Ern)'.

vengeful gesture, its object was to reveal the face of the other *as other*.<sup>728</sup> This is supported by Yasmin Jiwani, who highlights that the juxtaposition is particularly glaring because, unlike the hero, the villain can never avail himself of the victim status.<sup>729</sup> Accordingly, his evil nature is all the more glaring when contrasted with the innocence of the victim.

Such ascriptions of exaggerated polarised character traits to the US and its enemies recalls Edward Said's assertion that the Orientalist construction of the 'other' stems from a fear of Islam threatening Western freedom.<sup>730</sup> As such it is suggested that the vilification of the enemy reflects a prevailing discomfort over an essential 'otherness'. Indeed Saniotis notes that the rhizomal nature of Al Qaeda has meant that conventional warfare has been rendered superfluous and ineffective, reducing Western military might to chasing ghosts and phantoms.<sup>731</sup> Thus, Al Qaeda's 'mystique' lies in its 'apparent panoptic power' whereby the terrorists observed and monitored everyday life and culture in the US without being observed themselves.<sup>732</sup> Accordingly, Saniotis suggests that the West is equally as discomfited by the knowledge of this panoptic power as it is with the fact that the terrorists wish to destroy its way of life.<sup>733</sup>

Said also demonstrates that this demonization of Muslim/Arab men is central to the notion of Western superiority,<sup>734</sup> and Nancy Jabbra notes that these stereotypical representations of Middle Eastern people are deeply embedded in American culture.<sup>735</sup> Arab and Muslim men are depicted on television as violent, sadistic and promiscuous sexually. She argues that such descriptions are well worn, tracing back notions of the effeminate or homosexual Arab to the Renaissance, while, in his review of almost 1000 movies Jack Shaheen found

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<sup>728</sup> Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq*, at 49.

<sup>729</sup> Yasmin Jiwani, 'Trapped in the Carceral Net: Race, Gender, and the "War on Terror"' (2011) 4 *Global Media Journal* 13.

<sup>730</sup> Edward W. Said, '*Islam Through Western Eyes*' *The Nation* (26 April 1980)

<sup>731</sup> Arthur Saniotis, 'Re-Enchanting Terrorism: Jihadists as "Liminal Beings"' (2005) 28 *Studies in Conflict & Terrorism* 533.

<sup>732</sup> *ibid*, at 563.

<sup>733</sup> Arthur Saniotis, 'Re-Enchanting Terrorism: Jihadists as "Liminal Beings"' (2005) 28 *Studies in Conflict & Terrorism* 533.

<sup>734</sup> Edward W. Said, *Orientalism* (Penguin Classics, London 2003).

<sup>735</sup> Jabbra, 'Women, Words and War: Explaining 9/11 and Justifying US Military Action in Afghanistan and Iraq', at 237.

that almost all of them portrayed Arab men as evil.<sup>736</sup> Cloud argues that utilisation of such tropes is part of a wider technique to exploit imperialist understandings of the West and the East relying on Huntington's infamous 'clash of civilisations' anxiety.<sup>737</sup> 'Radicalised images of the savage Other and gendered images of women as victims lurk in Western culture's symbolic repertoire, taking shape as the clash of civilisations in perennial justifications for war.'<sup>738</sup> Indeed, according to Sari Kouvo, as well as accentuating the perceived clash of civilisations, the War on Terror has also 'dusted off imperial imagery of the "civilised" and the "native", and of men as agents either on the side of good or on the side of evil and of women as mourners and victims.'<sup>739</sup>

### 2.3.2. *The Damsel in Distress*

The final requirement for the operation of the heroic narrative is a victim; the archetypal damsel in distress. In the traditional fairy tale narrative the 'damsel in distress' is a young woman who is viewed as virtuous and chaste, and therefore innocent. She is epitomised by characters such as Sleeping Beauty, Cinderella, or Snow White, as she is invariably in danger or difficulty but lacks the agency or capacity to save herself, so much so that critical literature scholar Karen Rowe describes her as 'impotent'.<sup>740</sup> The reader is invited to sympathise with her plight and then rejoice when she is rescued by the hero.

In 'War on Terror', the damsel in distress, unlike the villain, was easy to identify. The oppressed women of Afghanistan provided a ready-made victim due to their appalling treatment by the Taliban, despite the fact that before 2001 very few people outside of the human rights movement were familiar with the Taliban.<sup>741</sup> However, once the White House highlighted the regime, this fundamentalist organisation and its orthodox

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<sup>736</sup> Jack G. Shaheen, 'Reel Bad Arabs: How Hollywood Vilifies a People' (2003) 588 *The ANNALS of the American Academy of Political and Social Science* 171 Cited in Jabbara, 'Women, Words and War: Explaining 9/11 and Justifying US Military Action in Afghanistan and Iraq', at 237.

<sup>737</sup> Simon Huntington, 'The Clash of Civilizations' (summer 1993) 72 *Foreign Affairs* 22.

<sup>738</sup> Cloud, "'To Veil the Threat of Terror": Afghan Women and the Clash of Civilizations in the Imagery of the US War on Terrorism', at 289.

<sup>739</sup> Sari Kouvo, 'Taking Women Seriously? Conflict, State-Building and Gender in Afghanistan' in Sari Kouvo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (Hart, London 2011).

<sup>740</sup> Karen E. Rowe, 'Feminism and Fairy Tales' 6 *Women's Studies: An Interdisciplinary Journal* 237, at 239.

<sup>741</sup> In the international arena, the UN SC passed several resolutions requiring the Taliban to act against terrorism, while the HRC and its predecessor reported the Taliban's violation of Human rights throughout the 1990's. See Chapter 2. The Taliban's treatment of women in Afghanistan was also the subject of a campaign by the Feminist Majority Foundation. This campaign is discussed further in sections 3.2, 4.1 and 4.2 and infra Chapter 5 at section 1.1.2.

interpretation of Sharia law was front-page news. Depictions of Afghan women forced to wear the all-encompassing burqa ran alongside accounts of woman and girls prevented from attending school, accessing healthcare or leaving their homes unaccompanied.<sup>742</sup> In the weeks preceding the commencement of OEF a small-scale documentary called *Beneath the Veil*, made by a UK journalist for Channel 4 TV and previously unseen in America, was shown repeatedly on primetime TV.<sup>743</sup> Other media outfits followed suit, the US media having ‘discovered’ the oppression of Afghan women. Major newspapers and magazines were saturated with articles on their plight. Popular US talk-show host Oprah Winfrey hosted discussions on her show, even inviting representatives from the American feminist organisation the Feminist Majority Foundation (FMF),<sup>744</sup> who brought along a burqa to demonstrate the oppression faced by Afghan women. Meanwhile, First Lady Laura Bush addressed the nation telling the American public that women in Afghanistan must not be forgotten and how the ‘brutal oppression of women was a goal of the terrorists’.<sup>745</sup> Similarly, in the UK Cherie Booth (wife of Prime Minister Tony Blair) made a speech highlighting the plight of Afghan women.<sup>746</sup> Additionally, the US Government released a document titled ‘The Taliban’s War Against Women’,<sup>747</sup> which emphasised that the War on Terror was also in part, on behalf of women and children.

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<sup>742</sup> David Stout, ‘A Nation Challenged: The First Lady Mrs Bush Cites Women’s plight Under the Taliban’ *New York Times* (New York 18 November 2001) <<http://www.nytimes.com/2001/11/18/us/a-nation-challenged-the-first-lady-mrs-bush-cites-women-s-plight-under-taliban.html>>; Editorial, ‘Liberating the Women of Afghanistan,’ *New York Times* (New York 24 November 2001) <<http://www.nytimes.com/2001/11/24/opinion/liberating-the-women-of-afghanistan.html>>; Amy Waldman, ‘A Nation Challenged: Resistance; Behind the Burqa Women Subtly Fought Taliban,’ *New York Times* (New York 19 November 2001) <<http://www.nytimes.com/2001/11/19/world/a-nation-challenged-resistance-behind-the-burka-women-subtly-fought-taliban.html>>; Lucy Ward, ‘Cherie Blair Pleads for Afghan Women’, *Guardian* (London 20 November 2001) <<http://www.theguardian.com/politics/2001/nov/20/uk.september11>>.

<sup>743</sup> Dispatches, *Beneath the Veil*, aired 26 June 2001.

<sup>744</sup> The is a US based women’s rights organisation that campaigns for gender equality both in the US and internationally. The foundation had been campaigning against ‘gender apartheid’ in Afghanistan since 1996 and was behind a grassroots campaign calling on Western Governments to denounce the Taliban for its treatment of women. In the months following the 9/11 attacks the organisation worked closely with the White House and provided its campaign information to the Administration.

<sup>745</sup> Radio Address by Mrs Laura Bush (17 November 2001). The transcript of this address is available at <<http://www.presidency.ucsb.edu/ws/?pid=24992>>.

<sup>746</sup> Lucy Ward, ‘Cherie Blair Pleads for Afghan Women’ *The Guardian* (London 20 November 2001).

<sup>747</sup> US Government ‘Report on the Taliban’s War Against Women’ (Bureau of Democracy, Human Rights and Labor, United States of America, Washington DC 17 November 2001) <<http://www.state.gov/j/drl/rls/c4804.htm>>.

Yet, while liberating the oppressed women of Afghanistan seemed like an altruistic primary motivation, the damsel's predicament did not stand alone. Confirming Rowe's assertion of impotence, Buchanan and Johnstone write that in the American western narrative women do not exist as characters in their own right, but merely as victims for the hero to save. They are simply the background against which the hero can showcase his prowess.<sup>748</sup> This means they can never be subjects, only objects leaving them exposed not only to the violence of the villain but of the hero as well.<sup>749</sup> Likewise, in the heroic narrative promulgated around OEF Afghan women do not exist as whole characters or real people; they exist only to be saved by the West. 'This pronouncement locates Afghan women in a de-contextualised, ahistorical space, where they seem to begin and end within the current crisis, having been provided 'freedom for the first time' by US forces.'<sup>750</sup>

Consequently, this means that while the damsel's plight is one of impending mortal peril which evokes sympathy, the nature of the story is not to wholly engage with the causes of this plight, but instead for it to serve as a plot device against which the hero can operate, confirming Mutua's observation of the interdependency of these characters.<sup>751</sup> Similarly, in the 'War on Terror' narrative the focus on the hero means that the causes of terror are not wholly engaged with. Consequently the oppressed women of Afghanistan were depicted as the helpless but blank damsels in distress, awaiting rescue by the heroic Western soldiers. As such, Usamah Ansari notes that they are 'inherently victimised'.<sup>752</sup> Yet it is clear that depicting OEF in this way fulfils Orford's markers of the heroic narrative, and as such serves to legitimate the military intervention by portraying it as an altruistic mission to protect innocent victims at home and abroad. However, as highlighted above, these one-dimensional characterisations are far from 'natural' and inevitable. Instead they are carefully and deliberately constructed to induce fear and paranoia, allowing public perception to be manipulated. Recourse to such characterisations is highly problematic because it relies on troubling constructions and deliberate misunderstandings of the 'other'.

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<sup>748</sup> Buchanan and Johnson, 'The Unforgiven Sources of International Law: Nation-Building, Violence, and Gender in the West (Ern)'.

<sup>749</sup> The lack of engagement with the damsel in distress character is discussed further in section 4.

<sup>750</sup> Zine, 'Between Orientalism and Fundamentalism: Muslim Women and Feminist Engagement'.

<sup>751</sup> Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights'.

<sup>752</sup> Usamah Ansari, "'Should I Go and Pull Her Burqa Off?': Feminist Compulsions, Insider Consent, and a Return to Kandahar' (2008) 25 *Critical Studies in Media Communication* 48.

Therefore, the remainder of this chapter argues that a problematic construction and deliberate misunderstanding of women and Muslim men lies at the root of the heroic narrative invoked in the ‘War on Terror’, and that such a construction belies the feminist credentials that were meant to underpin the War on Terror. In view of this discrepancy between feminist motivations and the reality of the narrative, the following sections focus on the inherent hypocrisy of the heroic narrative as sold to the public.

### **3. The Attraction of the Heroic Narrative**

As highlighted in Section 1 Orford tells us that the attraction of the heroic narrative is that it serves to render complex realities as simplistic situations with easy solutions. This simplified depiction masks the true consequences of conflict, by focussing on the plight of ‘innocent women and children’.<sup>753</sup> Their oppression is blamed on the irrational ‘other’ offering a plausible alibi for the use of militarism against this ‘other’. The motivation for framing military operations through the lens of the heroic narrative therefore is that it appears to offer the ‘innocent contentment that any “happy ending” narrative provides.’<sup>754</sup> Thus, as Sedef Arat-Koc notes, this dream of liberating victimised women is powerfully ‘seductive’ to Western leaders and feminists alike.<sup>755</sup>

Indeed, so powerful is this lure of contentment that it obscures reality. This was evidenced in the run up to the commencement of OEF when several humanitarian agencies, which warned that military action would kill tens of thousands and would likely lead to famine, seemed to have their warnings disregarded.<sup>756</sup> Despite the compelling evidence that a military offensive would destroy the last vestiges of infrastructure required to provide food and aid to thousands of Afghans, so appealing was the rescue fantasy that those who opposed OEF on the basis that it would halt the supply of humanitarian aid to hundreds of thousands of sick and hungry Afghans, many of whom were children, were denounced as being soft on the Taliban. As such, Hirschkind and Mahmood conclude that ‘It seemed like

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<sup>753</sup> See *supra* section 1.

<sup>754</sup> Sedef Arat-Koc, ‘Feature-Hot Potato: Imperial Wars or Benevolent Interventions? Reflections on “Global Feminism” Post September 11th’ (2002) 26 *Atlantis: Critical Studies in Gender, Culture & Social Justice* 53, at 55.

<sup>755</sup> *ibid*, at 55.

<sup>756</sup> The Afghan Women’s Mission highlighted that military action would prevent food aid supplies to millions of Afghans. International NGOs such as Oxfam and Islamic Relief warned that military strikes would cause a humanitarian catastrophe. See <<http://www.afghanwomensmission.org/2001/10/afghan-womens-mission-to-u-s-government-halt-bombing-immediately>> Accessed August 2015.

any attempt to widen the discussion beyond the admittedly brutal practices of the Taliban was doomed to be labelled as antithetical to women's interests.<sup>757</sup>

Orford and other scholars note how this narrative's capacity to obscure reality is what makes governments frame military action within it because such a 'crisis' generates almost universal and immediate support for military action that is neither ostensibly legal nor logical. Framing the 'War on Terror' within a heroic narrative was therefore attractive to the US and its allies because it made criticism of militarism virtually impossible. Those who did speak out against OEF, were often derided and denounced in the media, non-white feminists particularly so: Faludi highlights the vilification of writers Susan Sontag and Arundhati Roy after they criticised the US Government's response to the attacks.<sup>758</sup> While Jasmine Zine concluded that such vilification actually served to silence any criticism of the dominant narrative.<sup>759</sup> Therefore it is clear that this narrative perpetuates a 'moral vernacular' that silences the violences which actually occur.<sup>760</sup> The logical foreseeable consequences of military action are overwritten by an optimistic expectation that the action will instead bestow liberation and salvation to the victimised women in need of rescue.<sup>761</sup>

### 3.1. The Dark Appeal of the Heroic Narrative

Thobani writes that the desire to play the saviour and rescue other women stems from participating in a 'fantasy of the West'.<sup>762</sup> Indeed both Orford and Mutua note that the heroic narrative is actually an inherent construction of how the West sees itself<sup>763</sup> because, as Heathcote describes: 'the narratives are stories and histories for the West to reflect back its own image.'<sup>764</sup> The image in question is of course that the West is heroic and benevolent and by casting itself as the hero this position is never questioned. Mindful of this fantasy, Caren Kaplan cautions that 'feminists with socioeconomic power need to

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<sup>757</sup> Charles Hirschkind and Saba Mahmood, 'Feminism, the Taliban, and Politics of Counter-Insurgency' (2002) 75 *Anthropological Quarterly* 339 at 346.

<sup>758</sup> Faludi, *The Terror Dream: What 9/11 Revealed About America*.

<sup>759</sup> Zine, 'Between Orientalism and Fundamentalism: Muslim Women and Feminist Engagement', at 38.

<sup>760</sup> Anna M Agathangelou and Lily HM Ling, 'Power and Play through Poisies: Reconstructing Self and Other in the 9/11 Commission Report' (2005) 33 *Millennium-Journal of International Studies* 827, at 835.

<sup>761</sup> Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*

<sup>762</sup> Thobani, 'White Wars: White Feminisms and the "War on Terror"', at 175.

<sup>763</sup> Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* and Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights'.

<sup>764</sup> Gina Heathcote, 'Article 51 Self-Defense as a Narrative: Spectators and Heroes in International Law' (2005) 12 *Texas Wesleyan Law Review* 131, at 149.

investigate the grounds of their strong desire for rapport and intimacy with others.<sup>765</sup> In subscribing to the heroic narrative in order to feel safe and protected, Americans told themselves that the US military would help improve the lives of Afghan women, despite there being little evidence to support this view. Indeed the irony was that while American women supported the offensive in Afghanistan, Afghan women protested the bombing and called on their American sisters to prevent it.<sup>766</sup> These protestations were ignored because as Christine Delphy argues, ‘it is better for them to die from bombs, from hunger, from cold, than to live under the Taliban. Death from servitude: that is what Western public opinion has decided for Afghan women.’<sup>767</sup>

### ***3.1.1. The Fantasy of the West***

Thus, the fantasy that feminists are colluding in is the idea that military intervention, or indeed any type of intervention premised on rescuing the oppressed is a panacea to the problems faced by those in the Third World. In fact this fantasy serves to salve the conscience of the West and valorise those who assume the rescuer role. According to Melisa Brittain ‘because this narrative is at the heart of the west’s construction of itself, it is much harder for most, even those critical of racism, US foreign policy, and historical imperialism, to detect and resist.’<sup>768</sup> The allure of this rescue trope is that it reinforces the West’s sense of superiority, something which was much needed in the wake of 9/11 due to the sense of inferiority it imparted. The power of this fantasy to ascribe such superiority may in part explain why Western feminists were so readily willing to support military intervention in Afghanistan and endorse those who promoted it. Yet, as with all power dynamics, there is usually an ingrained power imbalance and in the case of OEF, feminists must be mindful of not entrenching this dynamic.

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<sup>765</sup> Caren Kaplan, ‘The Politics of Location as Transnational Feminist Political Practice’ in *Scattered Hegemonies: Postmodernity and Transnational Feminist Practices* (University of Minnesota Press, Minneapolis 1994) at 139.

<sup>766</sup> Cynthia Peters, ‘What Does Feminism Have to Say?’ in Susan Hawthorne and Bronwyn Winter (eds), *After Shock: September 11, 2001 Global Feminist Perspectives* (Raincoast Books, Vancouver 2003); WLUML, ‘Statement on the Attacks in the USA’ in Susan Hawthorne and Bronwyn Winter (eds), *After Shock: September 11, 2001 Global Feminist Perspectives* (Raincoast Books, Vancouver 2003).

<sup>767</sup> Christine Delphy, ‘A War for Afghan Women?’ in Susan Hawthorne and Bronwyn Winter (eds), *After Shock: September 11, 2001 Global Feminist Perspectives* (Raincoast Books, Vancouver 2003), at 339.

<sup>768</sup> Melisa Brittain, ‘Benevolent Invaders, Heroic Victims and Depraved Villains: White Femininity in Media Coverage of the Invasion of Iraq’ in Krista Hunt and Kim Rygiel (eds), *(En) Gendering the War on Terror: War Stories and Camouflaged Politics* (Ashgate Publishing Company, London 2006), at 76.

### ***3.1.2. The Fantasy of the Self***

Therefore, it is necessary to consider whether the ascription of superiority promulgated by the heroic narrative relies on orientalist assumptions and desires. While this is keenly documented by critical scholars, fewer feminists explore the idea that feminist motivations to support the ‘War on Terror’ may also stem from this orientalist attraction, despite an uneasy history of Western feminism being instrumentalised by the colonialist project. As Thobani notes ‘Feminists have historically had a complex relationship with the colonial and imperial projects that have furthered white racial supremacy internationally’.<sup>769</sup> This history is explored by Spivak who catalogues how feminism has traditionally been complicit with the colonial project through what she refers to as ‘soul making’; the means to contrast the individualism of the feminist subject with that of a nebulous other.<sup>770</sup> As such ‘Western feminism has not only been complicit in the Orientalist constitution of the non-Western woman as inherently victimized and in need of help, it has also constructed a Western feminist subject position in contrast to it.’<sup>771</sup> Indeed Western feminism is often accused of constructing a Third World woman who is bound to ‘tradition and domesticity’<sup>772</sup> against whom the modern, educated Western woman is juxtaposed. Unlike the passive Third World women these Western woman are portrayed as ‘having control of their own bodies and sexualities.’<sup>773</sup> Accordingly Western feminists should be mindful of endorsing the heroic narrative when it operates to entrench power dynamics by confirming Western women’s superiority over Third World women whose inferiority is depicted by their victim status.

### **3.2. Is the Heroic Narrative Really About Women?**

Despite the danger of endorsing orientalist assumptions, the appeal of ‘happy contentment’ meant that the events of 9/11 brokered some rather strange alliances which would beforehand have seemed unlikely. Hunt describes the alliance of the Bush Administration and the FMF, a prominent US feminist activist organisation, which alongside NGOs such

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<sup>769</sup> Thobani, ‘White Wars: White Feminisms and the “War on Terror”’ at 170. See also Valerie Amos and Pratibha Parmar, ‘Challenging Imperial Feminism’ (1984) 17 *Feminist Review* 3.

<sup>770</sup> Gayatri Chakravorty Spivak, ‘Three Women’s Texts and a Critique of Imperialism’ (1985) 12 *Critical Inquiry* (1) 243 at 244.

<sup>771</sup> Ansari, “‘Should I Go and Pull Her Burqa Off?’: Feminist Compulsions, Insider Consent, and a Return to Kandahar’, at 51.

<sup>772</sup> Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’ at 65.

<sup>773</sup> *ibid.*

as Amnesty International and Human Rights Watch, had been campaigning against the Taliban's treatment of Afghan women since 1996.

### *3.2.1. Supporting Afghan Women Prior to 9/11*

The sudden interest in Afghan women was notable because previous US administrations had not spoken out against the Taliban to any significant degree. This was in part due to the proposals by the oil company Unocal to build an oil pipeline through Afghanistan.<sup>774</sup> In order for the pipeline proposal to be successful the company required stability and a single administration which could control Afghanistan.<sup>775</sup> Consequently, Aramco (the US oil consortium) lobbied the US government to support or at least acquiesce to the Taliban.<sup>776</sup> An American diplomat was famously quoted as saying: 'the Taliban will probably develop like the Saudis did. There will be Aramco, pipelines, an emir, no parliament and lots of Sharia law. We can live with that.'<sup>777</sup> Indeed, a US Congress hearing in 2000 was told by US State Department spokesperson Glyn Davies that the United States found 'nothing objectionable' in the Taliban's takeover of Kabul in 1996.<sup>778</sup> Further, in testimony before a Senate Foreign Relations subcommittee in April 1999, Congressman Dana Rohrabacher said that the Clinton administration had conducted a 'covert policy' of supporting the Taliban 'on the assumption that the Taliban would bring stability to Afghanistan and permit the building of oil pipelines from Central Asia through Afghanistan to Pakistan' even though it was 'the most anti-Western, anti-female, anti-human rights regime in the world'.<sup>779</sup> Thus, Ahmed concluded that prior to 9/11, the US was well aware of the plight of Afghan women and the human rights abuses perpetrated by the Taliban. However, he argues that any concerns were overridden by economic and strategic interests in the oil pipeline.<sup>780</sup> Therefore the US Government's sudden and unprecedented concern for the plight of Afghan women appears strategic and opportunistic rather than genuine, making the unqualified support of OEF offered by feminist organisations puzzling and possibly

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<sup>774</sup> Nafeez Mosaddeq Ahmed, 'America and the Taliban: From Co-Operation to War' (2002) 4 *Global Dialogue* 77.

<sup>775</sup> George Monbiot, 'America's Pipe Dream' *The Guardian* (London 23 October 2001).

<sup>776</sup> Ahmed, 'America and the Taliban: From Co-Operation to War'.

<sup>777</sup> Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (Yale University Press 2010), at 201.

<sup>778</sup> Nafeez Mosaddeq Ahmed, 'Our Terrorists' *New Internationalist*, 426 (October 2009).

<sup>779</sup> Statement of Congressman Dana Rohrabacher 'US Policy Towards Afghanistan', Senate Foreign Relations Subcommittee on South Asia (14<sup>th</sup> April 1999).

<sup>780</sup> Ahmed, 'America and the Taliban: From Co-Operation to War'.

equally opportunistic.<sup>781</sup> Indeed, according to Michael Ferguson, the highlighting of women's rights was merely a strategy to emphasise the barbarous and evil nature of the Taliban. 'After September 11, the recognition of women's rights is figured as a sign of respect for women. Those who respect their women are civilised, those who do not are barbarians.'<sup>782</sup>

### **3.2.2. Marketing Women's Oppression for the 'War on Terror'**

Kolhatkar and Ingalls argue that Afghan women were simply utilised as a visual justification for the military action.<sup>783</sup> They note how the Taliban's appalling treatment of women was sensationalised and seized on after Karen Hughes, a counsellor to President Bush, designed a publicity campaign which widely publicised the suffering of Afghan women. Hughes maintained her aim was merely to demonstrate the 'cruel and evil nature of the people we were up against' rather than a rallying call to improve the women's lives.<sup>784</sup> This suggests that Afghan women were merely a useful tool to be commoditised in further justifying a forthcoming use of force of dubious legality. Indeed Stabile and Kumar go further and argue that the media attention was little more than a 'cynical ploy' through which 'elites sought to sell the war to the US public.'<sup>785</sup>

In view of its sudden utility, the fact that the Republican Administration had enraged many US feminists with its conservative policies, many of which were criticised as being anti-women,<sup>786</sup> the sudden interest in the plight of Afghan women appears uncharacteristic and opportunistic.<sup>787</sup> Indeed many scholars argued that such an appropriation of feminist rhetoric was not feminism at all but merely a 'cynical use of the rhetoric of women's rights and empowerment in order to "camouflage" the war aims and methods of the US and its allies.'<sup>788</sup> Zillah Eisenstein argued that it was a 'sexual decoy' for the actions of the US

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<sup>781</sup> See Delphy, 'A War for Afghan Women?'; Peters, 'What Does Feminism Have to Say?'; Karen Talbot, 'Afghanistan, Central Asia, Georgia: Key to Oil Profits' in Susan Hawthorne and Bronwyn Winter (eds), *After Shock: September 11, 2001 Global Feminist Perspectives* (Raincoast Books, Vancouver 2003).

<sup>782</sup> Ferguson M, "'W' Stands for Women: Feminism and Security Rhetoric in the Post-9/11 Bush Administration' (2005) 1 *Politics & Gender* 9, at 21.

<sup>783</sup> Kolhatkar and Ingalls, *Bleeding Afghanistan: Washington, Warlords, and the Propaganda of Silence*.

<sup>784</sup> *ibid*, see also Chapter 4 where the demonising of the enemy as a method of propaganda is discussed further.

<sup>785</sup> Stabile and Kumar, 'Unveiling Imperialism: Media, Gender and the War on Afghanistan'.

<sup>786</sup> Criticism of the Bush Administration's domestic policies is briefly discussed in section 3.3.2.

<sup>787</sup> This uneasy alliance between feminists and conservatives is discussed further in Chapter 4.

<sup>788</sup> Hunt and Rygiel, (*En*) *Gendering the War on Terror: War Stories and Camouflaged Politics*.

administration.<sup>789</sup> However, perhaps feminist groups felt that they could use the ‘War on Terror’ as a vehicle to press their agenda and influence the Administration. They may also have assumed that anything would be better for Afghan women than the Taliban.<sup>790</sup> Despite the naiveté of such a strategy feminist rhetoric is often co-opted as a justification for military action, and when the wider political aims are secured women rarely benefit.<sup>791</sup> Bearing these experiences in mind, feminists should be more cautious when supporting military action, or allowing their cause to be co-opted.<sup>792</sup>

### **3.3. Embedded Feminism: Is the Heroic Narrative ‘Feminist’?**

In view of the fact that the US Government’s highlighting of women’s rights can be considered opportunistic, Hunt calls the co-opting of feminist discourse by the White House ‘embedded feminism’.<sup>793</sup> In supporting this articulation, she recalls the numerous historical examples of embedded feminism whereby, through drawing attention to the position of women in colonial societies, the colonial powers cemented the Third World as other.<sup>794</sup> As such, ‘civilised’ women from imperial nations were called upon to rescue poor and oppressed native women through taking up the white man’s burden. However, as Brittain notes, colonial propaganda about the abuse of colonized women was by no means indicative of a genuine commitment to female emancipation by the British establishment<sup>795</sup> and in some ways could be said to be more about demonstrating the colonising state’s superiority and metaphorically demonstrating masculine dominance, than furthering advancement of women.

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<sup>789</sup> Eisenstein, *Sexual Decoys: Gender, Race and War in Imperial Democracy*.

<sup>790</sup> Morgan Robin, ‘New York City: The Day After’ in Susan Hawthorne and Bronwyn Winter (eds), *After Shock, September 11, 2001 Global Feminist Perspectives* (Raincoast Books, Vancouver 2003).

<sup>791</sup> Enloe, *Bananas, Beaches & Bases: Making Feminist Sense of International Politics*; Enloe, *Maneuvers: The International Politics of Militarizing Women's Lives*; Zillah Eisenstein, *Against Empire: Feminisms, Racism, and the West* (Zed Books, London 2004).

<sup>792</sup> Fluri, ‘The Beautiful ‘Other’: A Critical Examination of ‘Western’ Representations of Afghan Feminine Corporeal Modernity’, at 244. See also Young, ‘The Logic of Masculinist Protection: Reflections on the Current Security State’; Hunt, ‘The Strategic Co-Optation of Women's Rights’.

<sup>793</sup> Krista Hunt, “‘Embedded Feminism’ and the War on Terror” in Krista Hunt and Kim Rygiel (eds), *(En) Gendering the War on Terror: War Stories and Camouflaged Politics* (Ashgate Publishing Company, London 2006), at 60.

<sup>794</sup> *ibid.* See also Coomaraswamy, ‘Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women’.

<sup>795</sup> Hunt, “‘Embedded Feminism’ and the War on Terror”, at 54.

### *3.3.1. Championing Women's Rights during Colonial Times*

A further irony of this colonial protectionist narrative was, that while imperial nations encouraged European women to champion the liberation of brown women – there was little intention or support to challenge patriarchy back home. Indeed, encouraging Victorian women to support their victimised sisters abroad was one way of deflecting attention from their own inequality. ‘Even as the Victorian male establishment devised theories to contest the claims of feminism...it captured the language of feminism and redirected it, in the service of colonialism toward other men and the cultures of Other men.’<sup>796</sup>

It is both notable and ironic that, the British envoy Evelyn Baring, who cited the oppression of Egyptian women as a justification for British colonisation of Egypt, was also a founding member of the Men's League for Opposing Women's Suffrage.<sup>797</sup> Accordingly, Mervat Hatem notes that despite the British colonial image of civilising and liberating oppressed women, during the colonial reign in Egypt women's rights were actually reduced by the introduction of English legal norms in relation to property, inheritance and marriage which saw Egyptian women denied rights which had been theirs for centuries.<sup>798</sup> Unsurprisingly, Deborah Weissman concludes that women have tended to fare badly under colonialism, even when such administration is undertaken with paternalistic objectives.<sup>799</sup> Indeed, as Charlesworth, Chinkin and Wright assert, the dominant model of behaviour forced on colonised women was a Western model which saw them adopt, not only Western norms, but also all the restrictions implicit in the Western patriarchy.<sup>800</sup> Yet Pratt highlights that such a paradox is ‘totally comprehensible within orientalist discourse’ because the colonial protectionist narrative is ‘less about the situation of “brown women” and more about ensuring the superiority of “white men.”’<sup>801</sup>

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<sup>796</sup> Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (Yale University Press, New Haven 1992), at 151.

<sup>797</sup> Gallagher N, ‘Liberating Afghan Women’ (2004) 21 *American Journal of Islamic Social Sciences* 70.

<sup>798</sup> Mervat Hatem, ‘Through Each Other's Eyes: Egyptian, Levantine-Egyptian, and European Women's Images of Themselves and of Each Other (1862–1920)’ (1989) 12 *Women's Studies International Forum* 183.

<sup>799</sup> Weissman, ‘The Human Rights Dilemma: Rethinking the Humanitarian Project’, at 271.

<sup>800</sup> Charlesworth, Chinkin and Wright, ‘Feminist Approaches to International Law’ at 620.

<sup>801</sup> Nicola Pratt, ‘Weaponising Feminism for the “War on Terror”, Versus Employing Strategic Silence’ (2013) 6 *Critical Studies on Terrorism* 327, at 328.

### 3.3.2. *The Bush Administration's Feminist Credentials*

Just as with the British in Egypt, so too the US-driven 'War on Terror' in Afghanistan. The apparent US preoccupation with Afghan women's rights allowed it to encroach on women's rights in domestic politics.<sup>802</sup> Sensationalised reports of women treated no better than slaves or animals made feminists highlighting gender inequality in the West appear trite and dogmatic. It seems that they maybe even felt this themselves and instead 'focussed on the abuses of Other women by Other men, instead of on patriarchal western societies.'<sup>803</sup> By appearing to support women's liberation abroad, the US administration appeared sympathetic to women while at the same time curtailing the rights and freedoms of women in the US. For example, President Bush suspended funding to any international organisations that offered abortion services or counselling on his very first day of office.<sup>804</sup>

Moreover, Bush's promotion of a protectionist patriarchal paradigm produces the effect that 'the role of the masculine protector puts those protected, paradigmatically women and children, in a subordinate position of dependence and obedience.'<sup>805</sup> Thus, since 2001 American women have seen severe cutbacks in access to family planning services, health benefits unemployment compensation and disability insurance.<sup>806</sup> The US is one of only a handful of states which are not party to the CEDAW and according to Harold Koh, failure to ratify this treaty further demonstrates America's hypocrisy in purportedly championing women's rights.<sup>807</sup> As such, Eisenstein argues that the US Government engaged in a strategic neo-conservative attack on the gains of the civil rights and women's rights movements at home.'<sup>808</sup> As was the case in colonial times 'feminists and their co-opted discourses end up serving the political project in which they are embedded rather than furthering women's rights.'<sup>809</sup> In view of this it is suggested that the language of feminism, like that of humanitarianism, has come to be used as a shibboleth that cloaks dubious foreign policy, military intervention or economic projects in a benevolent guise, even

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<sup>802</sup> Gallagher, 'Liberating Afghan Women'.

<sup>803</sup> Hunt, "'Embedded Feminism" and the War on Terror', at 54.

<sup>804</sup> Katharine Viner, 'Feminism as Imperialism' *The Guardian* (London 21 September 2002).

<sup>805</sup> Young, 'The Logic of Masculinist Protection: Reflections on the Current Security State', at 2.

<sup>806</sup> Gallagher, 'Liberating Afghan Women'.

<sup>807</sup> Harold H. Koh, 'Why America Should Ratify the Women's Rights Treaty (Cedaw)' (2002) 34 *Case Western Reserve Journal of International Law* 263.

<sup>808</sup> Eisenstein, *Against Empire: Feminisms, Racism, and the West*, at 171.

<sup>809</sup> Hunt, "'Embedded Feminism" and the War on Terror', at 53.

though these particular projects do little to improve the lives of those whom they purport to help. Indeed Laura Shepherd goes further and claims that ‘the specific rendering of the “intervention” as motivated by feminist concerns is frankly unbelievable.’<sup>810</sup>

In view of this, it is apparent that the heroic narrative does not necessarily assist those women whom it purports to protect, and those recent adoptees of feminist rhetoric are not necessarily feminism’s allies. Feminists should thus be wary of endorsing and succumbing to the heroic narrative which is apparently full of false promise. Ultimately embedded feminists are only gaining access to the corridors of power ‘because of their willingness to legitimise the state’s engendered war story and the orientalist assumptions upon which it is based.’<sup>811</sup>

#### **4. The Effects of the Heroic Narrative on Afghan Women**

If part of the heroic narrative’s power lies in its capacity to obscure the reality of victimisation, it is all the more pertinent for feminists to attempt to uncover the reality of Afghan women’s oppression. However, this endeavour was made especially difficult in the lead-up to the ‘War on Terror’ because the Bush Administration, Western media and Western feminists alike in their keenness to document the plight of Afghan women silenced those same women and focussed attention on the symbol of their oppression – the burqa.

##### **4.1. Victimising the Veil**

Kolhatkar and Ingalls criticise the media’s fascination with faceless Afghan women and describe the misplaced solidarity as exploitation.<sup>812</sup> The lead up to OEF’s commencement saw an explosion in images and reporting on the fully veiled Afghan women in their blue burqas. The burqa, an all-encompassing garment that covers the full face, save for a small lattice through which to see, both horrified and enchanted the Western media. Various commentaries focussed on the horror of wearing the burqa. It was described as a

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<sup>810</sup> Shepherd, ‘Veiled References: Constructions of Gender in the Bush Administration Discourse on the Attacks on Afghanistan Post-9/11’, at 32.

<sup>811</sup> Hunt, “Embedded Feminism” and the War on Terror’, at 61.

<sup>812</sup> Kolhatkar and Ingalls, *Bleeding Afghanistan: Washington, Warlords, and the Propaganda of Silence*.

‘shroud’<sup>813</sup> and a ‘body bag for the living’<sup>814</sup> while the women wearing the garment were often described as ‘ghosts’ or ‘wraiths’.<sup>815</sup> This morbid fascination inevitably meant that the burqa became the sole visual representation of the lives of Afghan women. Western feminists stoked this febrile comment by emphasising the horrors of the burqa; the FMF demonstrating on the Oprah Winfrey programme the barbarity of the burqa by inviting Afghan refugees to appear in their burqas then ceremoniously unveiling them.<sup>816</sup> US Congresswoman Carolyn Maloney addressed the House of Representatives whilst wearing a burqa,<sup>817</sup> and during a Congressional hearing on the Taliban, Senator Barbara Boxer highlighted the burqa as the main abuse of women.<sup>818</sup>

#### ***4.1.1. Misunderstanding the Burqa***

Yet while it is understandable that the strategy of mainstream exposure of the Taliban’s treatment of women meant that a simplified message was promulgated, the result was an absence of critical media discussion of the complicated geo-politics which affected Afghanistan. This produced an incomplete understanding of the rich and diverse cultures adopted by Afghan people. Philosopher Alison Jaggar argues that this ‘incomplete understanding distort[ed] Western philosophers’ comprehension of our moral relationship to women elsewhere in the world...and also impoverish[ed] our assumptions about the intercultural dialogue necessary to promote global justice for women.’<sup>819</sup> In the same vein, Kolhatkar claims that the over-simplified message sensationalised the Taliban abuse by implying that Afghan women’s oppression was limited to the burqa and that burqa-clad women needed saving from the Taliban by the West.<sup>820</sup> Little attempt was made to understand the nature and history of the garment or its origins. Instead the media mainly implied that before the ‘barbarous’ Taliban, Afghan women had been free and lived

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<sup>813</sup> Eleanor Smeal, ‘Presentation before the House International Relations Committee, International Operation and Human Rights Subcommittee Hearings’ (31 October 2001).

<sup>814</sup> Richard Lacayo, ‘About Face for Afghan Women’ *Time Magazine* (25 November 2001).

<sup>815</sup> John Lee Anderson, ‘The Warlord’, *The New Yorker* (22 October 2001) at 41. See also Jessica Auchter, ‘Reimagining the Burqa: Farkhunda Zahra Naderi’s Campaign for Afghan Parliament’ (2012) 14 *International Feminist Journal of Politics* 370 at 374.

<sup>816</sup> Gillian Whitlock, ‘The Skin of the Burqa: Recent Life Narratives from Afghanistan’ (2005) 28 *Biography* 54.

<sup>817</sup> Fluri, ‘The Beautiful ‘Other’: A Critical Examination of ‘Western’ Representations of Afghan Feminine Corporeal Modernity’

<sup>818</sup> ‘The Taliban: Engagement of Confrontation?’ Hearing Before the Committee on Foreign Relations, United States Senate, One Hundred Sixth Congress, Second Session, (20 July 2000).

<sup>819</sup> Alison Jaggar, ‘“Saving Amina”: Global Justice for Women and Intercultural Dialogue’ (2005) 19 *Ethics & International Affairs* 55.

<sup>820</sup> Kolhatkar and Ingalls, *Bleeding Afghanistan: Washington, Warlords, and the Propaganda of Silence*.

parallel lives to Western women. Freeing them from their burqas, or unveiling them, was the key to liberating women to lead Western style lives.

Consequently, Ayotte and Husain conclude that the burqa became ‘the universal symbol’ of Afghan women’s oppression’.<sup>821</sup> More so, to some journalists it was even ‘the *tool* of oppression.’<sup>822</sup> Yet, such binary discourse is problematic because, as Ayotte and Husain note, while this symbolism is easy to understand, Afghan women’s oppression did not start with the Taliban nor their imposition of the burqa and conclude that ‘in many cases, representations of the burqa have come to stand in for all of the other violence done to Afghan women by an either visual or linguistic synecdoche.’<sup>823</sup> Lila Abu-Lughod also points out that Taliban did not invent the burqa and describes how it had in fact come to represent the symbolic separation of the male and female spheres of society.<sup>824</sup> She quotes anthropologist Hanna Papanek, who, after spending time in Pakistan described the burqa as ‘portable seclusion’ and states that ‘ever since...I have thought of these enveloping robes as mobile homes.’<sup>825</sup> More pertinently she also asks why, when the burqa gave women the freedom to move in the public sphere while at the same time symbolically signalling that they were still in the home, women would suddenly chose to become immodest by throwing off this marker or respectability.<sup>826</sup>

By failing to consider history, culture and social realities, liberal feminists can be criticised for focussing solely on the burqa.<sup>827</sup> Afghan scholar Taiba Rahim argues that while the most disagreeable feature of the burqa is its ‘deeply dehumanizing effect’,<sup>828</sup> the West’s obsession with the garment is equally as dehumanizing, as it renders women as merely victims. Instead Rahim writes how ‘behind the burqa, women laugh and cry, and hope and

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<sup>821</sup> Kevin J. Ayotte and Mary E. Husain, ‘Securing Afghan Women: Neocolonialism, Epistemic Violence, and the Rhetoric of the Veil’ (2005) 17 (3) *Feminist Formations* 112, at 115.

<sup>822</sup> Lina Abirafteh, ‘Chadari Politics’ in Jennifer Heath and Ashraf Zahedi (eds), *Land of the Unconquerable: The Lives of Contemporary Afghan Women* (University of California Press, California 2011), at 288.

<sup>823</sup> Ayotte and Husain, ‘Securing Afghan Women: Neocolonialism, Epistemic Violence, and the Rhetoric of the Veil’.

<sup>824</sup> Abu-Lughod, ‘Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others’, at 785.

<sup>825</sup> *ibid.*

<sup>826</sup> *ibid.*

<sup>827</sup> Kolhatkar and Ingalls, *Bleeding Afghanistan: Washington, Warlords, and the Propaganda of Silence*.

<sup>828</sup> Taiba Rahim, ‘An Identity of Strength: Personal Thoughts on Women in Afghanistan’ (2002) 84 *Revue Internationale de la Croix-Rouge/International Review of the Red Cross* 627.

despair' and are 'no less determined, no less strong, no less filled with emotions and projects than any other women on this planet.'<sup>829</sup> Furthermore, some conservative and educated Afghan women championed the garment and indeed support many of the laws restricting women's rights.<sup>830</sup> Billaud describes how Afghan MP Shakila Hachemi, at a rally organised by jihadi leaders at Kabul National Stadium, spoke out against her fellow MP Malalai Joya and Joya's promotion of Western secularism and human rights.<sup>831</sup> Billaud postulates that women such as Hachemi adopt conservative attire in part to conform to strict religious and cultural practices, but also to signify resistance to Western ideology. As such, both Billaud and Rahim caution against simplified homogenised accounts of Afghan women and the assumption that all Afghan women reject the burqa.

#### ***4.1.2. Re-writing the burqa***

Heath and Zahedi argue that a 'nuanced understanding reveals that the chadari can also be seen as a symbol of resistance'.<sup>832</sup> Yet Western feminist obsession with the burqa overlooks its utilization by Afghan feminists to smuggle schoolbooks and cameras to women's groups. The burqa can be a tool of resistance. In fact many Afghan activists spoke of the burqa allowing them freedom to continue their work.<sup>833</sup> A UN senior gender officer argued that the burqa actually protects women and gives them security and reassurance.<sup>834</sup> Indeed, Billaud concludes that for many women it increased their mobility and guaranteed their anonymity.<sup>835</sup> She also found that despite its intended purpose of preventing adultery – the burqa was in fact commonly known to be favoured by Kabul's sex workers, as it meant they could offer their services to men whilst appearing anonymous.<sup>836</sup> Furthermore, Afghan parliamentary candidate Farkhunda Zahra Naderi used the image of the burqa in her election campaign with the slogan: 'burqa: the window of power'.<sup>837</sup> In fact she stated that she had purposely chosen the image of the burqa rather

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<sup>829</sup> *ibid.*

<sup>830</sup> Julie Billaud, 'Visible under the Veil: Dissimulation, Performance and Agency in an Islamic Public Space' (2009) 11 *Journal of International Women's Studies* 120.

<sup>831</sup> *ibid.*

<sup>832</sup> Abirafeh, 'Chadari Politics', at 289. The adoption of the veil as a symbol of resistance to Western or imperialist ideas is discussed further *infra* section 4.3 and section 5.1.1.

<sup>833</sup> Ayotte and Husain, 'Securing Afghan Women: Neocolonialism, Epistemic Violence, and the Rhetoric of the Veil', at 117.

<sup>834</sup> Abirafeh, 'Chadari Politics', at 289.

<sup>835</sup> Billaud, 'Visible under the Veil: Dissimulation, Performance and Agency in an Islamic Public Space'.

<sup>836</sup> *ibid.*

<sup>837</sup> Jessica Auchter, 'Reimagining the Burqa: Farkhunda Zahra Naderi's Campaign for Afghan Parliament'.

than a picture of herself, as the burqa represented all Afghan women. It was anonymous and as such could be any woman, or every woman. She further adds that the removal of personal images allowed her campaign to focus on election issues rather than on her appearance. As such Jessica Auchter concludes that: ‘Naderi rewrites the burqa for Afghan women’.<sup>838</sup>

Yet in spite of this Western feminists tend to dismiss the idea of the burqa’s empowering potential.<sup>839</sup> Instead, Western discourse on the burqa only calls for its shedding by Afghan women. Such misunderstanding simply allowed feminists to reinforce the picture of Afghan women as silent, passive victims needing to be uncovered by the West. Yet such an approach is telling because the fantasy that women are silent and passive just because they’re veiled says more about the West’s ideas of women than it does about anyone else’s.<sup>840</sup>

#### **4.2. Silencing Afghan Women and Denying Agency**

Many Western feminists consider unseen Afghan women as silent. In fact many Afghan women’s groups were demonstrably vocal immediately before and after the start of OEF, however they were mostly ignored by the West. During the high profile campaign on behalf of Afghan women, many articles by Afghan women activists expressed concern at the focus of the campaign and the possibility that it might alienate the very women it was trying to help.<sup>841</sup> Sima Wali argued that ‘the true needs and wants of the Afghan people are largely absent from campaigns waged on their behalf.’<sup>842</sup> Often the delivery of aid programmes after the overthrow of the Taliban focussed on what many Afghans did not consider to be a priority, and sometimes proposed solutions that were ‘unpopular with Afghan women themselves.’<sup>843</sup>

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<sup>838</sup> *ibid*, at 370.

<sup>839</sup> Ayotte and Husain, ‘Securing Afghan Women: Neocolonialism, Epistemic Violence, and the Rhetoric of the Veil’, at 117.

<sup>840</sup> Stabile and Kumar, ‘Unveiling Imperialism: Media, Gender and the War on Afghanistan’.

<sup>841</sup> Abirafeh, ‘Chadari Politics’, at 281.

<sup>842</sup> Sima Wali, ‘Afghanistan: Truth and Mythology’ in *Women for Afghan Women: Shattering Myths and Claiming the Future*, ed. S. Mehta (Palgrave Macmillan, New York 2002), at 1.

<sup>843</sup> Sultan Barakat and Gareth Wardell, ‘Exploited by Whom? An Alternative Perspective on Humanitarian Assistance to Afghan Women’ (2002) 23 *Third World Quarterly* 909, at 910.

Meanwhile the Afghan Women Network, a group whose members were professional Afghan refugee women in Pakistan, reported that they were left ‘confused, insulted, hurt, angry and substantially ignored’<sup>844</sup> by the UN Gender Mission on its visit to Pakistan. The group criticised the Mission’s Head Angela King for failing to spend any time with ‘actual Afghan women’ yet purporting to speak on their behalf at the UN.<sup>845</sup> Jennifer Fluri notes how, while they were highlighting women’s rights in Afghanistan and drawing attention to Taliban atrocities such as stoning, the FMF failed to credit RAWA for filming the atrocities and in doing so alerting the wider world to the situation.<sup>846</sup> Furthermore, while RAWA is a strong grass roots organisation with valuable expertise in providing social programs to women, it was marginalised by the West, perhaps because of its revolutionary mandate and Marxist leanings. However, it may also be the case that RAWA’s rejection of the victim stereotype and its refusal to conform to this stereotype meant it was excluded from the discourse on Afghan women because as Sonali Kolhatkar observes ‘what good is it to flaunt images of Afghan women marching militantly with fists in the air, carrying banners about freedom, democracy and secular government? These women wouldn’t need saving.’<sup>847</sup>

### **4.3. The politics of Resistance**

Consequently, many Afghans became disillusioned and irritated by Western feminists’ preoccupation with, and vilification of, the burqa. This in turn has led to a climate of resistance against Western human rights discourse as a whole.<sup>848</sup> The focus on Afghan women being uniquely oppressed by Islam, Afghan men and Afghan culture, outside of any real appreciation for the complex social realities in operation has contributed to a backlash against Western modes of emancipation. The organisation Women Living Under Muslim Laws<sup>849</sup> notes that the US intervention has ‘fuelled resentment, leading to the

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<sup>844</sup> Saba Gul Khattak, ‘Afghan Women’ (2002) 222 Middle East Report 18, at 21.

<sup>845</sup> *ibid.*

<sup>846</sup> Fluri, ‘Rallying Public Opinion’ and Other Misuses of Feminism’.

<sup>847</sup> Sonali Kolhatkar, “‘Saving’ Afghan Women’ (RAWA Website) <<http://www.rawa.org/znet.htm>> accessed August 2015.

<sup>848</sup> Hunt, “‘Embedded Feminism’ and the War on Terror’, at 63.

<sup>849</sup> Women Living Under Muslim Laws is an international network organisation that aims to provide support to women living in countries where the laws or customs are said to derive from Islam. The organisation was founded in 1984 when 9 women from various African and Asian countries met to form a strategy against women being denied rights due to such laws. The organisation has evolved into a global network and now has offices in Africa, Asia and Europe. See <<http://www.wluml.org/node/5408>>.

radicalisation and increased recruitment by politico-religious extremists',<sup>850</sup> which in turn has impacted negatively on women's rights.<sup>851</sup> The backlash against neo-imperialist projects means that all Western/American imports are at risk of rejection by conservatives who see them as threatening local cultures and traditions, with women's rights being seen as 'a Western attempt to undermine this Muslim country.'<sup>852</sup> Since the Bush Administration has been so vocal about women's rights, it is understandable that this is then seen as hallmark of Western culture. As such, Hunt argues that 'the war on terror has created an environment in which those who oppose women's rights are strengthened.'<sup>853</sup> Since women are seen as the guardians of local cultures and customs, colonised countries can be seen to demonstrate resistance to Western hegemonic ideals by controlling or subordinating women.

For local men the position of their women was symbolic of and mirrored their own domination: colonialism means allowing the colonial power to abuse the colonised women, resistance to colonialism is reasserting the colonised males' own power over their women.<sup>854</sup>

This was similarly seen during the revolution in Iran, where many liberal educated Iranian women chose to veil in order to show solidarity to their country and reject what they regarded as American imperialism. Similarly during colonial rule in Algeria and Egypt it is claimed that veiling was 'turned into an act of resistance against the modernising elite co-opted by the colonial establishment.'<sup>855</sup> Likewise in Afghanistan, many women choose to reject Western-imposed ideas and continue their own customs and culture, some through continuing to wear the burqa. Indeed, Ballad notes that 'With the return of conservative elements within the political arena, an area of cultural resistance has emerged around

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<sup>850</sup> Women Living under Muslim Laws (WLUML) 'Statement on the first Anniversary of September 11<sup>th</sup>' (11 September 2002) <<http://www.wluml.org/node/920>> accessed August 2015.

<sup>851</sup> It is noted by Radhika Coomaraswamy that in many developing countries human rights are often viewed with suspicion due to the historical context of Western colonialism. See Radhika Coomaraswamy, 'To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights' in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia 1994).

<sup>852</sup> Hunt, "'Embedded Feminism" and the War on Terror', at 63.

<sup>853</sup> *ibid*, at 65.

<sup>854</sup> Christine Chinkin, 'Gendered Perspective to the International Use of Force, A' (1988) 12 *Australian Yearbook of International Law* 279.

<sup>855</sup> Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate*.

women and the family'<sup>856</sup> and she concludes that the Afghan Government's preoccupation with controlling women's appearance in public is a reaction to the presence of the international community in the country.<sup>857</sup>

However the failure of some Western feminists to understand or acquiesce to the testimony of Afghan women is problematic. By continuing to focus solely on metaphors of oppression such as the burqa, Western feminists silence and objectify Afghan women and reinforce the victim status. As Maryam Khalid asserts, although the rights of women in Afghanistan and indeed elsewhere in the world are a legitimate concern, adequate engagement 'demands that we interrogate motives for foreign policy and the ways in which they are justified, if we are to avoid accepting (and possibly contributing to) hegemonic discourses, and the gendered, racialized and sexualised violence they rationalise.'<sup>858</sup> Indeed such homogenised accounts of Third World women as victims, as epitomised by the heroic narrative, have long been criticised by Third World feminists who argue that such accounts often 'essentialize culture and define Third World women by that essentialized culture.'<sup>859</sup> The depiction of Afghan women solely as victims suggests that that the West feels more comfortable viewing them as passive objects who cannot speak for themselves, and evokes Mohanty's observations that Third World women can be depicted as having 'needs and wants' but never solutions, choices or agency.<sup>860</sup> However as Spivak warns, there are insurmountable problems when Western feminists try to speak for Third World women.<sup>861</sup> Here the accusation of cultural imperialism implicit in the rescue paradigm once again looms large.

## **5. The Consequences of the Narrative: Promoting American Hegemony**

Said argued that Orientalist discourse relied on images and narratives about the Orient, all of which allowed the West to pronounce upon and assume rule over both the idea and

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<sup>856</sup> Billaud, 'Visible under the Veil: Dissimulation, Performance and Agency in an Islamic Public Space'.

<sup>857</sup> *ibid.*

<sup>858</sup> Maryam Khalid, 'Gender, Orientalism and Representations of the 'Other' in the War on Terror' (2011) 23 *Global Change, Peace & Security* 15, at 28.

<sup>859</sup> Engle, 'Liberal Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States', at 433.

<sup>860</sup> Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses', at 72.

<sup>861</sup> Spivak, 'Can the Subaltern Speak?'

reality of the East.<sup>862</sup> Such images of the Orient serve to confirm the assumption that it is less civilised and therefore in need of saving, and must be made like the West. Said makes clear that central to this construction of the Orient is power: ‘the Orient can be made the Orient because of subjugation.’<sup>863</sup> He also tells us that the Orient exists to be watched by the Occident and it is through this that the Other is constructed as a uniform subject.<sup>864</sup> Said further notes how media representations of the Muslim world, and Afghanistan in particular, play on fears of Islam as a threat to Western freedom.<sup>865</sup> Section 2 of this Chapter outlined how this orientalist construction of the Other as irrational, dangerous and depraved allowed him to exist as a nebulous threat to Western Civilisation.<sup>866</sup> This construction serves as the perfect justification for intervention in order to neutralise this threat. In the ‘War on Terror’ construction this narrative is completed by surfacing images and stereotypes of oppressed Muslim women as victims of the barbarity and backwardness of the Oriental Other.

However, rather than the aim of liberating women being a happy coincidence of the ‘War on Terror’ it is a strategic deployment that not only justifies the violence, it normalises it.<sup>867</sup> As Pratt notes, ‘feminism (or particular strands of it) constitutes a racializing discourse that normalises the use of violence against the “Other” – particularly Muslim men – because it is claimed, they do not know how to treat their women properly.’<sup>868</sup> As such, while the enemy male exemplifies a dangerous masculinity that is ‘irrational and expresses itself in acts of barbarism, such as the oppression of women’<sup>869</sup> the West can be said to embody a superior and exaggerated masculinity that defeats the enemy yet is also ‘benevolent and paternal.’<sup>870</sup> Therefore it can be argued that the characterisations in the heroic narrative merely serve to reaffirm what the West already claims to know about the East. Yet rather than pertaining to offer any insight into the ‘other’, such constructions

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<sup>862</sup> Said, *Orientalism*.

<sup>863</sup> *ibid*, at 6.

<sup>864</sup> *ibid*.

<sup>865</sup> Edward W Said, *Covering Islam: How the Media and the Experts Determine How We See the Rest of the World* (Random House 1997).

<sup>866</sup> section 2.3.1.

<sup>867</sup> Pratt, ‘Weaponising Feminism for the “War on Terror”, Versus Employing Strategic Silence’.

<sup>868</sup> *ibid*, at 328.

<sup>869</sup> Khalid, ‘Gender, Orientalism and Representations of the ‘Other’ in the War on Terror’, at 20.

<sup>870</sup> *ibid*, at 20.

serve merely to reaffirm the West's superiority and image of itself.<sup>871</sup> Further, by serving up stereotypes of Muslim women needing to be saved, the West is merely legitimating to itself the need to remake the East in its own image. In the 'War on Terror' narrative this was epitomised in the remaking of Afghan women as liberated subjects.

### 5.1. Imperialism by Liberation

Thus, as Mohanty tells us there is an implicit assumption that the Western liberated woman is an autonomous individual while the oppressed Third World woman has still to find her individuality and become an autonomous subject.<sup>872</sup> In view of this, Cloud reminds us that while images of burqa wearing Afghan women are a fact of life in Afghanistan, the juxtaposed presentation of these images against those of 'liberated' Western women does more than represent reality; it creates a powerful discourse which calls for the entry of 'oppressed' women into modern civilisation which is in fact represented by consumer choice.<sup>873</sup> As such, by emphasising the burqa as the metaphor of the heroic narrative, Western audiences/feminists not only silence and marginalise Afghan women, they focus on unveiling as the metaphor of liberation. This meant that while the burqa stood as a measurement of Afghan women's oppression, their freedom was to be measured through their unveiling and adoption of capitalist consumerism. 'The freedom that we are bringing to these women is figured as the freedom to shop, which suggests that the American notion of freedom offered to the rest of the world through war can be reduced to the freedom of the market.'<sup>874</sup>

This is also the conclusion of other scholars<sup>875</sup> who highlight that the strand of feminism and women's rights which is being promoted is a white neo-imperialist individualism that 'promotes feminism through capitalist enterprise, and projects American style consumption

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<sup>871</sup> Heathcote, 'Article 51 Self-Defense as a Narrative: Spectators and Heroes in International Law'.

<sup>872</sup> Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses'.

<sup>873</sup> Cloud, "'To Veil the Threat of Terror': Afghan Women and the Clash of Civilizations in the Imagery of the US War on Terrorism', at 294.

<sup>874</sup> Kelly Oliver, *Women as Weapons of War: Iraq, Sex, and the Media* (Columbia University Press, New York 2010).

<sup>875</sup> Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Penguin Books, London 2007); Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq*; Mark Curtis, *The Great Game: The Reality of Britain's War in Afghanistan* (War on Want 2011); Sandy Gall, *War against the Taliban: Why It All Went Wrong in Afghanistan* (Bloomsbury Publishing 2013); Astri Suhrke, *When More Is Less: The International Project in Afghanistan* (Columbia University Press, New York 2011).

as the evidence of cultural modernity.’<sup>876</sup> Purima Bose highlights the mainstream reporting on the efforts of Beauty Without Borders, an organisation whose aim was to open a beauty school in Kabul to both bolster women’s morale and train them for future employment. She notes that despite the feel-good articles in the Western press<sup>877</sup> the beauty school was not a success and was eventually closed down, in part because one of the American beauticians published a salacious memoir of her experience, its content infuriating many Afghans.<sup>878</sup> Bose concludes that the ‘pedagogical mission of the beauty academy was to export US beauty practices and Western commodities, thus cultivating a new market for beauty products, and also capitalist ideology that conjoins female appearance and economic uplift as empowerment for Afghan women.’<sup>879</sup> Thus, it was ‘positioned as a refuge for women by bringing order and discipline to the existing practises of Afghanistan.’<sup>880</sup> However, the adoption of feminist rhetoric to support this mission is problematic because it presumes that emancipation can only be achieved through re-modelling Afghan women as their Western counterparts, seeking to transform them into consumers who are free to dress in Western clothes. This once again reproduces Afghan women’s bodies as a metaphor for liberation through the way they are transformed into the ‘modern Western and hegemonic model of the global feminine subject.’<sup>881</sup>

This continual focus on Afghan women as victims of their culture, as represented by their appearance, once again demonstrates the friction between Western and ‘Southern’ feminists.<sup>882</sup> The charge that global feminism is merely an exportation of the values of Western liberal feminists has been made by many Third World scholars.<sup>883</sup> They argue that

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<sup>876</sup> Purima Bose, ‘From Humanitarian Intervention to the Beautifying Mission: Afghan Women and Beauty without Borders’ (2010) 51 *Genders*.

<sup>877</sup> For an examination of the reporting of the Kabul Beauty School in Western media see Fluri, ‘The Beautiful ‘Other’: A Critical Examination of ‘Western’ Representations of Afghan Feminine Corporeal Modernity’.

<sup>878</sup> See Bose, ‘From Humanitarian Intervention to the Beautifying Mission’ and also Purima Bose, ‘A Cosmetic Cover for Occupation’ (October 2009) <<http://www.solidarity-us.org/node/2368>> accessed August 2015.

<sup>879</sup> Bose, ‘From Humanitarian Intervention to the Beautifying Mission’.

<sup>880</sup> Fluri, ‘The Beautiful ‘Other’: A Critical Examination of ‘Western’ Representations of Afghan Feminine Corporeal Modernity’, at 248.

<sup>881</sup> *ibid*, at 242.

<sup>882</sup> Arat-Koc, ‘Feature-Hot Potato: Imperial Wars or Benevolent Interventions? Reflections on “Global Feminism” Post September 11th’

<sup>883</sup> See for e.g. Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’; Obiora, ‘Feminism, Globalization, and Culture: After Beijing’; Narayan, *Dislocating Cultures: Identities, Traditions and Third World Feminism*.

Western women focus on the visual oppression of Third World women, but often fail to engage with the wider and more complex issues that cause this oppression.<sup>884</sup> Furthermore, in representing Third World women simply as victims of their culture or religion, the problems they face are often presented as dichotomous to the problem-free, liberated lives lived by Western women. Indeed, focusing on the problems of the ‘other’ mitigates and diminishes the violence and discrimination many First World women face and instead suggests that such problems only exist in the Third World.<sup>885</sup> This is noted by Eisenstein who highlights the violence and repression that many developed world women face in their seemingly liberated lives to argue that the choice between exploitation and repression is actually no choice at all.<sup>886</sup> Likewise it is problematic that the choices being offered to Afghan women, and portrayed in the media as liberation, are in fact not choices at all.

### ***5.1.1. Uncovering Women’s Bodies***

Accordingly, the only choice offered to Afghan women is the choice to unveil. As discussed previously<sup>887</sup> the obvious visual marker of Afghan women’s oppression at the hands of irrational Muslim men was the veil, and so particular significance was placed on their ability to unveil. Such a focus on the Islamic veil or hijab is not new; there is a history of Western preoccupation or obsession with the veil.<sup>888</sup> Indeed, Leila Ahmed argues that such ‘peculiar practices of Islam with respect to women ha [ve] always formed part of the Western narrative of the quintessential otherness and inferiority of Islam’.<sup>889</sup> Reaction has veered between a mixture of derision at the concept of women needing to cover from men, and titillation towards exotically wrapped woman. Indeed since the Arabian Nights was translated into English, images of sensuous but hidden women have remained at the

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<sup>884</sup> Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’; Obiora, ‘Feminism, Globalization, and Culture: After Beijing’; Narayan, *Dislocating Cultures: Identities, Traditions and Third World Feminism*. See also Abdullahi An-Na’im, ‘Promises We Should All Keep in Common Cause’ in Joshua Cohen, Matthew Howard and Martha C. Nussbaum (eds), *Is Multiculturalism Bad for Women* (Princeton University Press, Princeton 1999).

<sup>885</sup> Leti Volpp, ‘Feminism Versus Multiculturalism’ (2001) 101 *Columbia Law Review* 1181; Azizah Y Al-Hibri, ‘Is Western Patriarchal Feminism Good for Third World/Minority Women?’ in Joshua Cohen, Matthew Howard and Martha C. Nussbaum (eds), *Is Multiculturalism Bad for Women* (Princeton University Press, Princeton 1999); Narayan, *Dislocating Cultures: Identities, Traditions and Third World Feminism*; Catherine Powell, ‘Introduction: Locating Culture, Identity, and Human Rights’ (1998) 30 *Columbia Human Rights Law Review* 201.

<sup>886</sup> Eisenstein, *Against Empire: Feminisms, Racism, and the West*, at 155.

<sup>887</sup> See infra section 4.

<sup>888</sup> Said, *Orientalism*. See also Narayan, *Dislocating Cultures: Identities, Traditions and Third World Feminism*.

<sup>889</sup> Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate*.

forefront of Western conceptualisations of the orient.<sup>890</sup> Said tells us that Western men simultaneously see veiled women as both victims to be saved and exotic prizes to be unwrapped.<sup>891</sup> Similarly Zine highlights that Western preoccupation is also rooted in discomfort over the veil's ability to invert the orientalist gaze.<sup>892</sup> By this she is referring to the fact that women in full veils such as niqabs or burqas are entirely masked to the observer. Yet, while these women cannot be seen, they are able to see their observers. Zine argues that it is this subversion that makes the West discomfited and that therefore, much of the Western preoccupation with the veil flows from this discomfort.<sup>893</sup>

In view of this, it is suggested that any discourse of Afghan women as victims, as signified by their blue burqas, was always a problematic and dangerous narrative to employ. A brief study of colonial history would inform feminists that during the colonial era the Islamic veil served as a strong visual marker depicting colonised women as victims of oppression and backward culture thereby reinforcing their need for civilised Europeans to educate and liberate them.<sup>894</sup> In French colonised Algeria, the French military held ceremonial unveilings of Algerian women that served to demonstrate to the population at large that France was removing the yoke of their backwards religion and culture and inviting them into the modern world. Yet Hatem notes that such unveilings did not offer women the freedom from oppression, but were merely coercion to uncover themselves.<sup>895</sup> She describes how, when harvests were poor, the French administration would distribute food rations to women, but only if they removed their veils.<sup>896</sup> While many European women applauded the unveiling of Muslim women as victories for female emancipation, today many scholars point to the voyeurism underpinning such ceremonies.<sup>897</sup>

Similarly, in the narratives which circulated after 9/11 the focus was on removing the mandate to veil. Yet there was little attempt to understand that many women, even if free

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<sup>890</sup> Fuad Shaban, *Islam and Arabs in Early American Thought: Roots of Orientalism in America* (Acorn Press, Swindon 1991).

<sup>891</sup> Said, *Orientalism*.

<sup>892</sup> Zine, 'Between Orientalism and Fundamentalism: Muslim Women and Feminist Engagement'.

<sup>893</sup> *ibid.*

<sup>894</sup> *ibid.*

<sup>895</sup> Hatem, 'Through Each Other's Eyes: Egyptian, Levantine-Egyptian, and European Women's Images of Themselves and of Each Other (1862–1920)'.

<sup>896</sup> *ibid.*

<sup>897</sup> See Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* Abu-Lughod, 'Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others'.

to unveil, would chose voluntarily to continue wearing their burqas. The success of the military intervention would be measured by the speed at which women could shed their burqas, or indeed how quickly the West could unveil Afghanistan. However, Ayotte and Husain criticise the eroticisation of Afghan women implicit in notions of unveiling, observing how these rely on the ‘voyeuristic Orientalism of a promise to uncover women’s bodies.’<sup>898</sup> The common theme being that ‘unveiling’ is merely the signifier for ‘the reduction of Afghan women’s agency to their conformity to popular US notions of feminist liberation.’<sup>899</sup>

## 5.2. Depicting Afghanistan as a Feminised State: Feminism’s Complicity

In the colonial narratives abounding after 9/11 the US depicted Afghanistan as a feminised state in its invocation of metaphors of sexual violence. There are posters of Osama bin Laden being anally penetrated by the Empire State Building.<sup>900</sup> According to Philipose such imagery is designed to taunt and humiliate.<sup>901</sup> Such imagery at once renders Afghanistan both feminine and infantilised. It cannot look after itself and therefore needs the West to assume responsibility for its affairs.<sup>902</sup>

This view of Western civilisation as the benchmark for all civilisations has remained since the colonial era. Gordon argues that after colonialism the UN’s trusteeship and mandate systems still subscribed to the same ideology of eastern states as being infantilised and needing to be taught how to behave.<sup>903</sup> While both colonialism and trusteeship are no longer viewed as viable enterprises by international law, Gordon argues that today’s justifications for intervening in ‘failing’ states, whether under the pretext of humanitarian intervention or as part of the global War on Terror, similarly reinvent existing tropes of Western superiority and patriarchy.

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<sup>898</sup> Ayotte and Husain, ‘Securing Afghan Women: Neocolonialism, Epistemic Violence, and the Rhetoric of the Veil’, at 121.

<sup>899</sup> *ibid.*

<sup>900</sup> Elizabeth Philipose, ‘Decolonizing the Racial Grammar of International Law’ in Robin L. Riley, Chandra Mohanty and Minnie Bruce Pratt (eds), *Feminism and War: Confronting US Imperialism* (Zed, London 2008).

<sup>901</sup> *ibid.*

<sup>902</sup> Ruth Gordon, ‘Saving Failed States: Sometimes a Neocolonialist Notion’ (1997) 12 *American University Journal of International Law & Policy* 903.

<sup>903</sup> *ibid.*

Because the West views certain peoples as different and perhaps inferior, solutions that would never be appropriate for sovereign industrialized democracies somehow become suitable and acceptable for these very different beings.<sup>904</sup>

Nesiah notes how, in the same way as the colonial powers convened to divide up Africa in the nineteenth century, so too do the big powers seek to exercise control over problem states.<sup>905</sup> However, unlike colonisation, today that control is more subtle. Powerful states now use the ideology of humanitarianism and human rights to justify interference. Nevertheless, just as in colonial times, Nesiah maintains that the reason for intervention or interference is one of self-interest rather than altruism, with human rights norms subject to ‘malleable standards’ and ‘capable of advancing US interests often at the expense of humanitarian concerns.’<sup>906</sup>

Despite endorsing and aligning with victims of oppression, the imperialist narrative of humanitarianism asserts that the infantilised victims cannot be trusted to run their own countries because the politicization of humanitarianism has gifted Western states, NGOs and international institutions greater leverage over non-Western societies in their ability to make judgments about ‘what is right and just, about whose capacities are built, and which local groups are favoured.’<sup>907</sup> Indeed David Chandler writes how despite the Serb oppression of ethnic Albanians in Kosovo being the ostensible reason for NATO force, the ‘victim status of the ethnic Albanians, that allowed them to gain the support of NATO states, was not enough to allow them a say in the post-war government of the province.’<sup>908</sup> NATO was particularly concerned that they would fill the vacuum with their own institutions.<sup>909</sup> As such Martti Koskenniemi concludes that the ‘Kosovo Albanian is worthy

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<sup>904</sup> *ibid.*

<sup>905</sup> Nesiah, ‘From Berlin to Bonn to Baghdad: A Space for Infinite Justice’.

<sup>906</sup> *ibid.*

<sup>907</sup> Chandler, ‘The Road to Military Humanitarianism: How the Human Rights NGOs Shaped a New Humanitarian Agenda’, at 700.

<sup>908</sup> David Chandler, ‘Rhetoric without Responsibility: The Attraction of “Ethical” Foreign Policy’ (2003) 5 *The British Journal of Politics & International Relations* 295, at 308.

<sup>909</sup> Slavoj Žižek, *The Fragile Absolute: or, Why is the Christian Legacy Worth Fighting For?* (Verso 2001) at 59.

of humanitarian support as long as he remains a helpless victim — but turns into a danger the moment he seeks to liberate himself.’<sup>910</sup>

Furthermore, while it can certainly be argued that the Western media helped to construct the heroic narrative around OEF by positioning US military masculinity as the saviour of civilisation, merely critiquing this narrative through the lens of masculinity is problematic. This characterisation relies on a one-dimensional view of masculinity that is rarely adequately defined. As such, the unqualified acceptance of the discourse of one-dimensional masculinity is problematic because it promotes a masculinity enshrined in heteronormativity. Judith Butler argues that there was a hierarchy of mourning for the victims of the attacks which privileged ‘those who were married, or on the way to be, heterosexual, happy, monogamous.’<sup>911</sup> In order for the West to reassert its dominance and ‘masculine’ superiority the narrative requires that it demonise and dehumanise the Third World ‘other’ by rendering him feminine and effeminate. Yet while much critical scholarship on the heroic narrative highlights the danger of such a dualist view of Western masculinity versus eastern femininity, this scholarship fails to adequately address the unequal power and racial dynamics which operate to *allow* the West to hold this view and as such, inadvertently promotes the heteronormative trope which underpins this discourse on ‘masculinity’.

The heroic narrative is therefore highly racialized as well as gendered, seeking to emphasise that patriarchal violence does not exist in the West.<sup>912</sup> Accordingly, as Thobani notes, even seemingly innocent feminist discourse that denounced the ‘War on Terror’ can still project an imperialist aura by underscoring this racialized narrative that infantilises Third World women and denounces Third World men in order to recreate whiteness.<sup>913</sup>

## 6. Conclusion

This chapter sought to demonstrate how the familiar heroic narrative operated post 9/11 and that it did so in order to advance a military intervention in Afghanistan and quash any dissent by generating wholesale support for the ‘War on Terror’.

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<sup>910</sup> Koskenniemi, ‘The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law’

<sup>911</sup> Judith Butler, *Prearious Life. The Powers of Violence and Mourning* (Verso, London 2004) at 32.

<sup>912</sup> Narayan, *Dislocating Cultures: Identities, Traditions and Third World Feminism*.

<sup>913</sup> Thobani, ‘White Wars: White Feminisms and the “War on Terror”’.

It argued that the heroic narrative operates so successfully because it retells and revisits the founding myths of western societies. The idea of constructing founding myths in order to develop collective national identity and consciousness can be traced back to the earliest human civilisations.<sup>914</sup> Mead argues that for America the founding myth which needs to be continually retold is the western: determined Americans conquering harsh and unforgiving lands and subduing disorder.<sup>915</sup> For America this myth is all pervading. Indeed Buchanan and Johnson argue that:

The narrative of 'frontier justice' is embedded much more deeply in internationalist discourse than reflections on the tenure of the most recent Texan in the White House might reveal. In our view, the contradictory legacy of frontier justice manifests itself both in the (American) ideal of the 'rule of law' and the interpretation of the ideal with the presumptions of liberal internationalism.<sup>916</sup>

Similarly, myths include citing the UK as the inventor and bearer of modern society revisiting Britain's past glory as an imperial nation.

Media discussion in the aftermath of 9/11 quickly invoked these mythologies in order to reassert national identity and unity. As such the popular narrative which emerged was of the heroic and benevolent West vanquishing evil and disorder in the east and bringing order, civilisation and modernity to the wretched peoples there.

The veiled semi-theological message was clear: having vanquished the 'evil' Taliban, the American saviours had taken off the Muslim yoke of oppression and moved women, and Afghan society generally, from darkness into light. No matter that the Northern Alliance, which replaced the Taliban, has an equally brutal history.<sup>917</sup>

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<sup>914</sup> Robert A. Segal, *The Myth and Ritual Theory: An Anthology* (Blackwell, Oxford 1998).

<sup>915</sup> Mead, 'Manhood, Mourning and the American Romance' in Birkenstein Jeff, Froula Anna and Randell Karen (eds), *Reframing 9/11: Film, Popular Culture and the 'War on Terror'* (Continuum, London 2010).

<sup>916</sup> Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches*, at 141.

<sup>917</sup> Stabile and Kumar, 'Unveiling Imperialism: Media, Gender and the War on Afghanistan'.

The effects of this narrative are that it manages to oversimplify complicated geo-political issues; it reasserts a hawkish conservative masculine approach to international law and international relations; it co-opts the language of human rights and women's rights, but does little to further these – ultimately damaging the human rights movement by linking it to imperialist foreign policies. Indeed Hunt and Rygiel state that far from being a war for women's rights, the War on Terror is, 'in fact a war *on* women's rights.'<sup>918</sup>

By adopting apocalyptic and fantasy rhetoric, Western states create expectations and hopes which can never be fulfilled, especially so when there is a war taking place. History tells of many promises made to colonial people, only for these promises to be broken when the colonisers' agendas changed.<sup>919</sup> Likewise in Afghanistan the US and UK co-opted the language of feminism and women's rights to generate support for the invasion of Afghanistan, but once OEF commenced and the agendas changed, there was little serious discussion or engagement as to how women's lives could actually be improved.<sup>920</sup> Not only did this create disappointment and disillusionment among the women of Afghanistan whose expectations were unfairly raised, it also adversely affected Western women by reducing feminist ideologies of women's equality to empty rhetoric. It also tainted the human rights and women's rights movement because they were used to further the agendas and interests of Western states.

Invoking the heroic narrative also heralded the return of traditional masculinity as a hegemonic ideology. Since women's only role in the narrative is as victims, it contributes to the belief that all women are victims who require strong masculine men to protect them. Invoking this idea creates the perfect justification for increasing militarisation domestically and use of force internationally. As such, it can be argued that US obsession with masculinity and its perceived markers such as militarization and rough justice may in fact hamper a more nuanced solution to events such as 9/11. Enloe concludes that the pressure

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<sup>918</sup> Krista Hunt and Kim Rygiel, '(En)Gendered War Stories and Camouflaged Politics' in Krista Hunt and Kim Rygiel (eds), *(En) Gendering the War on Terror: War Stories and Camouflaged Politics* (Ashgate Publishing Company, London 2006), at 11.

<sup>919</sup> Weissman, 'The Human Rights Dilemma: Rethinking the Humanitarian Project' at 271-273.

<sup>920</sup> See Chapter 2.

to ‘appear tough’ has resulted in US foreign policies that actually limit America’s capacity to participate in creating a more secure international community.<sup>921</sup>

Furthermore, in addition to rejecting feminist ideals at home, the discourse of masculinity requires Western states to view Eastern states and their people as feminised or infantilised. In order for the West to reassert its dominance and masculine superiority this narrative requires that it demonise and dehumanise the Third World other by invoking ‘clash of civilisations’ anxiety and binary tropes.

In addition to this, promoting militarism as a means by which to liberate women is not a novel strategy because as DuPre highlights, the deployment of Afghan women ‘in need of rescue’ is a strategy that has been used before, with little benefit to Afghan women.<sup>922</sup> Indeed the humanitarian ‘alibi’ is frequently cited as a reason for those promoting military action to engage in humanitarian rhetoric. Humanitarian organisations are generally trusted and their aims seen as benevolent by the public. For this reason Governments are now keen to appropriate the warm feelings associated with humanitarian work, so much so that humanitarianism is often cited as an alibi for military operations.<sup>923</sup>

Finally, the co-option of feminist rhetoric is open to accusations of hypocrisy as it is frequently noted that the West only appears to support the liberation of some oppressed women. Therefore while women in Afghanistan and those in Iran are considered victims of tyrannical regimes, Western governments (particularly the US) are less vocal about the oppression of women in Saudi Arabia or Pakistan, again raising the issue that women are not important unless advocating women’s rights serves a wider strategy.<sup>924</sup>

Thus, having demonstrated that women’s rights was used as an alibi for intervention in Afghanistan, and having asserted that the legal requirements to use force were not satisfied, this thesis now turns to how the intervention in Afghanistan came to be packaged

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<sup>921</sup> Enloe, *The Curious Feminist: Searching for Women in a New Age of Empire*, at 126.

<sup>922</sup> Schwartz-DuPre, ‘Portraying the Political: National Geographic’s 1985 Afghan Girl and a US Alibi for Aid’.

<sup>923</sup> Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*; David Rieff, *A Bed for the Night: Humanitarianism in Crisis* (Vintage 2002).

<sup>924</sup> Nayak, ‘Orientalism and ‘Saving’US State Identity after 9/11’.

as a legitimate use of force with the dual aim of liberating women, and why this was so readily accepted as a justification.

## Chapter 4 Propagandising Women's Human Rights

### Introduction

It is necessary to employ techniques to sell wars to the public because, as Kant tells us, democracy demands public consent before military force can be used.<sup>925</sup> Perhaps because of this, there exists a long and torrid history of governments attempting to sell wars to the public, usually by appealing to nationalistic sentiments and arousing anger and fear by demonising the enemy. The Public are encouraged to believe that war is in their best interests and is necessary to protect them from the enemy. By instilling this fear and paranoia, governments ensure support for military action. The same is true today. By considering the operation of propaganda as a means of selling war to the public, this chapter demonstrates that there is a standard technique through which governments seek to influence and manipulate public opinion in order to generate support for wars.

This chapter outlines how such a technique operated to sell the 'War on Terror' to the public by subtly, and sometimes not so subtly, framing it within a heroic narrative. As such, this chapter complements the preceding chapter, which outlined how the heroic narrative operates and demonstrated how the media were keen to adopt and exaggerate this narrative to contextualise the 'War on Terror'. So successful was this strategy that alternative narrative framings of the 9/11 attacks and subsequent 'War on Terror' were silenced. Instead the official framing of the 9/11 attacks as acts of war necessitating a military response, came to be accepted as 'natural' thereby allowing the heroic narrative to take root unchallenged. This chapter excavates precisely how this acceptance of a military response as natural materialised because, as Wojtek Wolfe notes, up until 9/11 all mentions of terrorism and war within political rhetoric had been separate. Each had inhabited separate spheres in both domestic and foreign policy, with war conceptualised as militaristic, and terrorism as either a domestic or international crime.<sup>926</sup> Thus this chapter posits that while the conception of the 'War on Terror' is a novel ideological assimilation, it is one that simply replicates classical war propaganda techniques.

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<sup>925</sup> Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Yale University Press, New Haven 2006).

<sup>926</sup> Wojtek Mackiewicz Wolfe, *Winning the War of Words: Selling the War on Terror from Afghanistan to Iraq* (Praeger Publishers, CT 2008).

This chapter therefore argues that the official framing of the 9/11 attacks was purposely and deliberately scripted through the use of targeted political rhetoric that carefully exploited collective memories of past events, such as WWII and the glory of the British Empire. Section 1 argues that the framing of 9/11 was not 'natural' or fluid, nor did the attacks require a new reality through which they could be understood. It utilises critical terrorism theories and discourse analysis to analyse how the discursive 'void' in the aftermath of the attacks presented an opportunity for politicians to shape reality and therefore public understanding. It then outlines some of the possible alternative understandings of the 9/11 attacks, and therefore alternative responses, that might not have relied on military action. It highlights, in particular, Judith Butler's invocation to harness the public mood of grief and use the aura of vulnerability to imagine an alternative global humanity. However, it concludes that such was the censoring of critique, even within the academy, that no viable alternative understanding was possible. Section 2 then draws on a number of thinkers to outline basic propaganda theory, which states that the deployment of propaganda techniques is inevitable when manufacturing public support for war. It also notes that propaganda relies on three key processes; demonising one's enemies, mythmaking, and media censorship. Section 3 outlines how such a propaganda model was applied to the 'War on Terror'. It concentrates specifically on how the 'War on Terror' was portrayed in the media and compares this to the portrayal of previous conflicts, arguing that it follows a well-trodden path. Sections 4 and 5 then discuss the state-specific meta-narratives through which propaganda techniques operated in order to sell the war to both the American and British public. These sections argue that the war was framed in a particular way in the US and UK in order to resonate with the particular culture and history of each state, allowing the public to draw on collective memories of nationhood, identity and past glory. This chapter ultimately concludes that the framing of the 9/11 attacks and the subsequent military action in Afghanistan was deliberately framed in a manner utilising well-worn war propaganda techniques. Thus, this thesis refutes the idea that 9/11 was exceptional and that military action was inevitable. Instead, by highlighting the operation of propaganda techniques, it explains how the actual horrors of war can be effectively subsumed within a wider humanitarian narrative that then facilitates or renders inevitable military action and for its recasting as benign or 'just'. The effectiveness of this

propaganda machine in relation to 9/11 which also analogised the current situation with past British triumphs over adversity, meant that any alternative understanding or approach was wholly eliminated. It both manufactured and then (at least in the short term) benefited from a public endorsement of military action without significant criticism.

## **1. Transforming the 9/11 Attacks into a Call to Arms: The Rhetorical Sleight of Hand**

Chapter 3 outlined how the military response to crisis is deliberately constructed. It is therefore necessary to examine how the 9/11 attacks, the catalyst for the ‘War on Terror’, were transformed from criminal acts into acts of war. Understanding the mechanics of such a transformation is important because, as was highlighted in Chapter 1, the legal recourse available to states varies drastically with a criminal terrorist act compared to an armed attack – or act of war. For a military response to be legal the 9/11 attacks had to meet the threshold of armed attack. Chapter 1 argued that the terrorist attacks did not meet this threshold and that, as such, the military response was not legal. However, this thesis has argued that despite the lack of objective legality, a subjective legitimacy was invoked through the use of a narrative which framed the attacks as acts of war, thereby positioning the US operation as a heroic liberation of Afghan women. This thesis argues that such ‘heroic’ rhetorical framing allowed the US and its allies to apply a veneer of legitimacy or quasi legality, which obscured illegality. It is therefore necessary to first ask how, and by what means, 9/11 was rhetorically morphed into an act of war, as this, according to critical terrorism theorist Richard Jackson is ‘the most important discursive move of all.’<sup>927</sup> According to Jackson, it is not enough to construct the attacks as a tragedy; instead it was necessary to ‘fix the exact nature and meaning of the events’ as something more.<sup>928</sup> Thus, this section demonstrates how the political rhetoric following 9/11 was highly scripted and manipulated in order to transform the 9/11 attacks into a call to arms, garnering public and international support for war.

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<sup>927</sup> Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism*, at 37.

<sup>928</sup> *ibid*, at 38.

## 1.1. The Power of Political Rhetoric

Jackson tells us that it is necessary to study the language of politicians because it creates meaning and it is through such language that situations come to be framed by the public.<sup>929</sup> According to communications theory, presidential crises can be viewed as rhetorical constructions because the ‘situation does not create the crisis; instead, the president’s response to the situation – how he *describes* it – creates our understanding of the situation as a crisis or not.’<sup>930</sup> Indeed analysis of rhetoric as a method of political persuasion<sup>931</sup> demonstrates that presidents can hold an ‘information monopoly’ that allows them to frame a crisis as they see fit.<sup>932</sup> As such, Krebs and Jackson argue that political rhetoric can actually be conceptualised as coercion.<sup>933</sup>

Furthermore, international relations scholarship tells us that a multitude of rhetorical devices or tropes exist in order to facilitate public understanding of government policy, particularly when that policy is war. The most effective of these is linking a war’s importance to core national values and portraying it as intrinsic to national security; ‘after all it is difficult to oppose a policy designed and marketed to keep [a country] safe.’<sup>934</sup> This very technique was employed after 9/11 when President Bush argued that the ‘War on Terror’ was necessary to protect America from further terrorist attacks.<sup>935</sup> Other well-worn tropes include using the memory of past events to shape contemporary understandings, the use of vague but idealistic language, and framing conflicts in simplistic good versus evil discourse.<sup>936</sup> Together, these tropes allow politicians to promote a sense of victimhood and a state of fear, both volatile situations where recourse to war becomes not only the natural response, but the *only* response. The tropes also raise the possibility of triumph.

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<sup>929</sup> *ibid.*

<sup>930</sup> Jim Kuypers, *Bush's War: Media Bias and Justifications for War in a Terrorist Age* (Rowman & Littlefield Publishing, Maryland 2006), at 4.

<sup>931</sup> See David Zarefsky, ‘Presidential Rhetoric and the Power of Definition’ (2004) 34 *Presidential Studies Quarterly* 607; Richard A. Brody, ‘International Crises: A Rallying Point for the President?’ (1984) 6 *Public Opinion* 41; Jeffrey Tulis, *The Rhetorical Presidency* (Princeton University Press, Princeton 1988).

<sup>932</sup> Brody, ‘International Crises: A Rallying Point for the President?’

<sup>933</sup> Ronald Krebs and Patrick Jackson, ‘Twisting Tongues and Twisting Arms: The Power of Political Rhetoric’ (2007) 13 *European Journal of International Relations* 35.

<sup>934</sup> Andrew Frank and Kenneth Osgood, *Selling War in a Media Age: The Presidency and Public Opinion in the American Century* (University Press of Florida, Gainesville 2010), at 3.

<sup>935</sup> George W. Bush, ‘Address to the Nation: Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11’ 37 WCPD 1347 (20 September 2001).

<sup>936</sup> Andrew Frank and Kenneth Osgood, *Selling War in a Media Age: The Presidency and Public Opinion in the American Century* (University Press of Florida, Gainesville 2010), at 3.

### ***1.1.1. Defining a New Reality***

In view of this, it is apparent that President Bush's rhetorical construction of 9/11 as both a crisis and act of war was inimical in framing the situation as a call to arms. Framing is the process whereby speakers attempt to communicate a point of view which encourages people to interpret the facts in a particular way. In utilising Gramsci's hegemony model sociologist Todd Gitlin tells us that 'media frames, largely unspoken and unacknowledged, organise the world both for journalists, who report it and, in some important degree, for us who rely on their reports'.<sup>937</sup> He argues that media framing is a cynical tactic yet it is particularly effective in setting the tone of the public response. On the 14<sup>th</sup> September 2001 President Bush announced that 'War has been waged against us',<sup>938</sup> and so began framing the terrorist attacks as acts of war. A day later he described the destruction of the Twin Towers as 'the first battle of war.'<sup>939</sup> This instantly employed language was taken up by the news networks that featured logos such as 'War on America' and 'circulated discourses that assumed that the United States was at war.'<sup>940</sup> It therefore appears that this shift from 'terrorist attack' to 'act of war' was deliberate rather than serendipitous. It is also significant because, as Wolfe notes, up until 9/11 all mentions of terrorism and war, within political rhetoric had been separate. Merging these two concepts created for the first time the entirely new paradigm of the 'War on Terror'.

### **1.2. The Promotion of Fear, Danger and Paranoia**

According to American historians Frank and Osgood; 'In addition to being Commander in Chief, the President of the United States is also the country's salesman in chief.'<sup>941</sup> This suggests that as well as leading the nation the President is required to 'sell' his policies to the American people. According to advertising theory, in order to sell a product, you have to first sell the problem. So to sell the 'War on Terror', the President had to first sell the

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<sup>937</sup> Todd Gitlin, *The Whole World Is Watching: Mass Media in the Making and Unmaking of the New Left* (University of California Press, Berkeley 2003), at 7.

<sup>938</sup> George W. Bush, 'Remarks at the National Day of Prayer and Remembrance Service' 37 WCPD 1309 (14 September 2001).

<sup>939</sup> George W. Bush, 'Remarks in a Meeting With the National Security Team and an Exchange With Reporters at Camp David, Maryland' 37 WCPD 1319 (15 September 2001).

<sup>940</sup> Douglas Kellner, 'Bushspeak and the Politics of Lying: Presidential Rhetoric in the "War on Terror"' (2007) 37 *Presidential Studies Quarterly* 622, at 625.

<sup>941</sup> Frank and Osgood, *Selling War in a Media Age: The Presidency and Public Opinion in the American Century*.

problem of terrorism and create fear of imminent attack.<sup>942</sup> In this way Jackson writes that a ‘ubiquitous feature of the discourse of the “war on terrorism” was the scripting of a perpetual state of threat and danger.’<sup>943</sup> Such an approach subscribes to traditional methods of propaganda that gain public support for war through installing fear of the enemy or what might happen should the country not go to war. This is known as ‘ontological hysteria’,<sup>944</sup> which, according to Michael Grosso, consists of ‘a prolonged fear of imminent annihilation’ and ‘panic over the insecurity of existence.’<sup>945</sup> Indeed Jeffrey Michaels argues that one of the consequences of declaring a war on terror was that ‘it meant the threat would be unbounded.’<sup>946</sup> It constructed a formless and nebulous threat, which only further contributed to the aura of fear in public consciousness. Yet despite the assumption that this was a natural reaction to the attacks, David Campbell has demonstrated how discourses of danger and the threat of foreign invasion have been at the heart of the American identity so implemented through its foreign policy for decades.<sup>947</sup> This suggests that it is actually a policy of the US Government to take advantage of the public’s fears. Indeed Peter McLaren argues that keeping people within this state of hysteria was a key tactic of the Bush administration.<sup>948</sup> Accordingly, analysis of political rhetoric post 9/11 points to high levels of fear mongering.<sup>949</sup> Such fear mongering was said to have reached its zenith in the period following 9/11, where terrorism was portrayed as a new and all-encompassing danger, leading Giorgio Agamben to conclude that a permanent ‘state of exception’ was created.<sup>950</sup> This notion of exceptionalism is important because it creates a siege mentality while also suggesting a temporariness that will soon be over, thus avoiding public dissent.

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<sup>942</sup> David Keen, ‘Endless War? Why Winning Is for Losers.’ (*e-international relations*, 2008) <<http://www.e-ir.info/2008/07/23/endless-war-why-winning-is-for-losers/>> accessed August 2015.

<sup>943</sup> Richard Jackson, ‘Language Power and Politics: Critical Discourse Analysis and the War on Terrorism’ (2005) 1 49th Parallel.

<sup>944</sup> See James Rhodes, *The Hitler Movement. A Modern Millenarian Movement* (Hoover Institution Press 1980) Cited in Peter McLaren, ‘George Bush, Apocalypse Sometime Soon, and the American Imperium’ (2003) 2 9-11 in *American Culture* 147.

<sup>945</sup> See Michael Grosso, *The Millenium Myth* (Quest Books, Wheaton, IL 1995) Cited in McLaren, ‘George Bush, Apocalypse Sometime Soon, and the American Imperium’.

<sup>946</sup> Jeffrey Michaels, *The Discourse Trap and the US Military: From the War on Terror to the Surge* (Palgrave Macmillan, Basingstoke 2013), at 22.

<sup>947</sup> David Campbell, *Writing Security: United States Foreign Policy and the Politics of Identity* (Manchester University Press, Manchester 1998).

<sup>948</sup> McLaren, ‘George Bush, Apocalypse Sometime Soon, and the American Imperium’.

<sup>949</sup> Krista De Castella and Craig McGarty, ‘Two Leaders, Two Wars: A Psychological Analysis of Fear and Anger Content in Political Rhetoric About Terrorism’ (2011) 11 *Analyses of Social Issues and Public Policy* 180.

<sup>950</sup> Giorgio Agamben, *State of Exception* (Kevin Attell tr, University of Chicago Press, Chicago 2005)

### *1.2.1. Framing Terrorism as a New Danger*

Yet despite this, many scholars highlight that global terrorism did not start with 9/11.<sup>951</sup> Rather, Jackson argues that public fear of terrorism began in the 1980s ‘when officials started to apply the term “terrorism” to acts of violence that they had previously called hijackings, bombings, assassinations, kidnappings, and sabotage.’<sup>952</sup> He notes that as a result of this reclassification it appeared as though there was a new terrorism menace in the world, although attacks such as the Lockerbie bombing, which targeted Americans perhaps focussed this belief. The media was quick to adopt this new language of terrorism and as such sensational stories of terrorism soon became a staple of television news.<sup>953</sup> As such, Jackson concludes that today’s fear and anxiety are the fruition of decades of public fear ‘that was deliberately encouraged by the authorities and continually experienced in the virtual dangers seen in 24... and countless other movies, television programmes and books.’<sup>954</sup> This meant that a ready-made paranoia of terrorism was primed for exploitation by both the US and UK Governments.<sup>955</sup> Indeed Chris Sparks argues that Bush sought to exploit chronic mass fearfulness through the introduction of a permanent war on terror.<sup>956</sup> Several other scholars highlight this exploitation of fear, with Richard Devetak writing that Bush continually invoked ‘threatening potentialities and worst-case scenarios’ and so constructed a gothic imaginary.<sup>957</sup> Adam Hill focuses on Osama Bin Laden’s capacity to ‘haunt’ the West and argues that his omnipotent ‘ghostly presence’ instilled fear into the public consciousness, perpetrating a sense of horror and paranoia.<sup>958</sup>

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<sup>951</sup> See for e.g. Michaels, *The Discourse Trap and the US Military: From the War on Terror to the Surge*, at 24 and Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism*.

<sup>952</sup> Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism*.

<sup>953</sup> *ibid.*

<sup>954</sup> *ibid.*

<sup>955</sup> Although it is outside the scope of this thesis, it is worth noting that it is often argued that the promulgation of a state of fear and paranoia allowed both the US and UK Governments to pass domestic legislation that had wide-reaching consequences for citizens, such as erasing civil liberties and increasing state surveillance. It is often argued that Governments exploited the fear of terrorism to increase state power. See e.g. Aniceto Masferrer, *Post 9/11 and the State of Permanent Legal Emergency* (Springer, Dordrecht and New York 2012); Susan N Herman, *Taking Liberties: The War on Terror and the Erosion of American Democracy* (Oxford University Press, Oxford 2011) and Wendy Brown, ‘Neo-Liberalism and the End of Liberal Democracy’ (2003) 7 *Theory & Event*.

<sup>956</sup> Chris Sparks, ‘Liberalism, Terrorism and the Politics of Fear’ (2003) 23 *Politics* 200, at 203-204.

<sup>957</sup> Richard Devetak, ‘The Gothic Scene of International Relations: Ghosts, Monsters, Terror and the Sublime after September 11’ (2005) 31 *Review of International Studies* 621, at 638.

<sup>958</sup> Andrew Hill, ‘The Bin Laden Tapes’ (2006) 10 *Journal for Cultural Research* 35, at 36.

### 1.3. Portraying 9/11 as a Crisis and a Unique Event

A further recurring trope in the transformation of the 9/11 attacks is the citing of their unique and unparalleled magnitude as the basis for going to war. This technique was employed very effectively by politicians and commentators in the aftermath of 9/11. Instead of reassuring people that 9/11 was an unusual event, although one which continued on from a long line of terrorist attacks, the Bush administration instead chose to construct 9/11 as a devastatingly unique event which occurred ‘out of time’<sup>959</sup> causing a rupture in which nothing in the future was predictable. Accordingly James Der Derian writes that it was ‘as if the history and future of international relations were disappeared by this temporal rift.’<sup>960</sup> He notes how the existing, longstanding rules of law, warfare, and diplomacy were usurped by what he refers to as a ‘global *in terrorem*’,<sup>961</sup> which had the ironic effect of making the terrorists’ achievements seem even greater than was actually the case.

Yet, he is not alone among scholars in noting that 9/11 was not unique or unprecedented.<sup>962</sup> In fact Baudrillard goes as far as to assert that ‘we have dreamt of this event’<sup>963</sup> perhaps to highlight that terrorists had previously attacked the World Trade Centre in 1993. However, the rhetorical positioning of 9/11 as the beginning of a new era, or as symbolising America’s loss of innocence all but obscures this fact from consideration.<sup>964</sup> Moreover Der Derian is critical of even those ‘more sophisticated analysts’, such as Michael Ignatieff, whose echoing of the exceptionality narrative helped to downplay the importance of social and political enquiry.<sup>965</sup> He also laments the fact that 9/11 was allowed to take on an ‘*exceptional ahistoricity*’.<sup>966</sup> This meant that 9/11 was constructed outside of history –

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<sup>959</sup> Jackson, ‘Language Power and Politics: Critical Discourse Analysis and the War on Terrorism’.

<sup>960</sup> James Der Derian, ‘In Terrorem: Before and after 9/11’ in Ken Booth and Tim Dunne (eds), *Worlds in Collision: Terror and the Future of Global Order* (Palgrave Macmillan, New York 2002), at 101.

<sup>961</sup> *ibid.*

<sup>962</sup> See Holland, ‘From September 11th, 2001 to 9-11: From Void to Crisis’; D. Nabers ‘Filling the Void of Meaning: Identity Construction in U.S Foreign Policy After September 11, 2001’ *Foreign Policy Analysis* (2009) 5 191-214.

<sup>963</sup> Jean Baudrillard, *The Spirit of Terrorism and Other Essays* (Chris Turner tr, Verso Books, London 2003)

<sup>964</sup> Lee Jarvis, ‘Times of Terror: Writing Temporality into the War on Terror’ (2008) *Critical Studies on Terrorism* 1 (2) 245-262.

<sup>965</sup> Der Derian, ‘In Terrorem: Before and after 9/11’.

<sup>966</sup> *ibid.*

except for when the ‘sepia tones of the second World War’ were invoked to ‘prepare the US for the sacrifice and suffering that lay ahead.’<sup>967</sup>

Such was the magnitude of the 9/11 attacks that linking them to the 1993 World Trade Centre bombings (the most obvious parallel) was not attempted because this previous attack could not evoke the same hysteria.

If mythification is accomplished by linking a current event to a monumental event of the past, then links to the previous small scale Trade Centre bombing were not adequate to signify the magnitude of the current attack. A much more dramatic historical reference was necessary instead, looking back towards the legendary Japanese attack on Pearl Harbour that brought America into World War II.<sup>968</sup>

In view of this, Holland argues that the immediately post 9/11 confusion can be described as a void in which language ‘failed to adequately or consistently regulate the meaning of the unfolding events.’<sup>969</sup> As such, attempts to fill this void began almost immediately. He argues that President Bush’s framing of 9/11 as a crisis simultaneously filled the void with meaning and offered a solution to the problem it represented.<sup>970</sup> Amidst the confusion, this articulation began to resonate with the public and future discourse quickly mimicked and indeed homogenised this articulation.

This demand was met through a ‘discursive shift... initiated by those with social power [and] reproduced by others’. The new policies of the War on Terror were set under way not by the ‘acts’ or ‘events’ of 9/11 themselves, but through the discursive construction of 9/11 as crisis by those with social power.<sup>971</sup>

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<sup>967</sup> *ibid.*

<sup>968</sup> H. Nossek, A. Sreberny and P. Sonwalkar (eds), *Media and Political Violence* (Hampton Press, New York 2007), at 169.

<sup>969</sup> Holland, ‘From September 11th, 2001 to 9-11: From Void to Crisis’.

<sup>970</sup> *ibid.*

<sup>971</sup> *ibid.*

This trope of having an event divorced from history and precedent is particularly powerful as any ensuing strategy becomes difficult to counter. It therefore cements 9/11 as a unique and unprecedented event which called for a unique and unprecedented response. Only an entirely new response – the ‘War on Terror’ offered by the Bush administration could be the solution.

#### **1.4. The Promotion of Victimhood After 9/11**

However, as well as the pervading sense of fear and paranoia, several scholars highlight that there was also a discourse of victimhood and grievance, which is equally effective in garnering support for militarism because this can exploit powerlessness, anger, hate and a desire for revenge, which then ultimately translates to support for war.<sup>972</sup> This sense of victimhood was palpable in the immediate aftermath of the terrorist attacks when there was an understandable raw outpouring of emotion from both public and authority figures. In her analysis of political discourse, Joanne Esch writes that the political lexicon overflowed with words such as ‘tragedy’, ‘suffering’, ‘loss’, ‘horror’, and ‘calamity’ and highlights how continued repetition of such words constructs a profound sense of victimhood.<sup>973</sup> Indeed Jackson writes that this evolved into a ‘myth of exceptional grievance’,<sup>974</sup> the main purpose and consequence of which was to establish and solidify America’s status as the victim. Bush frequently referred to the attacks as ‘a national tragedy’ and his continued references to ‘the nation’s suffering’, firmly established 9/11 as a national tragedy rather than a local (New York) or global one.<sup>975</sup> Indeed Wolfe notes that between September and October 2001 ‘hurt and ‘grief’ were the most frequently used words in US presidential discourse, even more than ‘war’.<sup>976</sup> Jackson argues that in this way the myth of exceptional suffering was linked to existing myths of American exceptionalism.<sup>977</sup> White House officials invoked this myth of exceptionalism by suggesting that the grief and suffering of

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<sup>972</sup> Vivienne Jabri, *Discourses on Violence: Conflict Analysis Reconsidered* (Manchester University Press, Manchester 1996); Stuart Kaufman, *Modern Hatreds: The Symbolic Politics of Ethnic War* (Cornell University Press, New York 2001); Franke Wilmer, *The Social Construction of Man, the State and War: Identity, Conflict, and Violence in Former Yugoslavia* (Routledge, London 2002).

<sup>973</sup> Joanne Esch, ‘Legitimizing the “War on Terror”’: Political Myth in Official-Level Rhetoric’ (2010) *Political Psychology* 31(3) 357 at 372.

<sup>974</sup> Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism*.

<sup>975</sup> Esch ‘Legitimizing the “War on Terror”’: Political Myth in Official-Level Rhetoric’, at 372.

<sup>976</sup> Wolfe, *Winning the War of Words: Selling the War on Terror from Afghanistan to Iraq*.

<sup>977</sup> Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism*.

9/11 were unique and that America was therefore a ‘special kind of victim.’<sup>978</sup> Thus they inferred that the events of 9/11 were so exceptional that the existing framework of international law was inadequate and so merited an exceptional response outside of this framework. Thus, as a ‘special victim’ the US positioned itself as being entitled to exact justice in any way it saw fit thereby morally legitimating the response.<sup>979</sup> Thus rendering victimhood ironically empowering.

More worryingly, another consequence of this grievance myth was that it abrogated moral responsibility and accountability for counter-violence. Jackson argues that one of the most horrific consequences of perpetuating the trope of victimhood through both the language and practices of officials, such as showing army recruits footage of 9/11—was the gross human rights violations at Abu Ghraib prison. By reinforcing the belief that the USA was the victim and not the aggressor, the ‘discursive construction of exceptional suffering made the daily humiliations handed out to prisoners in Abu Ghraib prison seem inconsequential compared with the atrocity of 9-11.’<sup>980</sup> The danger of such discourse is also discussed by Heathcote, who draws on domestic criminal law frameworks to analogise how the use of force, or indeed the discourse of violence is unhelpful in either understanding or formulating a response to violence.<sup>981</sup> The trope of victimhood can be a dangerous one, invoked to cast a veil over, or obscure analysis of any subsequent violence.<sup>982</sup>

Despite this, the trope of American victimisation, although used to good effect, was rarely commented upon, perhaps because many scholars wanted to highlight the heroic narrative, which required them instead to focus on tropes of ‘masculinity’. Thus the potential of victimhood to provide an alternative narrative, through which to understand and recover from 9/11, was squandered and instead this vulnerability was appropriated only to legitimate a US military response and was virtually ignored once the military deployment

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<sup>978</sup> *ibid*, at 37.

<sup>979</sup> Esch ‘Legitimizing the “War on Terror”: Political Myth in Official-Level Rhetoric’, at 373.

<sup>980</sup> Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism*, at 37.

<sup>981</sup> Heathcote, *The Law on Use of Force: A Feminist Analysis*.

<sup>982</sup> G. Bowman, ‘Xenophobia, Fantasy and the Nation: The Logic of Ethnic Violence in Former Yugoslavia’ in Goddard V, Llobera J and Shore C (eds.) *Anthropology of Europe: Identities and Boundaries in Conflict* (Berg, Oxford 1994) at 143-171.

commenced and the media could instead focus on the actions of the soldiers, framing them as heroic.<sup>983</sup>

#### *1.4.1. The Rejection of Alternative Narratives*

This deliberate discursive construction of 9/11 as an epochal event that could only be understood as an act of war has proven to be powerful and resilient. So much so that Holland and Jarvis conclude that even more than a decade later the dominant narrative-framing is virtually impossible to dislodge.<sup>984</sup> Yet a troubling consequence of this has been the silencing or rejection of alternative readings or framings of 9/11.

In an analysis of presidential rhetoric, Maggio in particular suggests that 9/11 could have been framed in a different way.<sup>985</sup> Bush could have insisted that the attacks were the work of madmen or looked on them as a symptom of the inequalities in the world.<sup>986</sup> Instead the straight talking language of the American Sheriff was appropriated in order to make Bush appear tough and, more strategically, to ensure he was not criticised by right wing republicans.<sup>987</sup> Interestingly, David Frum called Bush's initial response to the attacks 'a doughy pudding of stale metaphors'<sup>988</sup> which Holland argues 'rehashed an inappropriate compassionate conservatism characteristic of a now ended era.'<sup>989</sup> Thus, in the immediate aftermath of the attacks not only was there a 'void of language' and meaning, but the early attempts to fill this void drew on softer themes of hurt, anguish, and biblical judgement which may have offered an alternative response.<sup>990</sup>

Indeed, Maggio contrasts the framing of 9/11 with President Clinton's framing of the Oklahoma bombing, and the 1993 World Trade Centre bombing, neither of which were framed as acts of war.<sup>991</sup> Furthermore, Jackson notes that the IRA bombings in Northern

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<sup>983</sup> Esch 'Legitimizing the "War on Terror": Political Myth in Official-Level Rhetoric', at 373-374.

<sup>984</sup> Holland and Jarvis "'Night Fell on a Different World": Experiencing, Constructing and Remembering 9/11' (2014) *Critical Studies on Terrorism* 7 (2) 187-204.

<sup>985</sup> J. Maggio, 'The Presidential Rhetoric of Terror: The (Re) Creation of Reality Immediately after 9/11' (2007) 35 *Politics & Policy* 810.

<sup>986</sup> *ibid.*

<sup>987</sup> Jack Holland, 'Foreign Policy and Political Possibility' (2013) *EJIR* 19(1) 49-68, at 56

<sup>988</sup> David. Frum, *The Right Man: An Inside Account of the Surprise Presidency of George W. Bush* (Weidenfeld and Nicolson, London, 2003) at 127.

<sup>989</sup> Holland 'Foreign Policy and Political Possibility', at 56

<sup>990</sup> *ibid.*

<sup>991</sup> Maggio, 'The Presidential Rhetoric of Terror: The (Re) Creation of Reality Immediately after 9/11'.

Ireland could have been framed by the British Government as acts of war or used to create a powerful discourse of grievance. However they were not conceptualised this way because this would likely have destroyed any hopes for the peace process and further inflamed violence.<sup>992</sup> Such framing might also have allowed the UNSC to get involved, something which the UK strongly resisted. Also, since the IRA bombings and the Oklahoma bombing were perpetrated by white terrorists, Jackson suggests that it was more difficult to engage in ‘othering’ and invoke a war mentality against a barbarous enemy when that enemy is closer to home.<sup>993</sup> However, in the case of Islamist terrorism, once the framing was set it was almost unchallengeable. The debate parameters were fixed casting the US as victim and the attacks as acts of war, in what Maggio calls an ‘example of the shaping of “reality” and the closing of hermeneutic doors.’<sup>994</sup>

Yet despite this, it is entirely conceivable that an alternative understanding of 9/11 was possible. Whilst the previous chapter has attempted to outline the reasons why the official framing of 9/11 was universally accepted and a binary heroic narrative that justified war promulgated, it is now appropriate to highlight that there were some sporadic attempts to offer alternative readings of 9/11. Holland describes how UK Prime Minister Tony Blair and Australian Prime Minister John Howard, while both vocally supporting the US position, did not wholly endorse Bush’s ‘War on Terror’ narrative nor propagate it at home.<sup>995</sup> Instead their discourse was grounded in specific tropes that invoked each nation’s particular mythologies, which while not challenging the dominant narrative, offered the potential to situate 9/11 within a wider geopolitical understanding.<sup>996</sup>

Furthermore, Holland and Jarvis describe how, in the years following the attacks, some within the academy, and occasionally some political commentators, made attempts to reconceptualise 9/11 and utilise alternative framings to understand the events.<sup>997</sup> Many of these attempts focussed on dispelling the supposed uniqueness of the 9/11 attacks or the

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<sup>992</sup> Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism*, at 37.

<sup>993</sup> *ibid.*

<sup>994</sup> Maggio, ‘The Presidential Rhetoric of Terror: The (Re) Creation of Reality Immediately after 9/11’, at 811.

<sup>995</sup> The specific rhetorical tropes and meta narratives invoked to sell the ‘War on Terror’ in the UK is discussed further *infra* at section 5.

<sup>996</sup> Jack Holland, ‘Foreign Policy and Political Possibility’ (2011) 19 (1) EJIR 49-68.

<sup>997</sup> Holland and Jarvis, ‘“Night Fell on a Different World”: Experiencing, Constructing and Remembering 9/11’, at 195.

fixation on the number of victims as exceptional.<sup>998</sup> Yet, any such attempts to situate the 9/11 attacks within a wider foreign policy or even global understanding of tragedy were rebuked.<sup>999</sup> Several scholars posited alternative responses to 9/11 that were grounded in understanding 9/11 as a horrific event within a wider struggle of Islamic militants and terrorists attacking US foreign policy in the Middle East.<sup>1000</sup> While this was intended to offer insight and understanding, and as such prevent future attacks, these analyses were seen as exonerating the attacks and those who did so labelled ‘excuseniks’.<sup>1001</sup>

Frustrated at this quasi censorship, in 2004 Judith Butler criticised the academy and public intellectuals for failing to offer a sustained critique of 9/11 and the ‘War on Terror’ even in the face of media and political opposition.<sup>1002</sup> She also confronts those who silenced opposition by arguing that ‘it is not a vagary of moral relativism to try to understand what might have led to the attacks on the United States.’<sup>1003</sup> However, the appeal of the dominant narrative understanding of 9/11 has proven exceptionally impervious to criticism and as such has reduced the forum for debate. Thus Butler’s admonishments should serve as cautionary stimulus for those seeking to offer an analysis or understanding of 9/11. It is equally troubling that much of the academic scholarship critiquing OEF reads the war framing and subsequent heroic narrative as natural and inevitable.<sup>1004</sup> Indeed this endorsement of the ‘War on Terror’ narrative as a ‘natural’ response to 9/11 is particularly problematic because, as several scholars demonstrate, it was neither a natural nor instinctive response, but rather a highly scripted one that drew on historical analogy.<sup>1005</sup>

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<sup>998</sup> *ibid* at 196. See for example; C. Kennedy-Pipe and N.Rengger, ‘Apocalypse Now? Continuities or Disjunctions in World Politics After 9/11’ (2006) *International Affairs* 82 (3) 539-552 and F. Halliday *Two Hours that Shook the World: September 11, 2001: Causes and Consequences* (Saqi Books, London, 2002).

<sup>999</sup> See further Shelly Warwick, ‘Will the Academy Survive 9/11? Scholarship, Security, and United States Government Policy’ (2005) 22 *Government Information Quarterly* 573-593 at 583-585; Holland and Jarvis, ‘“Night Fell on a Different World”: Experiencing, Constructing and Remembering 9/11’ at 195 and Butler, *Precarious Life. The Powers of Violence and Mourning*, at XIII.

<sup>1000</sup> See for example Kennedy-Pipe and Rengger, ‘Apocalypse Now? Continuities or Disjunctions in World Politics After 9/11’ and Halliday *Two Hours that Shook the World: September 11, 2001: Causes and Consequences*.

<sup>1001</sup> Butler, *Precarious Life. The Powers of Violence and Mourning*, at XIII

<sup>1002</sup> *ibid* at 2.

<sup>1003</sup> *ibid*, at XIII

<sup>1004</sup> See *supra* Chapter 1 at section 2.4.1 and Chapter 3 at section 2.1. See also Linderfalk, ‘The Post-9/11 Discourse Revisited-The Self-Image of the International Legal Scientific Discipline’.

<sup>1005</sup> David Hoogland Noon, ‘Operation Enduting Analogy: World War II, the War on Terror, and the Uses of Historical Memory’ (2004) 7 *Rhetoric and Public Affairs* 339; S. Croft, *Culture, Crisis and America’s War on Terror* (Cambridge University Press, Cambridge, 2006) at 55 and Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism*, at 41-44.

Holland and Jarvis explore the reasons why this dominant narrative understanding of 9/11 has remained so influential on public discourse and concede that the framing is so secure that even a decade after the event, it is virtually impossible to penetrate this narrative.<sup>1006</sup> Thus, despite the potential for alternative readings and wider understandings of global politics, 9/11 as an unprecedented act of war on an innocent people has endured and thrived, and the construction of 9/11 as an ‘epochal event’ has passed into accepted fact.

In view of this, it is argued that while the war framing and subsequent rescue narrative is an appealing and enduring one, it was not the only way of addressing the violence perpetrated on the victims, therefore making arguments that recourse to war was unavoidable in a new world order somewhat duplicitous. Indeed Butler advocated harnessing the sense of vulnerability and loss to create a positive feminist response to 9/11 rather than one based on ‘violent acts of sovereignty.’<sup>1007</sup> She asked why experiences of fear and grief must automatically lead to military violence and retribution and posited an alternative approach: a lens of globalised humanity through which to frame the 9/11 attacks.<sup>1008</sup>

The dislocation from first world privilege, however temporary, offers a chance to start to imagine a world in which that violence might be minimised, in which an inevitable interdependency becomes acknowledged as the basis for global political community.<sup>1009</sup>

Thus the failure to even engage with such possibilities renders the turn to war especially determined. Despite the immediate imposition of the language of catastrophe and the narrative of crisis, it was some days after the attacks when the ‘war’ framing took hold and it was only once the military operation became certain that the heroic narrative was elevated to the forefront. This is confirmed by Wolfe, who argues that OEF as a humanitarian mission emerged as an idealist thematic frame which peaked *after* the

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<sup>1006</sup> Holland and Jarvis, “‘Night Fell on a Different World’”: Experiencing, Constructing and Remembering 9/11’.

<sup>1007</sup> Butler, *Precarious Life. The Powers of Violence and Mourning*, at xxii.

<sup>1008</sup> *ibid*, 19-49.

<sup>1009</sup> *ibid*, at xii.

military operation was sanctioned.<sup>1010</sup> He notes that this fits the familiar pattern whereby, after the initial show of strength and prowess, there is often a need for an emotional, as well as a rational appeal to go to war.<sup>1011</sup> Humanitarianism helps people to believe they are doing a good deed even when they are waging war. Therefore once the coalition military might was turned on the people of Afghanistan there was a need to reposition OEF as heroic rather than retributory. More so, it suggests that the justification of saving Afghan women emerged as a useful veneer which varnished the reality of war and thereby engendered support for it..

Having outlined how the framing of the 9/11 attacks as acts of war and the ideological construction of the ‘War on Terror’ relied on deliberate rhetorical tropes, this chapter turns to consider whether these tropes were in any way unique to 9/11 or whether in fact they adhered to standard modes of propaganda.

## **2. The Theory of Propaganda**

Propaganda is understood as the technique of influencing human action through the manipulation of representations. Harold Lasswell, who was influential in founding the study of propaganda in the 1930s, described it as ‘the management of collective opinions and attitudes by the manipulation of social suggestion.’<sup>1012</sup> Propaganda is often thought of as a modern phenomenon but can be traced back to the earliest civilisations.<sup>1013</sup> Writing on the history of propaganda, Oliver Thomson asserts that the earliest work of propaganda is the Old Testament, which had, and continues to have, immense influence on people’s attitudes.<sup>1014</sup> The term propaganda itself first appeared in a sixteenth century papal bull directed against Protestantism. Indeed, partly because of this association with the Roman Catholic Church, Thomson writes that the word acquired the overtones of a black art early on,<sup>1015</sup> although it was actually used to mean the dissemination of religious doctrine.<sup>1016</sup>

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<sup>1010</sup> Wolfe, *Winning the War of Words: Selling the War on Terror from Afghanistan to Iraq*.

<sup>1011</sup> *ibid.*

<sup>1012</sup> Harold Lasswell, *Propaganda Technique in World War I* (MIT Press, Cambridge, Mass. 1971), at 9.

<sup>1013</sup> See Philip Taylor, *Munitions of the Mind: A History of Propaganda* (Manchester University Press, Manchester 2003) and Oliver Thomson, *Easily Led: A History of Propaganda* (Sutton Publishing Ltd, Stroud 1999).

<sup>1014</sup> Thomson, *Easily Led: A History of Propaganda*, at 12.

<sup>1015</sup> *ibid.*, at 2.

<sup>1016</sup> T.M. Steinfatt, ‘Propaganda Theory’ in S.W. Littlejohn and K.A. Foss (eds), *Encyclopedia of Communication Theory*, vol 2 (Sage Publications, Incorporated 2009).

Today the term propaganda tends to be equated with the huge, state-instigated, secret information operations of World Wars I and II. It is also epitomised by more sinister and dystopian references, such as George Orwell's *1984*, in which the government engages in audacious propaganda to convince the public to support a perpetual state of war, even when the original reasons for that war have long ceased to exist.<sup>1017</sup> Indeed Bernays, one of the pioneers of propaganda study went on to coin the term 'public relations' as a euphemism for propaganda because he felt propaganda had been 'given such a bad name.'<sup>1018</sup> Yet, despite its more dystopian connotations, propaganda is a broad concept that encompasses the dissemination of information that is not impartial. It can range from highlighting selective facts, deliberately constructing a narrative to play on people's emotions, or embellishing the truth, to knowingly inventing falsehoods.

It is notable therefore that the propaganda operations of WWI and WWII have come to define our modern understanding of the tools and methods which governments use to generate public support for war. Historian Emily Rosenberg describes how President Woodrow Wilson was the first leader to utilise modern means of mass communication and advertising, censorship and domestic surveillance and in doing so created precedents for dealing with national emergencies which have been followed throughout the 20<sup>th</sup> and 21<sup>st</sup> Centuries.<sup>1019</sup> Wilson relied on these methods to persuade a pacifistic American population that was unwilling to interfere in a European war, to both support and intervene in it.<sup>1020</sup> To do so he established the Committee on Public Information (known as the Creel Committee after the Committee's chairman, newspaper editor George Creel), which 'succeeded, within six months, in turning a pacifist population into a hysterical, war-mongering population which wanted to destroy everything German, tear the Germans limb from limb, go to war and save the world.'<sup>1021</sup> The mastermind of the Creel Committee was Walter

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<sup>1017</sup> George Orwell, *Nineteen Eighty-Four (1984)* (Penguin 2000).

<sup>1018</sup> Edward Bernays, *Propaganda* (Horace Liveright, New York 1928).

<sup>1019</sup> Emily S Rosenberg, 'War and the Health of the State: The US Government and the Communications Revolution During World War I' in K.A. Osgood (ed), *Selling War in a Media Age: The Presidency and Public Opinion in the American Century* (University Press of Florida, Gainesville 2010), at 49.

<sup>1020</sup> Gareth Jowett and Victoria O'Donnell, *Propaganda & Persuasion* (Sage Publications, Incorporated 2011), at 214.

<sup>1021</sup> Noam Chomsky, *Media Control: The Spectacular Achievements of Propaganda* (Seven Stories Press, New York 1997), at 12.

Lippmann whose work would eventually define classical propaganda theory.<sup>1022</sup> Alongside Creel, Lippmann deduced that the best approach to persuading Americans was to use sales techniques. So much so, that Creel would later refer to the Committee as ‘the world’s greatest adventure in advertising.’<sup>1023</sup>

## **2.1. Using Propaganda to Sell War to the Public**

In ancient times folk tales, mythology and epic literature often aimed to arouse support for war. Homer’s *Iliad* is perhaps one of the best examples of such propaganda.<sup>1024</sup> It tells of a just cause, patriotic and noble warriors, and a fierce enemy.<sup>1025</sup> The theme of this epic tale is the glorification of war through arousing national pride and mythologizing the fighters as heroes. Such themes have consistently and successfully been invoked through the ages, the aim being to create a sense of national unity and culture worth protecting.<sup>1026</sup> Such propaganda also operates by subtly demonising enemies, thereby instilling a climate of fear. This creates the opportunity to control public opinion by ensuring that a particular agenda is followed to quash this fear. These techniques are outlined below, describing their role in generating support for wars throughout history.

### ***2.1.1. Demonising the Enemy***

Generating fear and paranoia of attack by the enemy is a tried and tested propaganda technique that fosters support for war through demonising the enemy. The Romans famously referred to those peoples outside the Roman Empire as ‘barbarians’ and depicted them as amoral and depraved, while medieval Christendom equally demonised non-Christians as blood thirsty and barbaric.<sup>1027</sup> To generate support for the Crusades frantic sermons indulged this stereotype by vividly describing the barbaric torture and sacrilegious activities of the enemy.<sup>1028</sup>

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<sup>1022</sup> Edward Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Vintage Books, London 1994).

<sup>1023</sup> George Creel, *How We Advertised America: The First Telling of the Amazing Story of the Committee on Public Information That Carried the Gospel of Americanism to Every Corner of the Globe* (Harper & Brothers, New York 1920), at 4.

<sup>1024</sup> Taylor, *Munitions of the Mind: A History of Propaganda*, at 31.

<sup>1025</sup> Homer, *The Iliad* (Penguin, London 2003 (Rev. Ed.)).

<sup>1026</sup> Thomson, *Easily Led: A History of Propaganda*.

<sup>1027</sup> Taylor, *Munitions of the Mind: A History of Propaganda*.

<sup>1028</sup> Pope Urban II, Sermon at Clermont, 1095 attributed to Robert the Monk, cited in Taylor, *Munitions of the Mind: A History of Propaganda*, at 73.

Similarly, during WWI achieving public support primarily relied on scaremongering and demonising the Germans. The UK and US disseminated stories of atrocities which generated massive outrage; stories such as Belgian babies being ripped apart by German soldiers or the German army boiling corpses to render them for fat and oil.<sup>1029</sup> These stories outraged and terrorised the allied populous yet they were wholly fabricated and purposely engineered by the British propaganda machine.<sup>1030</sup> They were used to great effect by both the US and UK and were even referred to by Prime Minister H.H Asquith in a speech to Parliament justifying the UK's decision to go to war.

We could not stand by and watch the terrible unrolling of events – public faith shamelessly broken, the freedom of small peoples trodden to the dust, the wanton invasion of Belgium, and then of France, by the hordes who leave behind them at every stage of their progress a dismal trail of savagery, of devastation and of desecration worthy of the blackest annals of the history of barbarism.<sup>1031</sup>

Indeed, Lasswell observed how this hyperbolic demonisation of the enemy was a recurring theme throughout WWI. He noted how officials decried 'the insolence and depravity of the enemy'<sup>1032</sup> and as such identified a 'cult of Satanism' in which the enemy is demonized so war can be justified on ethical grounds.<sup>1033</sup>

### ***2.1.2. Mythmaking***

As well as demonising the enemy, propaganda is also designed to invoke images of honour, public duty and sacrifice foreshadowing the realities of war. This is achieved through mythmaking. In ancient times this was done by means of epic literature that glorified wars and those who fought in them. It also created a sense of national unity and pride. During the medieval crusades war was constructed as a noble and chivalric quest

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<sup>1029</sup> Jowett and O'Donnell, *Propaganda & Persuasion*, at 163.

<sup>1030</sup> *ibid.*

<sup>1031</sup> UK Prime Minister Herbert Henry Asquith, 2nd October 1914 in Cardiff. Cited in Cate Haste, 'The Machinery of Propaganda' in R. Jackall and Arthur J. Vidich (eds), *Propaganda* (Macmillan Press, Basingstoke 1995), at 108.

<sup>1032</sup> Lasswell, *Propaganda Technique in World War I*, at 78.

<sup>1033</sup> *ibid.*, at 96.

with the crusaders thought of as warriors.<sup>1034</sup> Similarly, in World War I, Britain cast itself as the reluctant party in the hostilities, with Prime Minister Asquith telling Parliament that ‘the War has been forced upon us’.<sup>1035</sup> Britain declared war on Germany, he said because it was Britain’s duty to aid France and Belgium, thereby mythologizing the UK’s entry into the war in pursuit of honour. As such, Haste notes how the government ‘took the lead in defining the terms of an idealistic war’<sup>1036</sup> contrasting Britain’s ‘conscientious attempts to keep the peace’ with Germany’s aggression.<sup>1037</sup> Such mythology has lingered into the present day and allows certain conflicts to be rendered as honourable, chivalric gameplay rather than brutal and fatal, and creates a sharp distinction between the sides.

### ***2.1.3. Media Censorship***

A further propaganda method deployed in war is censorship of the media. This has taken various forms throughout history. In ancient and medieval times people received information from the church, which was able to censor what they were exposed to because the majority of ordinary people were illiterate.<sup>1038</sup> This explains why the printing press, which allowed for the mass dissemination of written material for the first time quickly became seen as a tool of subversion and dissent and was subject to prohibition, necessitating underground printing and dissemination of materials.<sup>1039</sup>

In time media censorship evolved to oversight of newspapers and journalists. Indeed, during WWI, newspaper editors were invited to submit war related articles to the Press Bureau; a government office established hastily with a two-fold task of providing information from the War Office and informally censoring sensitive information.<sup>1040</sup> Not wishing to offend the censors, newspapers therefore tended not to report details of the conditions the soldiers faced or any of the larger horrors or realities of trench warfare, as it was thought that such reports would demoralise the public and ultimately reduce support for the war.

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<sup>1034</sup> Taylor, *Munitions of the Mind: A History of Propaganda*.

<sup>1035</sup> UK Prime Minister Herbert Henry Asquith in a speech to Parliament 1914.

<sup>1036</sup> Haste, ‘The Machinery of Propaganda’, at 107.

<sup>1037</sup> *ibid.*

<sup>1038</sup> Taylor, *Munitions of the Mind: A History of Propaganda*.

<sup>1039</sup> *ibid.*

<sup>1040</sup> Haste, ‘The Machinery of Propaganda’, at 115.

In the later part of the twentieth century the huge rise in television ownership meant that TV news became especially influential.<sup>1041</sup> So much so that by 1967 President Johnson believed ‘that the Vietnam War would be won or lost in American living rooms.’<sup>1042</sup> Today news media provides round the clock information and instantaneous reporting, while the internet has allowed ordinary people to document via blogs, social media or video their own experiences of conflict. While this offers individuals a much wider variety of sources from which to obtain information, and a platform for discussion without relying on mainstream sources, the rise of the internet has also created greater opportunity for Governments or organisations to spread a carefully constructed narrative direct to individuals.

Thus, it is easy to see why propaganda has been held in equally high esteem and fear. The simple three step process through which the state’s enemies are demonised, the state’s actions valorised, and the facts distorted provides a simple recipe for encouraging public support for state wars. However, more than simply providing support, the propaganda mechanism works even more successfully to reduce the space in which dissent against these actions is acceptable. The adoption of the USA PATRIOT Act in particular has had troubling implications for civil liberties and sits uneasily with freedom of expression.<sup>1043</sup> Yet while there have been subsequent critiques of this legislation and the turn to the ‘security state’ the absence of such critique in the immediate aftermath of 9/11 only furthers Butler’s thesis that the powerful narrative-framing operated to silence dissent from all quarters. Sustaining this, Shelly Warwick notes how the ‘security state’ adopted in the wake of 9/11 produced a ‘chilling effect on academic freedom and free speech.’<sup>1044</sup> She highlights how several academics in the US who offered analyses outside the official narrative were disciplined and some dismissed from their positions.<sup>1045</sup> She further details how the American Council of Trustees and Alumni (ACTA) has sought to promote the

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<sup>1041</sup> Marilyn B. Young, ‘Hard Sell: The Korean War’ in Kenneth Osgood and Andrew K. Frank (eds), *Selling War in a Media Age: The Presidency and Public Opinion in the American Century* (University Press of Florida, Gainesville 2011).

<sup>1042</sup> *ibid.*

<sup>1043</sup> U. Gorha-Oscilowski, and P. Jaeger, ‘National Security Letters, the USA PATRIOT Act, and the Constitution: The Tension Between National Security and Civil Rights’ *Government Information Quarterly* 25 (2008) 625-644.

<sup>1044</sup> Shelly Warwick, ‘Will the Academy Survive 9/11? Scholarship, Security, and United States Government Policy’, at 583.

<sup>1045</sup> *ibid* at 584.

dissemination of analysis and opinion that supported the Bush administration's views under the guise that such views were marginalised on American university campuses due to their liberal bias.<sup>1046</sup> Two other conservative groups, Campus Watch and the Foundation for Individual Rights in Education (FIRE) also argue for conservative viewpoints to be promoted by universities and FIRE drafted an academic bill of rights, which it is still canvassing support for. The Association of American University Professors argued that the bill 'threatens to impose administrative and legislative oversight on the professional judgement of faculty, to deprive professors of the authority necessary for teaching, and to prohibit academic institutions from making the decisions that are necessary for the advancement of knowledge.'<sup>1047</sup>

Thus, it is clear that although ancient approaches to propaganda may have fallen out of use due to their authoritarian nature, more modern propaganda regimes, which are relatively subtle in comparison, and are legally enabled still operate to silence dissent.

### **3. The Use of Propaganda to Sell the War on Terror**

The need for a sophisticated propaganda model tells us that politicians have always been sensitive about the depiction of conflicts in the public domain and the 'War on Terror' was no exception.<sup>1048</sup> So much so that, Holland writes that 'the Bush administration was nearly as preoccupied with how the combat was portrayed as with the combat itself'.<sup>1049</sup> Clearly the Bush administration recognised that the 'War on Terror' would require positive and sympathetic news coverage both at home and abroad in order to succeed. As such, there was a series of strategies adopted to promote 'sympathetic' coverage of the conflict.

#### **3.1. Demonising the Enemy**

A recurring metanarrative invoked to sell the 'War on Terror' was the negative portrayal of enemies and of Islam in general. Chapter 3 detailed how, in order to perpetuate the narrative of Western troops as saviours to people in chaotic Third World countries, it was

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<sup>1046</sup> *ibid* at 586.

<sup>1047</sup> American Association of University Professors, 'The "Academic Bill of Rights" Campaign' (2005) <<http://www.aaup.org/issues/ABOR/aborintro2.htm>> accessed August 2015.

<sup>1048</sup> Frank and Osgood, *Selling War in a Media Age: The Presidency and Public Opinion in the American Century*, at 5.

<sup>1049</sup> Jack Holland, 'Blair's War on Terror: Selling Intervention to Middle England' (2012) 14 *The British Journal of Politics & International Relations* 74.

necessary to portray them as ‘Other’.<sup>1050</sup> This subscribes to the established war-time practice of constructing enemies as less than human through carefully crafted rhetorical practices. This is necessary in order to garner support for an aggressive war against another state as it removes any guilt and apparently ensures that the war is warranted. This construction of the enemy as less than human is done to exploit our perception of others. Indeed, Elliot states that such a rhetorical construction is intrinsic and indeed ‘fundamental to the nation’s public support of war... Dehumanising others renders the requisite horror of war tolerable’.<sup>1051</sup>

Consequently President Bush was quick to describe the ‘War on Terror’ as a war of ‘good versus evil’.<sup>1052</sup> He also referred to the perpetrators as ‘evil doers’.<sup>1053</sup> He called them an enemy that ‘preys on innocent and unsuspecting people.’<sup>1054</sup> In constructing the enemies as ‘evil’ Bush is able to desensitise citizens to the destruction of fellow humans.<sup>1055</sup> Furthermore, Anderson tells us that the function of such language is to stifle discussion as to alternative reactions.<sup>1056</sup> It also separates ‘the evildoer from the ranks of humanity’ thereby making it morally acceptable to destroy such people without qualms or legal scrutiny.<sup>1057</sup>

## **3.2. Media Censorship**

### ***3.2.1. Embedded Journalism***

The American and UK governments recognise the importance of a free press (as evidenced in the First Amendment of the US Constitution, Article 10 of the European Convention on Human Rights, and Article 19 of the ICCPR), and understand that blanket censorship such as adopted in WWI would not be welcomed by the public. Therefore, in order to address

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<sup>1050</sup> See supra Chapter 3, section 2.3.

<sup>1051</sup> Kimberly Elliot, ‘Subverting the Rhetorical Construction of Enemies through Worldwide Enfoldment’ (2004) 27 *Women and Language* 9.

<sup>1052</sup> George W. Bush, ‘Remarks Following a Meeting With the National Security Team’ 37 WCPD 1302 (12 September 2001).

<sup>1053</sup> George W. Bush, ‘Remarks Following Discussions With Prime Minister Junichiro Koizumi of Japan and an Exchange With Reporters’ 37 WCPD 1372 (25 September 2001).

<sup>1054</sup> George W. Bush, ‘Remarks Following a Meeting With the National Security Team’ 37 WCPD 1302 (12 September 2001).

<sup>1055</sup> Anderson, ‘The Rhetorical Impact of Evil on Public Policy’.

<sup>1056</sup> *ibid.*

<sup>1057</sup> *ibid.*

the problem of having the press report favourable coverage, former US Defence Secretary Donald Rumsfeld is credited with creating the modern phenomenon of embedded journalism. Embedding journalists within military units was not new but increasingly it is becoming the norm. Indeed in the run up to OEF, and particularly the 2003 Iraq War II, the Pentagon put in place a strategy which encouraged journalists to be attached to the military.<sup>1058</sup> Embedding is appealing to many journalists as it offers them military protection and the chance to experience conflict alongside soldiers, lending both access and authenticity.<sup>1059</sup> However the strategy adopted by the Pentagon meant that places were allocated to large news organisations rather than individual reporters meaning that journalists themselves associated embedding with prestige.<sup>1060</sup> Furthermore, the problem with this system is that journalists potentially lose their independence and come under the control of the military.<sup>1061</sup> As such, critiquing reporting of the war in Iraq, Douglas Kellner concluded that ‘on the whole the embedded journalists were largely propagandists who often outdid the pentagon and Bush administration in spinning the message of the moment.’<sup>1062</sup> This assessment was shared by many prominent journalists, including the BBC correspondent Ragey Omar who admitted that with hindsight, as an embedded journalist in Iraq he had not always been impartial and had relied too heavily on military briefings for his stories.<sup>1063</sup> While American journalist Gordon Dillow wrote that, despite his journalistic training, ‘I found myself falling in love with my subject. I fell in love with ‘my’ marines.’<sup>1064</sup> This may be in part due to the fact that embedded journalists become isolated from the bigger picture and are therefore less able to report objectively on the situation. This was commented on by former UK defence Minister Geoff Hoon, who said

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<sup>1058</sup> Memorandum from the Secretary of Defence Public Affairs Guidance (PAG) on Embedding Media During Possible Future Operations 2.A (Feb. 2003), <http://www.dod.mil/news/Feb2003/d20030228pag.pdf>.

<sup>1059</sup> See Andrew Hoskins, *Televising War: From Vietnam to Iraq* (Continuum, London 2004).

<sup>1060</sup> Howard Tumber and Jerry Palmer, *Media at War: The Iraq Crisis* (Sage Publications, New York 2004).

<sup>1061</sup> Justin Lewis, ‘Television, Public Opinion and the War in Iraq: The Case of Britain’ (2004) 16 (3) *International Journal of Public Research* 295, at 302.

<sup>1062</sup> Douglas Kellner, ‘9/11, Spectacles of Terror, and Media Manipulation’ in D. Miller (ed), *Tell Me Lies: Propaganda and Media Distortion in the Attack on Iraq* (Pluto Publishing, London 2004), at 151.

<sup>1063</sup> Interview with Ragey Omar in John Pilger and Alan Lowery, *The War You Don't See: Film Documentary* (2010).

<sup>1064</sup> Gordon Dillow, ‘Grunts and Pogues: The Embedded Life’ *Colum. Journalism Review* May/June 2003.

that: ‘while viewers might be seeing more of the war than ever before, they may actually be learning less, albeit in a more spectacular way.’<sup>1065</sup>

In addition to this, as well as embedded journalists sacrificing editorial control, a psychological dependency develops. David Miller reports that psychologically embedded journalists come to view themselves as a team member within the military units to which they are assigned.<sup>1066</sup> They are also aware they are heavily reliant on these units for personal protection. Therefore it is understandable that journalists come to sympathise with the aims and objectives of the military and as such mainly write pieces that focus on military news and how the conflict is affecting the soldiers rather than civilians. Accordingly, this psychological dependency inhibits impartial and thorough investigative journalism, thereby lowering editorial standards and sometimes sacrificing the truth in favour of ‘puff pieces.’<sup>1067</sup> Indeed, in analysing war photography in the ‘War on Terror’, David Campbell found that magazine photographs showed ‘a highly restricted pattern of depiction limited largely to a discourse of military technological power and response.’<sup>1068</sup> Yet even though the embedded photographers believed their work was unfettered and that they were free to operate as they chose, according to Campbell, ‘the way their pictures were used in publications did not challenge the official war narrative.’<sup>1069</sup> Accordingly the technique of embedding journalists contributed to a climate where military masculinity was prized and valorised in the media. Richard Keeble argues that the proliferation of ‘inordinately flattering’ features on the deeds of Special Forces, such as the SAS and American Navy Seals, were highly disturbing given that such features were almost entirely fictitious.<sup>1070</sup> This valorisation has continued, and in indeed, in the UK has actually increased. Kelly describes how this is seen in the cultural shift in the UK from media

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<sup>1065</sup> Geoff Hoon, ‘World Views: No Lens Is Wide Enough to Show the Big Picture’ *Daily Times Pakistan* (29 March 2003) cited in Tumber and Palmer, *Media at War: The Iraq Crisis*, at 24.

<sup>1066</sup> David Miller, *Tell Me Lies: Propaganda and Media Distortion in the Attack on Iraq* (Pluto Publishing, London 2004), at 90.

<sup>1067</sup> See Hoskins, *Televising War: From Vietnam to Iraq*, at 62-63.

<sup>1068</sup> David Campbell, ‘From Absence to Absence: The Visual Culture of the ‘War on Terror’’ (2011) <<http://www.e-ir.info/2011/11/09/from-absence-to-absence-the-visual-culture-of-the-%e2%80%98war-on-terror-%e2%80%99/>> accessed August 2015.

<sup>1069</sup> *ibid.*

<sup>1070</sup> R. Keeble, ‘Operation Moshtarak and the Manufacture of Credible, “Heroic” Warfare’.

neutrality towards the British military, to wholehearted endorsement.<sup>1071</sup> He highlights how this was not coincidental, but in response to British army Chief General Dannett's calls for 'greater public support for the troops' which resulted in a 'multi agency campaign of support the troops initiatives' that included the 'Help for Heroes' charity.<sup>1072</sup>

Furthermore, as well as the military demanding editorial control from embedded journalists, this system of embedding also attempts to control the information made available to those journalists. Those in the public eye often try to influence which information is made available, or attempt to frame it within a particular narrative – a process colloquially known as 'spin'.<sup>1073</sup> The press secretaries or 'Spin Doctors' maintain that they do not deceive but merely act to ensure that their version of the truth is the one which is reported rather than another version or interpretation. However, in the case of the 'War on Terror', Robin Brown concludes that the process of spin was taken much further and that the military actively and knowingly suppressed information.<sup>1074</sup> She describes how the US Attorney General signed a memorandum which reduced access to government documents under the Freedom of Information Act.<sup>1075</sup> Additionally Daya Thussu recounts how, in December 2001 US marines locked journalists in a warehouse in order to prevent them reporting the deaths of US soldiers.<sup>1076</sup> The US Government was then further accused of censoring unpleasant information when it bought exclusive rights to civilian satellite images of Afghanistan, effectively denying such images to the press.<sup>1077</sup> According to Thussu, the only possible reason for obtaining such rights was to prevent anyone else from distributing images which would show real time footage of US bombs falling on Afghanistan.<sup>1078</sup>

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<sup>1071</sup> John Kelly, 'Popular Culture, Sport and the Hero-ification of the British Military' (2012) 47 (4) *Sociology* 722–738, at 728.

<sup>1072</sup> *ibid.*

<sup>1073</sup> Robin Brown, 'Spinning the War: Political Communications and Public Diplomacy in the War on Terrorism' in D.K. Thussu and D. Freedman (eds), *War and the Media* (Sage Publications 2005).

<sup>1074</sup> *ibid.*

<sup>1075</sup> *ibid.*

<sup>1076</sup> Daya Thussu, 'Live TV and Bloodless Deaths: War, Infotainment and 24/7 News' in Daya Thussu and Des Freedman (eds), *War and the Media: Reporting Conflict 24/7* (Sage Publications, London 2005).

<sup>1077</sup> *ibid.*, at 125.

<sup>1078</sup> *ibid.*

### 3.2.2 *Spinning the 'War on Terror'*

While both the UK and US Governments already funded programmes which provided pro-Western propaganda through culture and the media to non-Western states, after 9/11 both governments increased such activities with a view to 'reshape the entire information apparatus with renewed emphasis on managing perceptions overseas.'<sup>1079</sup> The Pentagon created the Office of Strategic Influence whose remit was to influence foreign public opinion, with a particular focus on Islamic countries. Similarly, the UK Government created what Miller calls 'grey propaganda operations' tasked with providing British news and information free of charge to news organisations around the world.<sup>1080</sup> According to Miller, since 9/11 both the US and UK have invested heavily in these modern propaganda apparatus because they did not believe they could rely on the media 'to report consistently in conformity with the official line.'<sup>1081</sup> Further Con Coughlin notes how, after OEF commenced, the Bush administration put pressure on the Government of Qatar to censor any Al Qaeda tapes delivered to Al Jazeera, as it was thought that such broadcasts would undermine the US message.<sup>1082</sup> Nathan Roger describes how the White House even asked US networks to censor al-Qaeda footage and refrain from showing any Bin Laden videos.<sup>1083</sup> Miller estimates the total cost of propaganda operations for justifying the 'War on Terror' to be billions of US dollars and hundreds of millions of pounds<sup>1084</sup> making it a bigger and wider reaching propaganda operation than those of WW II.<sup>1085</sup>

### 3.2.3. *Sanitising War*

A further method used to control the depiction of the 'War on Terror' in the media was presenting the conflict as sanitised and safe, as both Governments were aware that they would lose public support if the human cost became clear. As such Keeble describes the war in Afghanistan as 'a series of manufactured, media-hyped "operations"'.<sup>1086</sup> Moreover, Thussu argues that the war was increasingly portrayed on television as 'infotainment'.<sup>1087</sup>

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<sup>1079</sup> Miller, *Tell Me Lies: Propaganda and Media Distortion in the Attack on Iraq*, at 81.

<sup>1080</sup> *ibid*, at 83.

<sup>1081</sup> *ibid*, at 80.

<sup>1082</sup> Con Coughlin, *American Ally: Tony Blair and the War on Terror* (Ecco Press, New York 2006), at 183. The US also bombed the Kabul office of Al Jazeera to prevent it being utilised by Al Qaeda.

<sup>1083</sup> Nathan Roger, *Image Warfare in the War on Terror* (Palgrave Macmillan, Basingstoke 2013), at 68.

<sup>1084</sup> Miller, *Tell Me Lies: Propaganda and Media Distortion in the Attack on Iraq*, at 80.

<sup>1085</sup> *ibid*.

<sup>1086</sup> Keeble, 'Operation Moshtarak and the Manufacture of Credible, "Heroic" Warfare'

<sup>1087</sup> Thussu, 'Live TV and Bloodless Deaths: War, Infotainment and 24/7 News'.

By this he means the tendency of news editors to use entertainment formats when reporting war. Such formats include video game style graphics to show strikes against the enemy, interviewing experts in a chat show manner, the use of arresting graphics, and the utilisation of sporting metaphors and analogies.<sup>1088</sup> Consequently, war reporting is now a series of fast paced reality TV style excerpts or as Bourdieu notes ‘a series of apparently absurd stories that all end up looking the same.’<sup>1089</sup> Yet, this format does not merely extend to TV reporting: Sara Brady argues that war itself is imagined as a game.<sup>1090</sup> Indeed Keeble goes so far as to describe Operation Moshtarak, a major OEF offensive in Afghanistan, as ‘a simulated, mediacentric event providing a symbolic show of US/UK military strength.’<sup>1091</sup>

Consequently, ‘as a result of this homogenisation of coverage of conflicts – bloodless and largely devoid of any real sense of death and destruction – the audience can be desensitised to the tragedy and horror of war.’<sup>1092</sup> Cynthia Webber calls this the circulation of non-knowledge and argues that such a phenomenon is dangerous because it prevents any meaningful analysis of conflicts such as OEF.<sup>1093</sup> From the commencement of OEF, in common with other modern conflicts, this circulation of non-knowledge includes the promulgation of sanitised, risk managed conflict rather than the horror and violent death often associated with war. This is achieved by the plausible deniability of civilian casualty numbers due to a policy of non-recording and an unspoken agreement by the press to not broadcast violent images.

### ***3.2.3.1 Collateral Damage***

War is portrayed as bloodless and sanitised on the news by adopting the use of metaphors which mask the true horror of the situation. During the first Gulf War in 1991, Corcoran

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<sup>1088</sup> *ibid.*

<sup>1089</sup> Pierre Bourdieu, *On Television and Journalism* (Priscilla Parkhurst Ferguson tr, Pluto, London 1998).

<sup>1090</sup> Sara Brady, *Performance, Politics, and the War on Terror: “Whatever It Takes”* (Palgrave Macmillan, Basingstoke 2012), at 78.

<sup>1091</sup> Keeble, ‘Operation Moshtarak and the Manufacture of Credible, “Heroic” Warfare’.

<sup>1092</sup> Thussu, ‘Live TV and Bloodless Deaths: War, Infotainment and 24/7 News’, at 124.

<sup>1093</sup> Cynthia Weber, ‘The Media, the ‘War on Terrorism’ and the Circulation of Non-Knowledge’ in Daya Thussu (ed), *War and the Media: Reporting Conflict 24/7* (Sage Publications Limited 2003).

notes how the term ‘collateral damage’ began to appear.<sup>1094</sup> The phrase was initially used to refer to the unintended destruction of civilian infrastructure that occurred as a result of US bombing raids on Iraq.<sup>1095</sup> However, despite the increasing frequency of the media in invoking the term, there was very little scrutiny of what it actually meant.<sup>1096</sup>

Collateral damage is now an effective metaphor which is invoked by both the military and the media to refer to a variety of situations, not least the deaths of innocent civilians as an unintended consequence of military action. The deaths of 17 Afghan civilians, who died while attending a wedding which was mistakenly targeted by NATO forces, was widely reported as collateral damage in the media.<sup>1097</sup> Philip Taylor further describes how the term gained currency during the first Gulf War by allowing coalition officials to stress that the enemy was Saddam Hussein and not the Iraqi people.<sup>1098</sup> Although there was a massive air strike against Iraq the coalition were insistent that there would be no repeat of Dresden or Hiroshima.<sup>1099</sup> Instead modern, smart missiles would attack military targets leaving civilians and civil infrastructure untouched. However when reports began to surface of civilian casualties and residential areas being hit the coalition were quick to attribute this as a tragic, but unintended, consequence of the war against Saddam. In fact so insistent were the spokesmen and so accepted was the fact that the air raids were not directed at civilians, that even when deaths did occur it became natural for media and the public to accept them as unlucky and unfortunate rather than as a rational and inevitable outcome of war. In the same way, the US was keen to explain that OEF was directed against the Taliban and Al Qaeda, not the Afghan people.

### **3.2.3.2 No Civilian Casualty Numbers**

Moreover, the realities of war are further sanitised by official US policy not to count or confirm any figures of civilian casualties caused by the War on Terror. There are no

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<sup>1094</sup> F. Corcoran, ‘War Reporting: Collateral Damage in the European Theater’ in G. Gerbner, H.I. Schiller and H. Molwana (eds), *Triumph of the Image: The Media’s War in the Persian Gulf—a Global Perspective* (Westview Press, Boulder 1992).

<sup>1095</sup> *ibid.*, at 109.

<sup>1096</sup> *ibid.*, at 109.

<sup>1097</sup> See Human Rights Watch, “‘Troops in Contact’: Airstrikes and Civilian Deaths in Afghanistan’ (HRW 2008)

<sup>1098</sup> Philip Taylor, *War and the Media: Propaganda and Persuasion in the Gulf War* (Manchester University Press, Manchester 1992), at 170.

<sup>1099</sup> *ibid.*

official recorded figures of Afghan casualties, although since 2007 UNAMA has released periodic reports that offer an estimate.<sup>1100</sup> However such figures are rarely reported in the main news media. After OEF commenced 5000 Afghan civilians died and another 20000 were thought to have died from the indirect effects of the bombing.<sup>1101</sup> However, this was not the focus of media coverage because it was felt that images of dead children from one of the most impoverished and oppressed countries in the world would erode public support for the campaign.<sup>1102</sup> Indeed when the *Lancet Medical Journal*<sup>1103</sup> later published a controversial study claiming that 100,000 Iraqis had been killed as a result of the US invasion, there was an outcry. The UK Government publicly criticised the findings and said that their own estimate was that 15,000 civilians had been killed. However the authors maintained the veracity of their findings and went on to publish a second report<sup>1104</sup> that claimed that in excess of 600,000 civilians had died in Iraq between 2003 and 2006. These figures were similarly rejected by the UK and US Governments.<sup>1105</sup> The reports' lead author has since been criticised and the veracity of its findings called into question.<sup>1106</sup>

Furthermore Aday argues that wars are reported as bloodless and sanitised by the censoring of casualty images.<sup>1107</sup> His study of casualty images in the 'War on Terror' found that news broadcasters typically showed five times as many images of fire fights as

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<sup>1100</sup> See UNAMA, 'Armed Conflict and Civilian Casualties, Afghanistan Trends and Developments 01 January–31 August 2008' (2008); UNAMA, 'Protection of Civilians in Armed Conflict: Annual Report' (2008); UNAMA, 'Protection of Civilians in Armed Conflict: Annual Report' (2009); UNAMA, 'Protection of Civilians in Armed Conflict: Annual Report' (2010); UNAMA, 'Protection of Civilians in Armed Conflict: Annual Report' (2011); UNAMA, 'Protection of Civilians in Armed Conflict: Annual Report' (2012); UNAMA, 'Protection of Civilians in Armed Conflict: Annual Report' (2013); UNAMA, 'Protection of Civilians in Armed Conflict: Mid Year Report' (2014); UNAMA, 'Protecting Afghanistan's Children in Armed Conflict' (2014).

<sup>1101</sup> Jonathan Steele, 'Counting the Dead' *The Guardian* (London 29 January 2003) Cited in Daya Thussu and Des Freedman, *War and the Media: Reporting Conflict 24/7* (Sage Publications Limited, London 2003), at 126.

<sup>1102</sup> Thussu, 'Live Tv and Bloodless Deaths: War, Infotainment and 24/7 News', at 126.

<sup>1103</sup> Gilbert Burnham and others, 'Mortality after the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey' (2006) 368 *The Lancet* 1421.

<sup>1104</sup> Gilbert Burnham et al, 'The Human Cost of the War in Iraq: A Mortality Study 2002-2006' (2006) *The Lancet Online* < [http://web.mit.edu/CIS/pdf/Human\\_Cost\\_of\\_War.pdf](http://web.mit.edu/CIS/pdf/Human_Cost_of_War.pdf) > accessed August 2015.

<sup>1105</sup> See Tony Blair, 'Comments to Parliament' HC Deb vol 428 col 1164 (8 December 2004). See also Matthew Tempest, 'Beckett Rejects Iraq Death Toll' *The Guardian* (London 12 October 2006); Editorial 'Bush Discredits Iraqi Death Toll Report' *The Guardian* (11 October 2006).

<sup>1106</sup> See Deborah MacKenzie, 'What is Behind Criticism of Iraq Deaths Estimate (6 February 2009) <<https://www.newscientist.com/article/dn16555-what-is-behind-criticism-of-iraq-deaths-estimate/>> accessed September 2015.

<sup>1107</sup> S. Aday, 'The Real War Will Never Get on Television: An Analysis of Casualty Imagery in American Television Coverage of the Iraq War' in Philip Seib (ed), *Media and Conflict in the Twenty-First Century* (Palgrave Macmillan 2004).

they did of casualties.<sup>1108</sup> He suggests that such self-censorship is undertaken because the broadcasters are aware that exposure to graphic imagery might damage public support for war.

### 3.3. The Promotion of Militarism in Other Media

As well as the public rhetoric and ‘spin’ by governments to encourage public support for military action there is usually also a subliminal campaign to generate positive coverage of wars once they are underway. During the Second World War and Korean War, film-makers were encouraged to produce pro-war films and seek military assistance and guidance. Marilyn Young notes that during the Korean War, if the script was not approved by the Motion Picture Production Office then no support would be forthcoming. As such, scripts were often rewritten ‘to gain the military’s approval and the free hard ware that went with it.’<sup>1109</sup> Today films are not actively censored by the government; however Hollywood producers are given access to Pentagon insiders and US military locations if their films are considered to support US military aims.<sup>1110</sup> Anti-war films or those which criticise US military actions are generally not given such assistance.<sup>1111</sup> Therefore, there is pressure within Hollywood to make films which portray the military in a positive way.<sup>1112</sup> Alford notes that in the last 20 years over a quarter of Hollywood films received assistance from the US military.<sup>1113</sup>

This demonstrates that in the same way as in previous conflicts, the portrayal of the ‘War on Terror’ took place in multiple arenas. The most obvious was the portrayal in the news in print media and on television. However the heroic narrative was also promulgated through much more subtle means in other media. Holland notes how prominent and popular television programs such as *The West Wing* helped to ‘reinforc[e] and amplify one of the key themes of the official response to 9/11’.<sup>1114</sup> For Holland, it is worrying that despite the avowedly liberal and rational stance of the show, the ‘extensive contextualisation of the

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<sup>1108</sup> *ibid.*

<sup>1109</sup> Young, ‘Hard Sell: The Korean War’, at 120.

<sup>1110</sup> Carl Boggs and Tom Pollard, *The Hollywood War Machine: US Militarism and Popular Culture* (Paradigm, Boulder 2007).

<sup>1111</sup> *Ibid* and Alford, ‘Why Not a Propaganda Model for Hollywood?’, at 4.

<sup>1112</sup> Boggs and Pollard, *The Hollywood War Machine*.

<sup>1113</sup> Alford, ‘Why Not a Propaganda Model for Hollywood?’, at 4.

<sup>1114</sup> Jack Holland, ‘“When You Think of the Taliban, Think of the Nazis”: Teaching Americans ‘9/11’ in NBC’s the West Wing’ (2011) 40 Millennium-Journal of International Studies 85.

previously incomprehensible events for a dominantly American audience actually relayed, amplified and reinforced the emerging dominant discourses of the Bush Administration.<sup>1115</sup> Although *The West Wing* initially set out to offer a liberal response to 9/11, of which there were remarkably few, ‘far from offering distinct interpretations, framings and responses to 9/11, [the programme] instead helped to reinforce official emerging narratives and invalidate alternatives.’<sup>1116</sup>

This is confirmed by Breton who argues that terrorism has created a culture of paranoia in popular culture which is reflected on screen. He notes that ‘in a period of increased emotional expression, decreased political engagement and aversion to taking risks, the representation of subjectivity is driven from the perspective of a fearful, isolated self.’<sup>1117</sup> As such, since 9/11 media executives have produced vast quantities of pro-war programming which appears to tap into this paranoia culture, and endorses and validates the ‘War on Terror’ as the only response to this threat. The proliferation of such media only serves to further embed the stereotypical characterisations intrinsic to the operation of the heroic narrative. David Holloway argues that the reluctance of Hollywood producers to subvert the official narrative runs deeper than simply expanding their pro-war programming.<sup>1118</sup> He argues that post-9/11 movie culture resulted in a form of “allegory lite”, which allowed film-makers to produce risk-averse engagements with contemporary events which generally steered clear of the alarming questions raised by September 11 and the neoconservative response to the attacks.<sup>1119</sup> This again contributes to the absence of any mainstream challenge to the official narrative of the ‘War on Terror’ and reduces the space in which those who do dissent can do so.

Consequently, such subtle censorship operates successfully to stifle and disarm any dissent against the official narrative. Additionally it also serves to interrupt the appropriation and

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<sup>1115</sup> *ibid.*

<sup>1116</sup> *ibid.*

<sup>1117</sup> H. Ortega Breton, ‘Screening for Meaning: Terrorism as the Product of a Paranoid Style in Politics and Popular Culture’ in Philip Hammond (ed), *Screens of Terror: Representations of War and Terrorism in Film and Television since 9/11* (Arima Publishing, Bury St Edmunds 2011), at 223.

<sup>1118</sup> David Holloway, *9/11 and the War on Terror* (Edinburgh University Press, Edinburgh 2008)

<sup>1119</sup> *ibid.*, at 81.

dissemination of this narrative by Al Qaeda or Bin Laden<sup>1120</sup> by continuing to reinforce their villainous status, even though, as Roger ironically notes, Al Qaeda's manipulation of news media and film relied on virtually identical tactics to those employed by the US and its allies.<sup>1121</sup>

#### **4. Propagandising the War on Terror in the US: The Operation of the Heroic Narrative**

This section will outline how the framing of the 'War on Terror' subscribes to the same basic propaganda techniques that were utilised to create a climate of fear, which then normalises and rationalises the need to go to war during WWI and most conflicts throughout history. It argues that the framing of the 'War on Terror' within a heroic narrative was a deliberate strategy that embedded well-worn propaganda techniques within a wider narrative that drew on American ideals of heroicism and frontier law making because such ideals resonate with the American public.

##### **4.1. American Frontier Mythmaking**

Holland argues that the key to understanding how the 'War on Terror' was sold to both the British and American public lies in understanding the particular foreign policies of these states.<sup>1122</sup> He argues that all states have a foreign policy culture which can be defined as 'a culture of conceptualising their state and its unique identity, position and role in the world'.<sup>1123</sup> Such cultures reflect current internal opinions about a state's role and position in the world, and 'popular perceptions of the danger, foreign policy priorities and security challenges facing a state in world affairs.'<sup>1124</sup> This culture will reflect a state's unique history, geographical location, traditions, identity, and conceptions of how that state deals with the wider world. Foreign policy culture is therefore an encompassing term which 'incorporates the foreign policy traditions, strategic culture and geographical imaginations of a population.'<sup>1125</sup>

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<sup>1120</sup> Several authors highlight that one of the main reasons why the heroic narrative fails as a justification for the 'War on Terror' is that the same narrative can be (and was) equally appropriated by Bin Laden in order to justify his own actions and demonise the West. See e.g. Saniotis, 'Re-Enchanting Terrorism: Jihadists as "Liminal Beings"'.  
<sup>1121</sup> Roger, *Image Warfare in the War on Terror*, at 56-76.  
<sup>1122</sup> Holland, *Selling the War on Terror: Foreign Policy Discourses after 9/11*, at 98.  
<sup>1123</sup> Gearoid Toal, Simon Dalby and Paul Routledge, *The Geopolitics Reader* (Routledge, Oxford 1998).  
<sup>1124</sup> Holland, *Selling the War on Terror: Foreign Policy Discourses after 9/11*, at 22.  
<sup>1125</sup> *ibid.*

In analysing the particular foreign policy cultures of the US, it can therefore be argued that Bush crafted a foreign policy discourse that would resonate strongly with right wing Republican voters but would also appeal to the mainstream.<sup>1126</sup> Such discourse appealed because it positioned the US as tough and un-beholden to other nations while concomitantly creating a climate of fear and paranoia about terrorism. Indeed, according to McLaren, ‘the use of messianic and millenarian tropes works best on the intended audience (in this case, the American public) when the performance is disabused of shrillness, appears uncompromising, and remains unrestrained, confident, anagogic, and sometimes allegorical.’<sup>1127</sup> Therefore, although Bush’s rhetoric and foreign policy was criticised for being vague, idealistic and selective with facts, according to McLaren, this is precisely *why* it would appeal to American voters. In American culture the President is titled the Commander in Chief and is expected to lead both the country and the military, therefore tough, unwavering, militaristic language is expected from the US President during a crisis. Indeed this counts for more than a rational foreign policy. Therefore, Holland concludes that President Bush deliberately positioned himself as tough and presidential by adopting a ‘gung-ho’ discourse which was most likely to resonate with a US audience even though it lacked detail, logic and considered analysis.<sup>1128</sup>

In view of this it is easy to see how the metaphor of the ‘War on Terror’ became the heroic narrative in which a ‘gung-ho’ America dispensed justice and retribution to the bad guys, but also rescued and liberated the oppressed women of Afghanistan at the same time, making the entire operation a just and benevolent one that was impossible to criticise. Yet within this frontier justice narrative operated distinct metanarratives which tapped into different ideologies and cultural understandings and helped frame the ‘War on Terror’. These metanarratives were interwoven within the ‘War on Terror’ imagery in a way that would appeal to American sentiments and patriotism.

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<sup>1126</sup> *ibid*, at 25.

<sup>1127</sup> McLaren, ‘George Bush, Apocalypse Sometime Soon, and the American Imperium’, at 327.

<sup>1128</sup> Holland, *Selling the War on Terror: Foreign Policy Discourses after 9/11*.

#### 4.1.1. Invoking Cold War Imagery –The Analogy of Evil

In the US, world events prior to 9/11 had been framed within a Cold War narrative in which America symbolised freedom and progress while the Soviet Empire symbolised tyranny and oppression.<sup>1129</sup> However, the end of this global stalemate meant that the reassuring panacea to the evil Soviet empire no longer existed and so a new but familiar Manichean construct, which would make sense of 9/11 and justify military deployment, was needed. As such, according to Jim Kuypers, immediately after 9/11 the Bush administration began planting the seed<sup>1130</sup> that allowed Bush to formalise ‘in both temporal and special terms the new cold war.’<sup>1131</sup> This new cold war is the ‘War on Terror’<sup>1132</sup> and it would become a theme which could be invoked again and again when discussing 9/11 and the decision to attack Afghanistan. Bush referenced the fight against communism when discussing the ‘War on Terror’ and told Congress that it was war for all those ‘who believe in progress and pluralism, tolerance and freedom.’<sup>1133</sup> The cold war analogy is appropriate because like the ‘War on Terror’ it was a war of ideology that similarly divided the world into good and evil, thus necessitating a strong military.<sup>1134</sup> Butler highlights how the analogy continually surfaced in the American media through references to those who called for answers or nuanced understanding of 9/11 as ‘excusniks’ invoking the cold war image of ‘refusniks’ and ‘peaceniks’.<sup>1135</sup>

However, despite the reassuring binary construct of the US fighting an evil empire, Bush’s advisers were unclear about exactly how such a war could be fought and won.<sup>1136</sup> Indeed, according to Wolfe the ‘War on Terror’ was a policy with no clear indicators of success and no visible timeline for conclusion, but he concludes that it became not only a brand that could be returned to over and over again, but one where its ambiguity helped to

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<sup>1129</sup> *ibid.*

<sup>1130</sup> Kuypers, *Bush's War: Media Bias and Justifications for War in a Terrorist Age*, at 6.

<sup>1131</sup> McLaren, ‘George Bush, Apocalypse Sometime Soon, and the American Imperium’, at 330.

<sup>1132</sup> McGoldrick, *From '9-11' to the 'Iraq War 2003': International Law in an Age of Complexity*, at 29.

<sup>1133</sup> George W. Bush, ‘Address to the Nation: Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11’ 37 WCPD 1347 (20 September 2001).

<sup>1134</sup> Jan Angstrom, ‘Mapping the Competing Historical Analogies of the War on Terrorism: the Bush Presidency’ (2011) 25 (2) *International Relations* 224-242, at 236.

<sup>1135</sup> Butler, *Precarious Life. The Powers of Violence and Mourning*, at xxii.

<sup>1136</sup> Donald Rumsfeld told interviewers that he disliked the term ‘War on Terror’ and would not have called it such. He had unsuccessfully attempted to shift Pentagon discourse away from such a concept and remarked that he tried to limit its use. See ‘Interview with Secretary Donald Rumsfeld and Cal Thomas of Fox News Watch’ News Transcript (Office of the Assistant Secretary of Defense (Public Affairs) 7 December 2006) cited in Michaels, *The Discourse Trap and the US Military: From the War on Terror to the Surge*, at 21.

contribute to its success.<sup>1137</sup> Americans could identify with, and relate to, the concept of a war on terror because terrorism was being portrayed as an all-pervading threat to the Western (American) way of life in the same way that the Soviet empire once was through Bush's identification of the terrorists as the 'heirs of fascism, totalitarianism and Nazism.'<sup>1138</sup> In this way he 'skilfully associates them with oppressive regimes of the past'<sup>1139</sup> for as Devetak notes all monsters are now measured against Hitler.<sup>1140</sup>

However, as Jan Angstrom notes, the Cold War analogy is an ill-fitting one because the 'War on Terror' does not involve two superpowers and is not state centred.<sup>1141</sup> While the arms race against Soviet aggression could be justified, the forceful militaristic approach to terrorism is not as sure of success. Yet, employing this model has meant that, in the same way as fear of communists saw the creation of a widespread surveillance culture, the fear of terrorism has seen the US (and many other states) adopt draconian powers curbing civil liberties, which have been widely accepted due to the climate of fear.<sup>1142</sup>

#### ***4.1.2. Invoking World War II Imagery: The Analogy of the Just War***

In addition to this, the second analogy that tapped into American identity and ideals was the romanticised visions of WWII where Bush 'regularly invoked the "lessons of history" to insinuate that the United States has been reliving the tribulations of the "good war"'.<sup>1143</sup> If allusions to the Cold War suggested that the American way of life would defeat and outlast a paranoid and evil ideology, then allusions to WWII were about firmly positioning the American military and ordinary civilians as heroes. The most readily conjured images and references to 9/11 immediately drew parallels with the attack on Pearl Harbour.<sup>1144</sup> Indeed McGoldrick notes that the comparison of Bush's language to Roosevelt's and the

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<sup>1137</sup> Wolfe, *Winning the War of Words: Selling the War on Terror from Afghanistan to Iraq*.

<sup>1138</sup> George W. Bush, 'Address to the Nation: Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11' 37 WCPD 1347 (20 September 2001).

<sup>1139</sup> Maggio, 'The Presidential Rhetoric of Terror: The (Re) Creation of Reality Immediately after 9/11'.

<sup>1140</sup> Devetak, 'The Gothic Scene of International Relations: Ghosts, Monsters, Terror and the Sublime after September 11', at 364.

<sup>1141</sup> J. Angstrom, 'Mapping the Competing Historical Analogies of the War on Terrorism: the Bush Presidency' at 237.

<sup>1142</sup> *ibid* at 237.

<sup>1143</sup> David Hoogland Noon, 'Operation Enduring Analogy: World War II, the War on Terror, and the Uses of Historical Memory'.

<sup>1144</sup> See Adam Hodges, *The "War on Terror" Narrative: Discourse and Intertextuality in the Construction and Contestation of Sociopolitical Reality* (Oxford University Press, Oxford 2011); Noon, 'Operation Enduring Analogy: World War II, the War on Terror, and the Uses of Historical Memory', at 352-353.

choice of the term ‘axis of evil’ to explain who the enemies were in the ‘War on Terror’ invoked the imagery of the axis powers.<sup>1145</sup> Such language invoked and capitalised on understandings of WWII, which was seen as a ‘good’ and ‘just’ war.<sup>1146</sup> In the same way that American history views the country as rising from the ashes to revenge a devastating attack by winning WWII, so too would America avenge 9/11 by winning the ‘War on Terror’ because in the USA WWII is seen as ‘exemplary’.<sup>1147</sup> Therefore it is unsurprising that such parallels were invoked to justify the deployment of force in Afghanistan.

Yet as several scholars note, the widespread enshrinement of World War II has reduced a complicated and nuanced era to a ‘simple shining legend’ that precludes any exercise of critical exploration.<sup>1148</sup> As David Noon highlights, the analogy is so successful precisely because it deflects any rigorous intellectual engagement with an issue as complex as 9/11.<sup>1149</sup> Moreover Hodges posits that the ‘generic script’ of a state at war functions as a ready-made framework for understanding and promulgating the narrative.<sup>1150</sup> Yet, as he notes, there are alternative ‘generic scripts’ that could just have easily been drawn on, invoking an alternative analogy that did not incite a military response.

## **5. Propagandising the War on Terror in the UK: Revisiting Colonial Narratives**

In Britain like in other coalition states, ‘post 9/11 foreign policy was exceptionally scripted by the administration’.<sup>1151</sup> However while it is well established that Bush repeatedly invoked narratives of frontier justice and a tyrannical evil empire, neither of these tropes were particularly familiar nor likely to resonate with British audiences. Indeed John Dumbrell notes that the US and UK have moved much further apart, particularly in

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<sup>1145</sup> McGoldrick, *From '9-11' to the 'Iraq War 2003': International Law in an Age of Complexity*, at 33.

<sup>1146</sup> Bar On Bat-Ami, ‘Terrorism, Evil, and Everyday Depravity’ 18 *Hypatia* 157.

<sup>1147</sup> Michael Walzer, ‘World War II: Why Was This War Different?’ (1971) 1 *Philosophy & Public Affairs* 3.

<sup>1148</sup> See Noon, ‘Operation Enduring Analogy: World War II, the War on Terror, and the Uses of Historical Memory’, at 343 and Michael CC Adams, *The Best War Ever: America and World War II* (Johns Hopkins University Press, Baltimore 1994).

<sup>1149</sup> Noon, ‘Operation Enduring Analogy: World War II, the War on Terror, and the Uses of Historical Memory’, at 355.

<sup>1150</sup> Hodges, *The “War on Terror” Narrative: Discourse and Intertextuality in the Construction and Contestation of Sociopolitical Reality*, at 20.

<sup>1151</sup> Holland, ‘Blair's War on Terror: Selling Intervention to Middle England’, at 4.

political culture since WWII.<sup>1152</sup> He notes how British people are typically much less religious than Americans, much more positive to state action and much less likely to express a sense of patriotism.<sup>1153</sup> Therefore it was necessary to embed foreign policy discourse in the domestic political and cultural landscape of the UK in order to invoke a particularly British response to 9/11. As such, Holland observes that there were two key themes or narratives of British foreign policy discourse which were central to selling the 'War on Terror' to a British audience. These themes were presenting a British sense of self as the guardian of humanitarianism alongside a determination to show leadership on the world stage by appearing rational, modern and pragmatic.<sup>1154</sup> 9/11 was thus framed as an 'attack on democracy and, at times, on civilisation' rather than as a war on terrorism.<sup>1155</sup> However, the aim was the same; to generate mass public support for military intervention in Afghanistan.

### **5.1. Britain as a Force for Good**

When New Labour came to power in 1997, one of the party's key foreign policy themes was to make Britain a force for good in the world. Foreign Secretary Robin Cook advocated a 'global foreign policy' for Britain that would contain an 'ethical dimension'.<sup>1156</sup> Throughout the New Labour years, this ethical foreign policy, which primarily involved promoting human rights and democracy, was given prominence by policy makers and became increasingly popular with the British public and NGOs, who had been invited to help formulate the policy.<sup>1157</sup> The Government's commitment to this new ethical foreign policy was to be tested in 1999 when hundreds of thousands of ethnic Albanian Kosovar civilians were forced to flee from their homes after Slobodan Milosevic's militias began conducting a campaign of ethnic cleansing. Tony Blair took the view that the international community had previously let down the people of Srebrenica, and as such the British Government was resolute that Milosevic could not be allowed to act

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<sup>1152</sup> John Dumbrell, 'Working with Allies: The United States, the United Kingdom, and the War on Terror' (2006) 34 *Politics & Policy* 452.

<sup>1153</sup> *ibid.*

<sup>1154</sup> Holland, *Selling the War on Terror: Foreign Policy Discourses after 9/11*, at 118.

<sup>1155</sup> Holland, 'Foreign Policy and Political Possibility', at 57.

<sup>1156</sup> Robin Cook 'British Foreign Policy Speech' (12 May 1997) <<http://www.Theguardian.com/world/1997/may/12/indonesia.ethicalforeignpolicy>>.

<sup>1157</sup> Nicholas Wheeler and Tim Dunne, 'Good International Citizenship: A Third Way for British Foreign Policy' (1998) 74 *International Affairs* 847; Steven Kettell, *New Labour and the New World Order: Britain's Role in the War on Terror* (Manchester University Press, Manchester 2011).

with impunity.<sup>1158</sup> This time the Government was prepared to use force if necessary to protect the civilians and send a strong message to Milosevic.<sup>1159</sup> Despite being unable to secure a UN resolution to authorise any use of force, Tony Blair spoke of the need to take a 'moral stand'.<sup>1160</sup> He told the House of Commons: 'We must act to save thousands of innocent men women and children from humanitarian catastrophe, from death, barbarism and ethnic cleansing by a brutal dictatorship. We have no alternative but to act and act we will.'<sup>1161</sup>

However, the Clinton administration did not share the British Government's humanitarian stance. The USA was initially reluctant to use force against Serbia and even then would only agree to air assaults, despite it being generally acknowledged at the time that Milosevic was unlikely to capitulate unless a full ground offensive was launched.<sup>1162</sup> Attempting to persuade President Clinton to commit ground troops, Prime Minister Blair gave a speech to the Chicago Economic Club, which was described as the most important of his political career.<sup>1163</sup> In this speech he outlined the five criteria he believed necessary for humanitarian intervention, and in doing so set out the 'Blair Doctrine' and attempted to highlight the morality of this cause.<sup>1164</sup> This doctrine was to form Blair's justification for the 'War on Terror'.<sup>1165</sup> Accordingly in British discourse on the 9/11 attacks and the subsequent military intervention in Afghanistan there was a natural tendency for politicians to ground OEF and the wider objectives in the language of humanitarianism and also for British politicians to invoke a sense of moral righteousness in justifying these actions.<sup>1166</sup>

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<sup>1158</sup> Tony Blair, *A Journey: My Political Life* (Hutchinson, London 2010).

<sup>1159</sup> *ibid.*

<sup>1160</sup> See Tony Blair, 'A New Generation Draws the Line' *Newsweek* (19 April 1999) and Tony Blair, 'A New Moral Crusade' *Newsweek* (14 June 1999).

<sup>1161</sup> Tony Blair, 'Statement to Parliament' HC Deb 23 March 1999 vol 328 col 162.

<sup>1162</sup> The Russian Foreign Minister Viktor Chernomyrdin is credited with securing the withdrawal of Serbian forces from Kosovo after he advised Milosevic that NATO was close to launching a ground offensive against Serbia and that if it did Russia would not interfere. On hearing this Milosevic agreed to end the violence in Kosovo. See 'Private interview with Con Coughlin', cited in Coughlin, *American Ally: Tony Blair and the War on Terror* at 104.

<sup>1163</sup> Coughlin, *American Ally: Tony Blair and the War on Terror*.

<sup>1164</sup> *ibid.*, at 93.

<sup>1165</sup> *ibid.*

<sup>1166</sup> Holland, 'Blair's War on Terror: Selling Intervention to Middle England' and Holland, 'Foreign Policy and Political Possibility', at 58.

It is justice too that makes our coalition as important on the humanitarian side as on the military side. We have established an effective coalition to deal with the humanitarian crisis in the region, which of course existed before 11 September.<sup>1167</sup>

There was also much talk of the intervention in Afghanistan being difficult but necessary: the right thing to do.<sup>1168</sup> In his analysis of the patterns in Blair's speeches between 1997 and 2003, Norman Fairclough demonstrates how, post 9/11, Blair strongly focussed on promoting global human rights and equality as a means of tackling the increasing terrorist threat.<sup>1169</sup> Even the Iraq war would later be justified by 'humanitarianism as well as determinism'.<sup>1170</sup> Interestingly, the British theme of humanitarianism was initially unwelcomed by the US and in fact, prior to 9/11, the USA had rejected the idea of humanitarianism as a basis or justification for intervention.<sup>1171</sup>

Tony Blair similarly utilised such reasoning to invoke images of compassion once OEF had commenced. However, he was able to be more subtle than Bush and articulate that the 'War on Terror' needed to be set against a wider backdrop of global inequality and injustice.<sup>1172</sup> Blair portrayed the 'War on Terror' as a kindness to the world community and also to the people of Afghanistan, whom it would free from tyranny. However, the effect of his imagery was the same; the British public conceptualised the invasion of Afghanistan and the wider 'War on Terror' as an act of benevolence and liberation towards the people of Afghanistan. This in effect re-animated the heroic and colonial narratives of saving people, even though the idea of specifically saving Afghan women had not yet begun to feature prominently in public discourse in the UK. This ethical dimension was also present in EU texts and discourse on tackling terrorism. In an analysis of EU counter-terrorism

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<sup>1167</sup> Tony Blair, 'Statement to Parliament' HC Deb vol 372 col 813 (4 October 2001).

<sup>1168</sup> Holland, 'Blair's War on Terror: Selling Intervention to Middle England'.

<sup>1169</sup> Norman Fairclough, 'Blair's Contribution to Elaborating a New Doctrine of International Community' (2005) 4 *Journal of Language and Politics* 41.

<sup>1170</sup> Paul Hoggett, 'Iraq: Blair's Mission Impossible' (2005) 7 *The British Journal of Politics & International Relations* 418, at 422.

<sup>1171</sup> Coughlin, *American Ally: Tony Blair and the War on Terror*, at 115.

<sup>1172</sup> Holland, *Selling the War on Terror: Foreign Policy Discourses after 9/11*.

discourse post 9/11, Jackson highlights that the EU texts had ‘a much stronger focus on dealing with the underlying causes of terrorism’ than the US discourse.<sup>1173</sup>

## 5.2. Britain as a World Leader

The second element of British foreign policy culture was the promotion of the UK as a reluctant world leader, which evoked images of WWII and Britain’s moralistic stance against Hitler.<sup>1174</sup> Indeed Holland notes that ‘not only was this variant enabling in the sense of helping to make British leadership conceivable, it also helped to sell a moral foreign policy to “Middle England” through appeals to romanticised images of a glorious imperial past, to which Britons could now return guilt free.’<sup>1175</sup>

In view of this, in the days and weeks after 9/11, Blair increasingly spoke of a global world community.<sup>1176</sup> He saw Britain as playing a leading role in this homogenous alliance whereas Bush was increasingly inward looking.<sup>1177</sup> Due to this, Blair came to be seen by many as the key player in the global ‘War on Terror’. His inclusive approach and appeals to the world community resonated with world leaders and the public.<sup>1178</sup> Moreover Blair’s rejection of ‘gung ho’ unilateralism allowed him to appear sensible and rational and the champion of ‘common sense’.<sup>1179</sup> This positioning of Britain as an important world power allowed Blair to tap into enduring beliefs about Britain’s importance and role in world politics and as such found favour with the British public.<sup>1180</sup> The genius of such an approach was that it legitimised and normalised a military invasion against a country that had not demonstrated aggression towards the UK. It also made it very difficult for opponents to argue against such action.<sup>1181</sup> To do nothing would be seen as cowardly.

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<sup>1173</sup> Richard Jackson, ‘An Analysis of EU Counterterrorism Discourse Post 9/11’ (2007) 20(2) Cambridge Review of International Affairs 233-247, at 239.

<sup>1174</sup> See for example Tony Blair, ‘Meeting with Leaders of the Muslim Communities in Britain’ (27 September 2001) <<http://www.oocities.org/clintonbennett/Lectures/Blair.html>>; Tony Blair, ‘Statement to Parliament Opening Debate on Iraq’ HC Deb 18 March 2001 vol 401 col 760.

<sup>1175</sup> Holland, ‘Blair’s War on Terror: Selling Intervention to Middle England’, at 7.

<sup>1176</sup> *ibid*

<sup>1177</sup> *ibid*.

<sup>1178</sup> Alistair Campbell, *The Blair Years* (A. Knopf, New York 2008), at 565.

<sup>1179</sup> Holland, ‘Foreign Policy and Political Possibility’, at 59; Richard Johnson, ‘Defending Ways of Life: The anti-terrorist Rhetoric of Bush and Blair’ (2002) 19 (4) *Theory, Culture and Society* 211-231.

<sup>1180</sup> Holland, ‘Foreign Policy and Political Possibility’, at 59.

<sup>1181</sup> Holland, *Selling the War on Terror: Foreign Policy Discourses after 9/11*.

Therefore, although the US and UK governments utilised similar propaganda techniques to sell the ‘War on Terror’, these techniques operated in different ways and evoked different reactions. The US mythologies were about strength, revenge and rising from attack, and packaged within the ideology of American exceptionalism and unilateralism. In contrast the UK mythology was about promoting rights in a fairer world and accepting a role in world leadership invoking nostalgic memories of the days of Empire.<sup>1182</sup> Yet these images were tailored to their intended audiences, with the result that both the US and UK public were able to normalise the construction of 9/11 as a declaration of war and the construction of the ‘War on Terror’ and intervention in Afghanistan as a viable response. Then when the bombing began and there were inevitably casualties, the ‘War on Terror’ and particularly OEF, was able to be framed as a humanitarian operation, which highlighting the valour of coalition forces against a barbaric enemy equally feared in the US and Europe. The continued media management of the ‘War on Terror’ meant that evidence that contradicted this framing was simply not reported.

## **6. Conclusion**

This chapter demonstrates how both the UK and US governments engaged in time-honoured methods of propaganda in order to sell the ‘War on Terror’ to the public in much the same way as previous wars have been propagandised. It notes that both Governments achieved this by utilising particular rhetorical tropes to frame the 9/11 terrorist attacks as acts of war necessitating a military response. This chapter highlighted the use of propaganda as a standard operating tool in justifying warfare in order to dispel the myth that the 9/11 attacks were exceptional and unprecedented, and thereby necessitated an exceptional response that allowed for the use of military force outside the international legal framework.

In order to demonstrate how these narratives were utilised to sell the ‘War on Terror’, this chapter outlined how methods of propaganda have been invoked in almost every major war in order to gain public support. A particular feature of both academic and mainstream commentary in 9/11 has been the differentiation of the attack from all previous incidences of terrorism. However, this chapter demonstrated how the rhetorical strategy, which

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<sup>1182</sup> Kettell, *New Labour and the New World Order: Britain's Role in the War on Terror*.

conceptualised 9/11, adhered to standard propaganda operations utilised to sell previous wars. As such, it was exceptionalism, constructed in a standard, routine way. Governments appealed to people's sense of patriotism, freedom and protection, and embraced dehumanising images of the enemy in order to justify the 'War on Terror', and as such the incursion into Afghanistan, in much the same way that governments did during World Wars I and II. In the US the 'War on Terror' was further framed as a fight of good against evil, in which American heroes would avenge the attacks, much as they had in WWII. While in the UK the 'War on Terror' was framed as part of a global battle against extremism and within the wider campaign to promote human rights and democracy, while simultaneously capitalising on nostalgia of the British Empire.

This chapter concludes that the heroic narrative appears as a textbook propaganda operation in generating support for patriotic war. There was actually very little exceptionalism or circumstances unique to 9/11, yet the rhetorical construction of the attacks and heroic framing of the subsequent 'War on Terror' has allowed the US and its allies to garner public support for the military intervention by silencing opposition and reducing the space for those who opposed the action to posit alternative understandings or framings. Ultimately this has meant that the official narrative of the military operation in Afghanistan as a benign and altruistic operation has endured. The public supported OEF safe in the knowledge that it was liberating Afghan women.

Thus, having established that 9/11 did not give rise to an exceptional set of circumstances, nor a change in law prescribing the use of force, the final chapter of this thesis deals with the residual consequences of the heroic narrative; the assumption that war can be a positive influence and that emancipation will automatically flow from a regime change. It interrogates this supposition with a view to offering a cautionary warning against associating military action with the emancipation of women and examines the motivation of those who do.

**PART III:**  
**CHALLENGING THE FAUSTIAN BARGAIN**

## Chapter 5 Feminism Goes to War

### Introduction

This chapter aims to analyse the peculiar attraction of militarism as a viable tool with which to secure women's rights. Feminism's endorsement of militarism represents a departure from the traditional ideology of feminism towards more hawkish tendencies and thus merits sustained analysis. While the radical feminist movement is no stranger to the endorsement of militarism and use of force, second wave feminism and its mainstream liberal permutations are generally associated with pacifism and the anti-war movement.<sup>1183</sup> Yet, by strategically capitalising on the growing discourse of human rights, many non-radical feminists have sought to frame gender crimes as crimes against humanity in order to deliberately elicit a military response. Having abandoned associations with pacifism these feminists have been labelled the 'feminist hawks'.<sup>1184</sup>

This chapter begins by exploring what has been termed the 'marriage of convenience' between feminists and military interventionists and then attempts to challenge an assumption that hawkish feminism has made; namely that military force is a useful tool for promoting women's rights. The first section briefly charts the development of humanitarian intervention as a legal 'norm' and recounts the turn to militarism within the human rights community that culminated in the alliance of feminists, human rights NGOs and humanitarians with conservative military interventionists, or hawks. It then outlines how these feminist scholars and activists recognised that they could appropriate the rhetoric and narratives deployed to provoke intervention in furtherance of women's rights.

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<sup>1183</sup> Charlesworth notes that since Aristophanes' *Lysistrata* women have been associated with pacifism and that women have often been presumed naturally peaceful because of a supposed affinity between peace and motherhood. Hilary Charlesworth, 'Are Women Peaceful? Reflections on the Role of Women in Peace-Building' (2008) 16 *Feminist Legal Studies* 347 at 349. See also Otto, 'Disconcerting "Masculinities": Reinventing the Gendered Subject (S) of International Human Rights Law'; Dianne Otto, 'Making Sense of Zero Tolerance Policies in Peacekeeping Sexual Economies' in Vanessa Munro and Carl Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish 2007).

<sup>1184</sup> See note 39, see also Engle, 'Calling in the Troops: The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Intervention'; Samantha Godec, 'Between Rhetoric and Reality: Exploring the Impact of Military Humanitarian Intervention Upon Sexual Violence-Post-Conflict Sex Trafficking in Kosovo' (2010) 92 *International Review of the Red Cross* 235; and Nesiah, 'From Berlin to Bonn to Baghdad: A Space for Infinite Justice'. Godec notes how other scholars prefer the term 'imperial feminists.' The problems associated with hawkish feminism are discussed infra at section 1.

In particular it demonstrates how feminists were successfully able to frame the abuse and rape of women in Bosnia as war crimes with a view to eliciting international action to protect these civilians. This section then turns to the pro-interventionist arguments advocated by prominent (non-feminist) hawks. It argues that, despite the simplicity and apparent logic of advocating military force to protect women, hawkish feminism is a flawed approach. This is demonstrated by highlighting the problems associated with hawkish feminism: namely its tendency to succumb to a crisis mentality and its inclination to present complex situations in a black and white manner, implying that the choice is to intervene militarily or do nothing. The section uses the Kosovo episode of 1999 as a case study to demonstrate how hawkish scholars were able to frame the situation as a 'crisis' with an obvious solution, thereby positioning military action as humanitarian and necessary, despite its illegality and potentially unpredictable consequences. This section ultimately questions whether this 'marriage of convenience' is a victory for feminism or a retrograde step.

Further, given this anxiety regarding hawkish feminism, Section 2 then outlines the well-known consequences and effects of conflict on women and highlights how they are disproportionately affected by conflict. It also highlights the ingrained stereotypical roles that women are forced into during conflict and notes how popular understandings and constructions of gender, which exert a pull on women's lives during peace-time, become even further entrenched and reified during times of conflict, thereby questioning the appropriateness of conflict as a means to secure gender equality. This section further highlights the paradoxical position of those advocating war; their utilisation and glorification of the feminine image as a motivation for men to fight while simultaneously ignoring the actual harm which befalls women as a consequence of such fighting. It notes that the persistence of the orthodox framing of war as being for the protection of women endures, despite contrary evidence.

As a further rejoinder to the view that war can benefit women, Section 3 discusses the legal protection afforded to women by international humanitarian law and considers the feminist scholarship that has highlighted how this regime does not adequately protect women from gender abuses, and in fact deprioritises crimes against women in comparison with other

crimes committed during conflict. This section then argues that despite the existence of law purporting to protect women during conflict, the reality is that women's lived experiences often do not mirror those presupposed by the legal regime. In particular this section focuses on the inability of international humanitarian law to protect women from rape and sexual abuse during conflict, and notes how the promise of accountability has somehow become conflated with the promise of protection and prevention. This conflation has arguably furthered the elevation of a narrative whereby military force is viewed as a benevolent gesture that has only positive consequences for women.

The final section of this chapter then considers the alternative postmodern scholarship, which postulates that legal protection against gender abuses only ingrains the dominant narrative that war is a tool of liberation that visits no harm on innocent civilians. Instead this scholarship argues that the conflation of legal protection with legal accountability only obscures the reality, which is that women will always be at risk of abuse during conflict. This scholarship also warns against subscribing to the binary narrative of rape as the worst, and only, harm visited on women during conflict, as this can have the unintended effect of infantilising women and moreover weaponising rape. Such scholarship argues that despite its intentions, progressive protectionist jurisprudence and legislation have served only to cement gendered constructions of women as victims in need of protection bestowed by powerful men.

However, it is not the intention of this thesis to advocate the removal of international criminal responsibility for sexual crimes during conflict, but instead to draw attention to the complacency that is borne of the over reliance on such instruments. Thus this chapter ultimately presents an argument against using military force to secure women's rights and concludes that, as women are the main victims during conflict, promoting militarism is a dangerous solution for feminists to acquiesce to, far less advocate. It does so as a final rejoinder to the acceptance of the heroic narrative as legitimacy cause to use force, and chides those academics who have accepted it being recast as such.

## 1. Sending in the Troops: Feminists Turn to Militarism to Protect Women

Feminist scholars and activists have been pivotal in placing women's rights on the international agenda and the progressive jurisprudence would attest to this success and the willingness of the mainstream to engage with such discourse.<sup>1185</sup> Indeed Janet Halley asserts that feminism 'is running things in the European Union, the human rights establishment, even the World Bank.'<sup>1186</sup> However, despite such progress many feminists are still troubled and frustrated by the failure to capitalise on these gains and adequately address the gender-based oppression faced by millions of women across the globe. Charlesworth notes that 'despite all the talk of women, gender and gender mainstreaming, women's lives remain on the periphery of international institutions.'<sup>1187</sup> Frustrated by this failure, some feminist scholars and activists appear to have taken a pragmatic approach and concluded that the use of military force may offer a realistic and speedier solution to the problem of women's oppression.

### 1.1. The Birth of the Feminist Hawks

The thawing of the Cold War consolidated a move towards acceptance of humanitarian intervention as a legal norm.<sup>1188</sup> Kofi Annan appeared to endorse this 'norm' in 1999<sup>1189</sup> and then, like the General Assembly, embraced the doctrine of R2P and demonstrated a

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<sup>1185</sup> Some notable successes include: the 1994 Cairo Conference Population and Development, 'Report of the International Conference on Population and Development' (Cairo 5-13 September 1994 Annex, Programme of Action of the International Conference on Population and Development 18 October 1994) UN Doc A/CONF.17/13; 1995 Beijing Conference on Women, 'Beijing Declaration and Platform for Action' (Fourth World Conference on Women, Beijing, China, 4-15 September 1995) UN Doc DPI/1766/Wom (hereinafter Beijing Declaration and Platform for Action); The strengthening of the Committee overseeing CEDAW; the CEDAW Additional Protocol allowing the right of individual complaint; the drafting of the Declaration on the Elimination of Violence Against Women (20 December 1993) UN Doc A/RES 48/104 and the increased representation of women at senior levels at the UN. The evidence of feminist success in influencing international jurisprudence is discussed further infra at section 2.2.2 and section 3.1.2.

<sup>1186</sup> Halley, *Split Decisions: How and Why to Take a Break from Feminism*, at 20.

<sup>1187</sup> Hilary Charlesworth, 'Talking to Ourselves? Feminist Scholarship in International Law' in Sari Kouvo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (Hart, London 2011), at 23.

<sup>1188</sup> For a discussion of the development of the 'norm' of humanitarian intervention see N. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*; Nicholas Wheeler, 'The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society' in Jennifer Welsh (ed), *Humanitarian Intervention and International Relations* (Oxford University Press, Oxford 2006); Chesterman and Brownlie, *Just War or Just Peace?: Humanitarian Intervention and International Law*.

<sup>1189</sup> Kofi Annan, *The Question of Intervention: Statements by the Secretary General* (United Nations Department of Public Information 1999).

commitment to its development.<sup>1190</sup> The growing strength of the human rights movement coupled with the revitalization of the UN collective security system following the break-up of the Soviet Union saw the idea of humanitarian intervention gain unprecedented momentum.<sup>1191</sup> Indeed Orford observed in 1997 that ‘the dominant liberal consensus is that collective humanitarian intervention has become necessary to address the problems of local dictators, tribalism, ethnic tension, and religious fundamentalism thrown up in the post-Cold War era.’<sup>1192</sup> It appeared that humanitarian intervention would offer the much needed panacea to global human rights abuses and was championed by many in the human rights community.<sup>1193</sup> This departure from the rigid sovereignty model of international law towards ‘muscular humanitarianism’<sup>1194</sup> was also seized upon by feminist scholars as ‘an opportunity to draw attention to the systematic abuses of women and to demand a military response’<sup>1195</sup> resulting in what Nesiah describes as a ‘marriage of convenience’<sup>1196</sup> between traditional conservative interventionists and feminist scholars. Having seen (questionably successful) military intervention to protect civilians in Somalia, Haiti and East Timor, feminists came to realise that similar uses of force might be appropriated to protect women.<sup>1197</sup> Military intervention in foreign states to protect civilians from atrocities

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<sup>1190</sup> UN GA ‘World Summit Outcome’, at paras 138-139; See also Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge, Cambridge University Press 2011).

<sup>1191</sup> The Security Council was willing to define humanitarian emergencies as ‘threats to international peace and security’. UN/SC Res 688 was ground-breaking in this respect because, while states were keen to assert that this was not a violation of Iraq’s sovereignty, this was the first time that internal human rights issues had been held to be a threat to international peace. See Wheeler, ‘The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society’.

<sup>1192</sup> Anne Orford, ‘Locating the International: Military and Monetary Interventions after the Cold War’ (1997) 38 *Harvard International Law Journal* 443, at 443.

<sup>1193</sup> Engle traces the move towards the endorsement of humanitarian intervention by human rights organisations such as Human Rights Watch and Amnesty International among others, noting how Kenneth Roth, Executive Director, Human Rights Watch was comfortable with the term ‘human rights hawk.’ See Engle, ‘Calling in the Troops: The Uneasy Relationship among Women’s Rights, Human Rights, and Humanitarian Intervention’. David Rieff cites organisations such as Doctors Without Borders, Save the Children and the International Rescue Commission as taking ‘bolder positions on the need to redress wrongs, as well as build latrines, set up clinics or provide food.’ See Rieff, *At the Point of a Gun: Democratic Dreams and Armed Intervention*, at 42.

<sup>1194</sup> Orford, ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’.

<sup>1195</sup> Godec, ‘Between Rhetoric and Reality: Exploring the Impact of Military Humanitarian Intervention Upon Sexual Violence—Post-Conflict Sex Trafficking in Kosovo’.

<sup>1196</sup> Nesiah, ‘From Berlin to Bonn to Baghdad: A Space for Infinite Justice’. See also Rieff, *At the Point of a Gun: Democratic Dreams and Armed Intervention*, at 157.

<sup>1197</sup> See *infra* at section 1.3 for discussion on the evolution of feminist approaches to humanitarian intervention. Calls for intervention in Bosnia were framed in terms of mass abuses against women, while Kosovo was predominantly framed in terms of race and ethnicity. However Godec notes that the result of intervention in Kosovo has been serious negative consequences for women, this has rarely been highlighted or discussed by feminist scholars.

during armed conflicts or from mass human rights abuses perpetrated against ethnic minorities or women suddenly appeared to be a viable strategy

### *1.1.1. Yugoslavia: An unholy courtship*

The fragmentation of Yugoslavia and the subsequent conflict in Bosnia provided the first opportunity for feminists to press for a military intervention to remedy the mass abuse of human rights. Of particular concern was the mass rape of women held in internment camps, an atrocity which received massive media coverage. Yet the first obstacle arose over how to categorise and ultimately bring an end to these mass rapes. Many feminists were aware early on that if the rapes were framed as genocide then this would be more likely to merit a response from the international community, specifically a military response, in part because of the power of that word and in part because it fitted with the overall narrative of the conflict.<sup>1198</sup> Indeed, Engle notes how ‘some feminists seemed to understand that claims of genocide or even ethnic cleansing might solicit international intervention.’<sup>1199</sup> She therefore concludes that ‘in this way, they both contributed to and took advantage of the rhetorical appeal of genocide in pleas for military intervention.’<sup>1200</sup> She demonstrates how the strategy in Bosnia of equating rape with genocide meant that the situation was given higher priority by the international community.<sup>1201</sup> With this in mind, similar campaigns modelled on this strategy would later press for intervention in Kosovo and then Afghanistan by similarly framing the abuses of civilians as human rights abuse and genocide.<sup>1202</sup> Having abandoned the traditional feminist view of pacifism and instead openly calling for military intervention, these feminists were dubbed the ‘feminist hawks’.<sup>1203</sup>

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<sup>1198</sup> This strategy in part reflects what Halley refers to as ‘feminist law making’: the turn to law or ‘governance’ to police and redress the harms done to women. The Genocide Convention requires the international community to act to prevent mass atrocities. As such, feminists sought to invoke this sense of urgency when referring to the rape and sexual abuse of Yugoslav women.

<sup>1199</sup> Engle, ‘Calling in the Troops: The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Intervention’.

<sup>1200</sup> *ibid.*

<sup>1201</sup> *ibid.*

<sup>1202</sup> The FMF was engaged in a long-running campaign to highlight the treatment of Afghan women by the Taliban. It referred to the oppression of Afghan women as gender apartheid and the campaign received much celebrity endorsement and was highly publicised. See *supra* Chapter 3 at sections 2.3.2, 3.2, 4.1 and 4.2. .

<sup>1203</sup> See Engle, ‘Calling in the Troops: The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Intervention’; Godec, ‘Between Rhetoric and Reality: Exploring the Impact of Military Humanitarian Intervention Upon Sexual Violence–Post-Conflict Sex Trafficking in Kosovo’; and Nesiah, ‘From Berlin to Bonn to Baghdad: A Space for Infinite Justice’.

### *1.1.2. A war for women's rights? An unholy relationship*

Leading the argument that systematic violence against women ought to merit military intervention was prominent feminist scholar Catharine MacKinnon. Although, MacKinnon's position was consistent with her radical ideology she was also joined by prominent liberal feminists who saw the 'War on Terror' as the perfect opportunity to market hawkish feminism. Eleanor Smeal, leader of the FMF was quick to describe the 'War on Terror' as a 'different kind of war',<sup>1204</sup> and in contrast to many feminists who saw the Bush Administration's interest in Afghan women as cynical and opportunistic, considered the sudden interest in Afghan women to be evidence that the FMF's long-standing campaign against 'gender apartheid' had finally paid off.<sup>1205</sup> She was joined by feminist theorist Phyllis Chesler who stated that she had 'long dreamed of rescuing women.'<sup>1206</sup> Other notable feminist hawks were political theorist Jean Elshtain, who posited a revised Augustinian just war theory to argue that the 'War on Terror' was a just cause,<sup>1207</sup> and human rights scholar Samantha Power, who had consistently argued in favour of military intervention, to protect civilians in places like Bosnia and Darfur.<sup>1208</sup> Like Elshtain, Power believed that the defence of innocent third parties was a just motivation that legitimated military intervention.<sup>1209</sup> Power advocated military intervention not only on the basis that it is a moral duty, but she also asserted that in attending to human rights crises, the US would indirectly curb international terrorism.<sup>1210</sup> Such a stance clearly encompasses both conservative security concerns with liberal notions of humanitarian intervention.

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<sup>1204</sup> Sharon Lerner, 'Feminists Agonize over War in Afghanistan: What Women Want', *Village Voice*, October 31-November 6 2001.

<sup>1205</sup> Hunt, "Embedded Feminism" and the War on Terror' at 58; Janelle Brown, 'A Coalition of Hope', *Ms Magazine*, Vol 12(2) Spring, 65-76.

<sup>1206</sup> As an Israeli intellectual Chesler frames her support of the 'War on Terror' within the 'clash of civilisations' ideology, arguing that fundamentalist Islam is a threat to both Israel and the US who are facing a new anti-Semitism. See Phyllis Chesler, *The New Anti-Semitism: The Current Crisis and What We Must Do About It* (Jossey-Bass, San Francisco 2003). Yet some non-white Muslim feminists have also framed their support for the 'War on Terror' within this trope. See for e.g. Irshad Manji, *The Trouble with Islam: A Wake-up Call for Honesty and Change* (Mainstream Publishing, Edinburgh 2004).

<sup>1207</sup> J.B. Elshtain, *Just War against Terror: The Burden of American Power in a Violent World* (Basic Books, New York 2004).

<sup>1208</sup> See Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Basic Books, New York 2002).

<sup>1209</sup> *ibid*

<sup>1210</sup> *ibid*.

Unlike many contemporary hawks seizing upon the late-1990s' appetite for humanitarian intervention, MacKinnon had long bemoaned the fact that the widespread human rights abuse of women was often relegated to the domestic sphere and deemed not worthy or capable of being dealt with on an international level.<sup>1211</sup> In critiquing the 'War on Terror', MacKinnon was keen not only to promote intervention, but to point out the hypocrisy of an international regime content to authorise military intervention to fight terrorism but not the everyday violence that is visited on women.<sup>1212</sup>

Because so much violence against women takes place in what is called peacetime, its atrocities do not count as war crimes unless a war among men is going on at the same time. Instead of being regarded as war crimes—as beyond the pale, if to some degree inevitable in exceptional contexts—acts of violence against women are regarded not as exceptional but inevitable, even banal, in an unexceptional context, hence beyond no pale.<sup>1213</sup>

Therefore, in contrast to the stereotypical feminist view MacKinnon does not see the military intervention to combat terrorism as problematic *per se*. Instead she advocates that a similar 'war' is needed to defend women.<sup>1214</sup> She notes how prior to 9/11 those feminist activists and scholars who advocated such a stance were routinely dismissed by mainstream international lawyers because international law did not concern itself with individuals or private actors, unless their actions could be attributed to the state.<sup>1215</sup> However, MacKinnon's argument is premised on the fact that the perpetrators of the 9/11 attacks were also private actors whose actions have never been attributed to a state. As

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<sup>1211</sup> See Catharine MacKinnon, 'Crimes of War, Crimes of Peace' (1993) 4 UCLA Women's Law Journal 59.

<sup>1212</sup> Catharine MacKinnon, 'Women's September 11th: Rethinking the International Law of Conflict' (2006) 47 Harvard International Law Journal 1.

<sup>1213</sup> *ibid.*

<sup>1214</sup> In this regard MacKinnon diverts from the archetypal feminist approach that views war as intrinsically detrimental to women. Yet her highlighting of the international regime's approach to terrorism and contrasting it with its approach to violence against women highlights how the international regime is able to ignore women. This same point is the subject of much feminist scholarship that criticises international law's failure to address systematic abuses of women. See for e.g. Charlesworth, Chinkin and Wright, 'Feminist Approaches to International Law'; Dorinda Dallmeyer (ed) *Reconceiving Reality: Women and International Law* (American Society of International Law, Washington DC, 1993); Hilary Charlesworth, 'Feminist Reflections on the Responsibility to Protect' 2 *Global Resp Protect* 232; Rebecca Cook, *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia 1994); Charlesworth, 'Talking to Ourselves? Feminist Scholarship in International Law'; Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law'.

<sup>1215</sup> MacKinnon, 'Women's September 11th: Rethinking the International Law of Conflict'.

such, as is posited in this thesis,<sup>1216</sup> MacKinnon argues that the 9/11 attacks did not meet the requirements to be considered an armed attack – the threshold for launching a military attack in self-defence. Despite this, the ‘War on Terror’ was still launched against Al Qaeda. MacKinnon therefore logically asserts that if international law can authorise military action against private actors for their role in the deaths of American civilians, then it has rejected the public/private divide (and would be a radical evolution, much in the same way CEDAW was) and so should equally be able to authorise military action against those individual men who perpetrate human rights abuses and violence against women. Although MacKinnon concedes that an offensive modelled on the ‘War on Terror’ would be both unrealistic and inadvisable in practice, she continues to advocate such a response on an ideological basis. The main point of her argument is that this so-called tipping point of international law was not that force can now be used outside Security Council authorisation, but that state resources can be used to address situations created by private individuals to penetrate the Westphalian paradigm, as exemplified by the ‘coalition of the willing’ who acted militarily to overthrow the Taliban in Afghanistan and pursue Al Qaeda.

However, while MacKinnon highlights the law’s malleability given the ‘War on Terror’, it does not necessarily mean that war on violence against women is the correct way to elevate the status of women’s rights: indeed the opposite is correct. While MacKinnon’s anger at society’s dismissal of women’s rights and the refusal of international law to uphold them is understandable, demanding parity with armed attacks in order to solicit military intervention is a flawed approach, both in its own terms and as a model for female emancipation. For as Heathcote notes: ‘law that seeks to restrain armed conflict through controlled force rests on a fundamental error about the possibility of military violence to be controlled, rational or useful for the creation of women’s security.’<sup>1217</sup> As such MacKinnon fails to address whether such high stakes tactics would actually be beneficial to the women’s rights movement, or indeed those individual women whose lives she seeks to improve. Indeed the questionable success of military intervention as regards terrorism should urge caution, especially given the faltering nature of her paradigmatic example.

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<sup>1216</sup> See *supra* Chapter 1.

<sup>1217</sup> Gina Heathcote, ‘Feminist Reflections on the End of the War on Terror’ (2010) 11 *Melbourne Journal of International Law*, at 26.

### *1.1.3. Women's rights and anti-terrorism discourse: An unholy marriage*

While her radical and uncompromising views make MacKinnon a dominant, and arguably the lone voice amongst feminist legal scholars for a war for women's rights, she is however not alone in advocating a rejection of the Westphalian model of international law on the basis that 9/11 set a precedent or brought forth a new world order. Indeed, as Chapter 1 noted, several mainstream international law scholars argue that international law now can no longer turn a blind eye to the actions of non-state actors.<sup>1218</sup> Indeed it can be argued that it was not simply the case of feminists taking advantage of mainstream discourse, but rather the entering into of a Faustian bargain with mainstream military hawks, who realised that women's rights offered a ready-made justification with which to call for military intervention.

It is therefore somewhat ironic to note that the essential tenets of feminist theory on the public/private dichotomy within international law have actually been resurrected by mainstream hawkish international lawyers, not in furtherance of women's rights, but to expand the scope of self-defence and the use of military force against terrorism.<sup>1219</sup> Rachael Johnstone insightfully traces a parallel between the early feminist scholars who argued that dismantling the public/private distinction was the solution to bringing the abuses of women within the mainstream human rights regime reflected in CEDAW, and these contemporary hawkish international lawyers who cite the atrocities of Al Qaeda as reason for making the acts of private individuals justiciable under international law.<sup>1220</sup> At the heart of both these arguments is the assertion that the Westphalian model of international law cannot address the problems of the modern world. Therefore these hawkish scholars advocate an incursion into the sanctity of state sovereignty and call for international law to address itself to the actions of private actors. Interestingly Johnstone notes that of the many scholars who advocated a reimagining of international law in order to address terrorism, only Tal Becker<sup>1221</sup> appears to recognize the parallel between his

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<sup>1218</sup> Greg Travalio and John Altenburg, 'Terrorism, State Responsibility, and the Use of Military Force' (2003) 4 *Chinese Journal of International Law* 97; Proulx, 'Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks' (2005) 23 *Berkeley Journal of International Law* 615; Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart, London 2006).

<sup>1219</sup> RL. Johnstone, 'Unlikely Bedfellows: Feminist Theory and the War on Terror' (2009) 9 *Chicago-Kent Journal of International & Comparative Law* 1.

<sup>1220</sup> *ibid.*

<sup>1221</sup> Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*.

argument and that of the early radical feminist theory.<sup>1222</sup> Yet the parallel has not gone unnoticed by feminist scholars who reason that aligning with the conservative hawks in this way would ultimately benefit women if a precedent is set for regulating private actors. While this endorsement and co-option of feminist theory by mainstream international lawyers may appear as a victory, feminists should be wary of such an alliance because ‘those most forcefully advocating an expansion of state responsibility for terrorism are not doing so with feminist arguments in mind.’<sup>1223</sup>

## 1.2. Criticisms of Hawkish Feminism

### 1.2.1. *The crisis mentality*

A major criticism of the feminist hawks is that by subscribing to the crisis mentality of international law they allow their feminist ideologies to be ‘co-opted to serve crisis governance.’<sup>1224</sup> As such, Otto asks whether, once co-opted to serve the crisis, these ideas become ‘permanently divested of their feminist policies or whether they can be (re)claimed’ by feminists.<sup>1225</sup> So far it would appear to be the former, with Otto noting how in both Afghanistan and Iraq the co-option of feminist rhetoric and ideology has failed to bring about lasting feminist engagement or make a positive contribution to women’s lives.<sup>1226</sup> Indeed she writes how, ‘as soon as their fleeting instrumental value was exhausted, they were discarded’.<sup>1227</sup>

Furthermore, in critiquing the trend towards militarism by feminists, several scholars have drawn a parallel with colonialism,<sup>1228</sup> where illegitimate occupation and exploitation were justified by the UK as an attempt to ‘save brown women from brown men.’<sup>1229</sup> Similarly,

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<sup>1222</sup> Johnstone, ‘Unlikely Bedfellows: Feminist Theory and the War on Terror’, at 12.

<sup>1223</sup> Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Manchester 2000), *preface*.

<sup>1224</sup> Otto, ‘Remapping Crisis through a Feminist Lens’, at 83.

<sup>1225</sup> *ibid*, at 84.

<sup>1226</sup> See *supra* Chapter 3 where the problems associated with allowing feminist rhetoric to be co-opted were discussed. Otto is correct to highlight how the ‘War on Terror’ has not benefitted women. For further evidence see Chapter 2.

<sup>1227</sup> Otto, ‘Remapping Crisis through a Feminist Lens’.

<sup>1228</sup> See *supra* Chapter 3. See also Engle, ‘Calling in the Troops: The Uneasy Relationship among Women’s Rights, Human Rights, and Humanitarian Intervention’; Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics’; Arat-Koc, ‘Feature-Hot Potato: Imperial Wars or Benevolent Interventions? Reflections on “Global Feminism” Post September 11th’; Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’.

<sup>1229</sup> Spivak, ‘Can the Subaltern Speak?’

the underlying assumption of the feminist hawks is that military force underwritten by the patriarchal power of international law will 'save' women who are victims of gender violence or discrimination.<sup>1230</sup> However, this assumption often fails to engage with the consequences of militarisation, the alternative complex factors that create conflict<sup>1231</sup> or the use of emotive language to frame these situations.<sup>1232</sup> Additionally it is noted that endorsement of the protectionist war paradigm fails in any way to engage with the charge that militarism promotes further violence and is not a viable solution to human rights abuses.<sup>1233</sup>

As such, hawkish interventionism is also criticised for positing a black and white approach in which the international community either chooses to intervene militarily, or it chooses to do nothing.<sup>1234</sup> Such an approach equates 'not acting militarily with "not acting"'<sup>1235</sup> and presents a militaristic response as the only logical conclusion to Third World problems. This approach is able to present a Western response as logical while at the same time obscuring the fact that the same Western states may in fact have contributed to the very conditions that caused such crisis.<sup>1236</sup> Indeed this 'all or nothing' assertion is a false dichotomy and is challenged by Orford who writes that: 'The opposition between collective humanitarian intervention and inactivity is a false one.'<sup>1237</sup>

Engle further criticises the crisis approach by pointing to the dangers inherent in labelling situations as crises<sup>1238</sup> and echoes the warning of Martti Koskenniemi: 'The more

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<sup>1230</sup> Orford, 'The Destiny of International Law'

<sup>1231</sup> Both Engle and Orford have routinely criticised interventionists for failing to acknowledge the economic factors that can push states into crisis. See Orford, 'Locating the International: Military and Monetary Interventions after the Cold War'; Karen Engle, 'Feminism and Its (Dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (1999) 99 *American Journal of International Law* 778. Gina Heathcote also criticises the binary approach when she calls for feminists to imagine new approaches to address the issue of conflict. See Heathcote, 'Feminist Reflections on the End of the War on Terror'.

<sup>1232</sup> Charlesworth, 'International Law: A Discipline of Crisis'

<sup>1233</sup> See Carol Cohn, 'Mainstreaming Gender in UN Security Policy: A Path to Political Transformation?' in Shirin Rai and Georgina Waylen (eds), *Global Governance: Feminist Perspectives* (Palgrave Macmillan, Basingstoke 2008); Heathcote, 'Feminist Politics and the Use of Force: Theorising Feminist Action and Security Council Resolution 1325'; Heathcote, *The Law on Use of Force: A Feminist Analysis*.

<sup>1234</sup> See supra Chapter 3 section.2.1.

<sup>1235</sup> Engle, 'Calling in the Troops: The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Intervention', at 224.

<sup>1236</sup> *ibid*, at 224.

<sup>1237</sup> Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' at 459.

<sup>1238</sup> Engle, 'Calling in the Troops: The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Intervention', at 17.

international lawyers are obsessed by the effectiveness of the law to be applied in “crisis” the less we are aware of the subtle politics whereby some aspects of the world become defined as “crisis” whereas others do not.’<sup>1239</sup>

### ***1.2.2. Creating tiers of victimisation***

Accordingly, Engle argues that the resultant ranking of victims is in fact ‘problematic and counter to women’s interests’<sup>1240</sup> as it creates a hierarchy of victims; the deserving and the undeserving. This was seen during the conflict in the former Yugoslavia when Bosnian Muslim and Croat women were deemed by Western feminists to be ‘authentic victims’. Yet the fact that many Bosnian Serb women were also victimised was often ignored because it paled in significance to the mass atrocities visited on mainly Muslim women. Halley makes a similar point when highlighting the mass rape of German women by Soviet soldiers at the end of WWII.<sup>1241</sup> Because Germany was the aggressor and the losing party, the abuses visited on German individuals are deemed less noteworthy.

Despite the attraction of such a binary distinction, in Bosnia there was ample evidence that women on all sides of the conflict were being raped. However, by choosing to view the rapes perpetrated against Bosnian Muslim women by Serbian men as genocidal, many feminists effectively took sides, subscribing to the deserving or authentic victim paradigm. One of the most vocal in arguing that rapes committed by Serbian men were genocidal was MacKinnon who attempted to establish a legal framework that would distinguish between ‘ordinary’ rape and genocidal rape.<sup>1242</sup> However such a framework left many uncomfortable and it was criticised by some feminists who argued that by elevating genocidal rapes she would render ‘ordinary rape’ and even the mass rapes of Bosnian Serb or Croat woman invisible and less important.<sup>1243</sup>

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<sup>1239</sup> Koskenniemi, “‘The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law’, cited in Engle, ‘Calling in the Troops: The Uneasy Relationship among Women’s Rights, Human Rights, and Humanitarian Intervention’.

<sup>1240</sup> Engle, ‘Feminism and Its (Dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina’, at 788.

<sup>1241</sup> Janet Halley, ‘Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict’ (2008) 9 Melbourne Journal of International Law 78

<sup>1242</sup> Catharine MacKinnon, ‘Rape, Genocide, and Women’s Human Rights’ (1994) 17 Harvard Women’s Law Journal 5.

<sup>1243</sup> See Rhonda Copelon, ‘Surfacing Gender: Reconceptualizing Crimes against Women in Time of War’ in Alexandra Stiglmayer and Marion Faber (eds), *Mass Rape: The War against Women in Bosnia-Herzegovina* (University of Nebraska Press, Lincoln 1994); Susan Brownmiller, ‘Making Female Bodies the Battlefield’

As such, the resurrection of this feminist debate on rape serves to highlight the crucial fact that those who deploy genocide as the basis on which to justify military intervention are not unaware of the reaction it generates. Indeed, as Engle notes, the rhetorical power of genocide is exactly what they had hoped to capitalise on.<sup>1244</sup> However, there is a danger that such a strategy distinguishes those rapists from those who commit ‘single or “normal” acts of gendered violence’<sup>1245</sup> which risks ‘rendering rape invisible once again’<sup>1246</sup> or open to being committed with impunity.

Additionally, the elevation of only certain types of mass gender violence furthers the projection of those perpetrators as ‘other’, which, as the previous two chapters highlighted, is problematic because, as Heathcote notes, ‘the threshold for violence directed at the “Other” is lower than the threshold triggering justified violence against other legal subjects.’<sup>1247</sup> Monstrous deeds are portrayed at once as tragic and lamentable and as a justification for intervention, while also simultaneously serving as a marker against which to juxtapose the behaviour, valour and honour of western men.<sup>1248</sup> Chapter 3 outlined how: ‘radicalised images of the savage Other and gendered images of women as victims lurk in Western culture’s symbolic repertoire, taking shape as the clash of civilisations in perennial justifications for war.’<sup>1249</sup> Yet it also demonstrated how this timelessly seductive imagery, which positions Western militaries as the heroic rescuers of helpless Third World women, is not in fact grounded in reality, and furthermore minimises the violence and oppression that First World women may be subjected to, while also obscuring the abuses that the ‘heroic’ rescuers often perpetrate.<sup>1250</sup> As such, rape becomes the hallmark of the depraved, barbaric ‘other’ whose behaviour can then be juxtaposed against the chivalry and civility of the Western hero. The danger of this imagery is that in sensationalising

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in Alexandra Stiglmyer and Marion Faber (eds), *Mass Rape: The War against Women in Bosnia-Herzegovina* (University of Nebraska Press, Lincoln 1994).

<sup>1244</sup> Engle, ‘Feminism and Its (Dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina’

<sup>1245</sup> Gordon Stables, ‘Justifying Kosovo: Representations of Gendered Violence and US Military Intervention’ (2003) 20 *Critical Studies in Media Communication* 92.

<sup>1246</sup> Copelon, ‘Surfacing Gender: Reconceptualizing Crimes against Women in Time of War’, at 198. The issue of ‘everyday’ rape becoming normalised as an outcome of conflict is discussed further at section 3.

<sup>1247</sup> Heathcote, ‘Feminist Reflections on the End of the War on Terror’, at 9.

<sup>1248</sup> See *supra* Chapter 3 section 2.3.

<sup>1249</sup> Cloud, ‘“To Veil the Threat of Terror”: Afghan Women and the Clash of Civilizations in the Imagery of the US War on Terrorism’, at 289.

<sup>1250</sup> The problem of sexual abuse perpetrated by peacekeepers is discussed *infra* at section 3.

genocidal rape, it suggests that only ‘other’ men can be guilty of rape. Thus, the Kosovo situation is examined in order to explore whether ‘sensation rhetoric’ entreats deployment of military forces in order to protect civilians is based on an objective assessment of the situation, or by recourse to stereotypes of the enemy.

### **1.3. Dispelling the Myths of Military Intervention: Lessons from Kosovo**

The so-called humanitarian intervention in Kosovo generated much legal debate with several prominent international lawyers concluding that the intervention was, in their opinion, illegal but legitimate.<sup>1251</sup> However, Godec wryly comments that despite the volume of argument generated, none of the mainstream/non-feminist critiques considered the impact of the intervention on women.<sup>1252</sup> She notes how, since the deployment of UN troops in 1999, Kosovo has become a major destination for trafficked women and girls. The reason for this is that the ‘sudden presence of military personnel created an immediate increase in demand for sexual services in a region with previously negligible demands.’<sup>1253</sup> She also argues that the disruption of the economy and civic society during the conflict resulted in an increased number of vulnerable women and girls. Yet, even in the face of such a negative effect of the military intervention ‘the general social position of women in Kosovo before or after the “Kosovo crisis” is not regarded as in any way connected with the main crisis game.’<sup>1254</sup> Such negation of ‘actual’ women’s experiences allows international law to measure its own success while operating as ‘an arena of desire and fantasy’.<sup>1255</sup>

Although NATO cited civilian protection as its motivation for its aerial campaign, it did so on the basis of a utilitarian calculation that weighed the negative effects that such a campaign would have on those same civilians. The majority of those who suffered ill effects during the conflict were those whom the NATO operation was designed to

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<sup>1251</sup> Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ 10 *European Journal of International Law* 1; Antonio Cassese, ‘Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’ (1999) 10 *European Journal of International Law* 23.

<sup>1252</sup> Godec, ‘Between Rhetoric and Reality: Exploring the Impact of Military Humanitarian Intervention Upon Sexual Violence–Post-Conflict Sex Trafficking in Kosovo’, at 245.

<sup>1253</sup> *ibid.*

<sup>1254</sup> Charlesworth, ‘International Law: A Discipline of Crisis’, at 389.

<sup>1255</sup> David Kennedy, ‘Autumn Weekends: An Essay on Law and Everyday Life’ in Austin Sarat and Thomas Kearns (eds), *Law in Everyday Life* (University of Michigan Press, Ann Arbor 1993).

protect.<sup>1256</sup> The Independent Commission on Kosovo concluded that NATO had ‘failed to achieve its avowed aim of preventing massive ethnic cleansing’, noting that almost one million Kosovar Albanians were made refugees and almost 10,000 died.<sup>1257</sup> Despite these findings the prevailing narrative of Kosovo was that the intervention was a morally just and benevolent mission.<sup>1258</sup> Charlesworth notes how ‘the epithet “humanitarian” was often used by international lawyers to describe the NATO intervention in Kosovo as though it were an uncontroversial and factual description.’<sup>1259</sup> However the reality was that the aerial bombing campaign was carried out at high altitude to prioritise military personnel over civilian life.<sup>1260</sup> Therefore while Kosovo ‘highlighted the continuing chasm between human rights rhetoric and reality’<sup>1261</sup> Afghanistan can be said to have underscored it.

It would appear then that the one dimensional pro-intervention narrative in Kosovo, like that in Afghanistan<sup>1262</sup> relied on amplified accounts of rape and gender violence, which served to render the Serbs as evil and depraved, and the Kosovar Albanians as innocent civilians necessitating rescue from chivalrous NATO forces. However, the downside of this narrative is that it implicitly portrays the West as being the ‘complete antithesis of Serbian brutality’<sup>1263</sup> in which the West is active and the Kosovar Albanians are passive victims. Indeed subscription to such ‘victimology’ underpins the whole operation of international law in which those civilians inhabiting a state in which the West has militarily intervened can only ever be victims.<sup>1264</sup> As such, this contributes to an image of Western forces as benign and benevolent. Sexual abuse and violence are then believed to be the purview of non-Western forces. This then acts as a self-fulfilling prophecy, with Western

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<sup>1256</sup> Cordesman, A. ‘The lessons and Non-lessons of the Air and Missile Campaign in Kosovo’ (1999, Washington, Centre for International Studies). Cited in Stables, ‘Justifying Kosovo: Representations of Gendered Violence and US Military Intervention’, at 97.

<sup>1257</sup> The Report of the Independent International Commission on Kosovo, at 5.

<sup>1258</sup> See Koskenniemi, ‘“The Lady Doth Protest Too Much” Kosovo, and the Turn to Ethics in International Law’. He notes how most international lawyers approved of the NATO bombing even though they were aware of its illegality.

<sup>1259</sup> Charlesworth, ‘International Law: A Discipline of Crisis’, at 383.

<sup>1260</sup> *ibid.*

<sup>1261</sup> Christine Chinkin, ‘Kosovo: A “Good” or “Bad” War?’ (1999) 93 *American Journal of International Law* 841.

<sup>1262</sup> A detailed analysis of the pro-intervention narratives of Afghanistan is discussed in Chapter 3.

<sup>1263</sup> Stables, ‘Justifying Kosovo: Representations of Gendered Violence and US Military Intervention’, at 103.

<sup>1264</sup> Kennedy, ‘Spring Break’ Kennedy, ‘Autumn Weekends: An Essay on Law and Everyday Life’; Anne Orford, ‘Feminism, Imperialism and the Mission of International Law’ (2002) 71 *Nordic Journal of International Law* 275; Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*

troops believed to be above abuse, it further contributes to the call for their deployment against those who commit such brutal acts.

## **2. The Argument against Using Militarism to Protect Women's Rights**

*'When any policy approach is militarized, one of the first things that happens is that women's voices are silenced.'*<sup>1265</sup>

All war and conflicts have significant negative consequences for civilians.<sup>1266</sup> Historically those civilians inhabiting lands where opposing armies fought were directly in the line of fire and so at very serious risk of death or injury. Furthermore, civilians on the losing side were often slaughtered with impunity and in ancient times it was common to enslave the population of defeated states. While modern warfare has tended to situate conflict away from civilians, and legal prohibitions now prevent direct attacks on civilians,<sup>1267</sup> it is well documented that civilians are still at great risk of death or injury if they remain in an area of conflict.<sup>1268</sup> While this section does not attempt to deny that these consequences are the most serious, it will focus on the more indirect and specific consequences of conflict on women and girls in an attempt to counter the argument that military force is a useful tool for securing women's emancipation. This section offers a brief account of the evidence and literature pertaining to women and conflict. It highlights that the reality of military deployments during conflicts is often to increase hardship for the civilian population, particularly women. It further outlines how evidence repeatedly demonstrates that women suffer disproportionately from the effects of conflict and how, even peace-keeping deployments, can have negative consequences for local women.<sup>1269</sup> As such, it concurs

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<sup>1265</sup> Enloe, *The Curious Feminist: Searching for Women in a New Age of Empire*.

<sup>1266</sup> One of the aims of the UN Charter, as noted in the Preamble, is to 'save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.' The Charter of the United Nations, Preamble.

<sup>1267</sup> Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 and Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts 1125 UNTS 3 (Protocol I) (adopted 8 June 1977). Article 51 of Protocol I prohibits: direct attacks on civilians, specifically indiscriminate attacks; acts with the purpose of spreading terror among civilians; reprisals against civilians and using civilians as shields for military operations.

<sup>1268</sup> See for e.g. A Wenger & S J A Mason, 'The Civilianization of Armed Conflict: Trends and Implications', (2008) 827 *International Review of the Red Cross* 835, at 836; Beijing Declaration and Platform for Action, at para 133.

<sup>1269</sup> The problem of abuses committed by peace-keepers is discussed briefly infra at section 3.

with the view that ‘military intervention is rarely in women’s interests and should not be pursued as a tool to uphold human rights’.<sup>1270</sup>

## **2.1. Common Occurrences of Gender Abuse During Conflict**

### ***2.1.1. Direct effects of conflict***

The International Committee of the Red Cross (ICRC) concludes that women experience conflict in distinct ways to men.<sup>1271</sup> Indeed, it is known that during conflict women are likely to suffer increasing sexual violence, lack of adequate food and water and lack of basic provisions, much more so than men.<sup>1272</sup> This is due to a variety of inter-related factors such as women’s physiology making them smaller and weaker, but also due to cultural reasons and their status in society.<sup>1273</sup> For example, women may be expected to eat last, girls’ health and well-being are often considered less of a priority, or simply that women become vulnerable when the men in the family leave to join the fighting. In addition to this, women are known to constitute the majority of the victims of deliberate and indiscriminate attacks by armed groups or governments.<sup>1274</sup> Karima Bennouna quotes the UN Secretary General in stating that ‘Of those killed in conflict by small arms, 90 percent are civilian; and of those, 80 percent are women and children.’<sup>1275</sup> Furthermore, limited access to education and medical facilities during conflict has an enormous impact on women, particularly with regard to maternal health. This leads to greater incidence of maternal and infant mortality.<sup>1276</sup>

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<sup>1270</sup> Judith Gardam, ‘Women and the Law of Armed Conflict: Why the Silence?’ (1997) 46 *International and Comparative Law Quarterly* 55.

<sup>1271</sup> Charlotte Lindsey-Curtet, Florence Tercier Holst-Roness and Letitia Anderson, ‘Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document’ (International Committee of the Red Cross, 2004), at 6; See also ‘Statement by Renee Guisan, Head of the ICRC Delegation to the Fourth World Conference on Women’ (Beijing); Beijing Declaration and Platform for Action, para 136.

<sup>1272</sup> See UN Press Release, ‘Women Suffer Disproportionately During and After War, Security Council Told During Day Long Debate on Peace and Security’ UN Doc SC/7908 (29 October 2003).

<sup>1273</sup> Beijing Declaration and Platform for Action.

<sup>1274</sup> This was acknowledged by the Security Council in the preamble of SC Res 1325 UN Doc S/Res/1325 (31 October 2000).

<sup>1275</sup> Karima Bennouna, ‘The Impact of Armed Conflict on Women’ (2003) 24 *Women's Rights Law Reports* 173, at 173.

<sup>1276</sup> See International Committee of the Red Cross, ‘Civilians in War’ (1 October 1995) <<http://www.icrc.org/eng/resources/documents/misc/57jmkz.htm#a3>>; Doedens W, ‘Reproductive Health in Crisis Situations’ WHO Health in Emergencies Issue 20 (Jan 2005) and Cottingham J et al, ‘Sexual and Reproductive Health in Conflict Areas: The Imperative to Address Violence against Women’ (2008) 115 *BJOG: An International Journal of Obstetrics & Gynaecology* 301, at 302.

Women also experience violence simply because they are women and are at an increased risk of gender violence during conflict.<sup>1277</sup> The ICRC lists the most frequently documented forms of gender abuse against women and girls in armed conflict as; rape, sexual slavery, forced prostitution, forced pregnancy, and forced sterilization,<sup>1278</sup> acts that are now enshrined as crimes in the ICC statute.<sup>1279</sup> It also notes that certain groups of women and girls face a heightened risk of gender violence. These groups include ‘those who are internally displaced, migrants, widows, heads of household, detainees, those associated with armed forces or armed groups, and those of a specific ethnicity.’<sup>1280</sup>

### ***2.1.2. Indirect effects of conflict***

Women and girls also suffer indirectly from the effects of war. During a conflict situation the men of the family or wider community often leave to join the fighting. This leaves women increasingly vulnerable and isolated as they often have to protect themselves, their children and their property from violence.<sup>1281</sup> At the outbreak of hostilities many women do not flee because, ironically, they believe that the fact that they are women will keep them safe from violence.<sup>1282</sup> The ICRC’s Project on Women and War highlighted how many, mainly elderly, women stayed behind in the UN protected areas of Croatia believing they would be safe, only to suffer repeated harassment and attack.<sup>1283</sup> This is also compounded by the fact that women are often less mobile than men due to both physiology, care duties or pregnancy.<sup>1284</sup>

However, even if women flee conflict and seek refuge this does not guarantee safety. It is well known that women and children form the majority of the world’s refugee

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<sup>1277</sup> Elisabeth Rehn and Ellen Johnson Sirleaf, ‘Unifem Women, War and Peace: The Independent Experts’ Assessment on the Impact of Armed Conflict on Women and Women’s Role in Peace-Building’ (United Nations Development Fund for Women 2002), at 22; Commission on Human Rights, ‘Integration of the Human Rights of Women and the Gender Perspective: Violence against Women’ (Submitted by Ms Radhika Coomaraswamy Special Rapporteur on Violence Against Women in accordance with Commission on Human Rights Res 2000/45 23 January 2001) UN Doc E/CN.4/2001/73/Add.1

<sup>1278</sup> ICRC Statement to the UNGA, 68<sup>th</sup> Session, Third Committee, item 28 of the agenda (16 October 2013).

<sup>1279</sup> Article 7 (1) (g) of the ICC Statute.

<sup>1280</sup> ICRC Statement to the UNGA (16 October 2013).

<sup>1281</sup> Charlotte Lindsey, ‘Women and War’ (2000) 82(839) *International Review of the Red Cross* 561, at 564.

<sup>1282</sup> *ibid*

<sup>1283</sup> *ibid*, at 565.

<sup>1284</sup> *ibid*, at 564; International Committee of the Red Cross, *Women and War* (1995) <<http://www.icrc.org/ihrceng.nsf/8ec4e051a8621595c12564670032d7ef/63fa9b7bbd8e677e4125622d0033e0d9?OpenDocument>> accessed August 2015.

population.<sup>1285</sup> Refugee women experience significantly higher burdens than refugee men due to the burden of caring for small children, and are also more vulnerable to exploitation than men.<sup>1286</sup> Even though the UN High Commissioner for Refugees has developed guidelines to protect women in refugee situations,<sup>1287</sup> Julie Mertus notes how implementation of these has been difficult.<sup>1288</sup> The UN Commission on the Status of Women highlighted that women in conflict zones face discrimination in access to relief supplies. More pressingly, the Commission also notes how women are very rarely involved in the decision-making processes surrounding humanitarian aid.<sup>1289</sup> As a result of this, women's particular needs are often overlooked.<sup>1290</sup> The ICRC cites examples where women were not consulted about the logistics of water delivery and this resulted in women being issued with water containers that were too heavy and large for them to carry.<sup>1291</sup> This also extends to the post-conflict situation, which Bennoune notes is a 'perilous time for women'.<sup>1292</sup>

A further negative effect is that, on an ideological level, war can entrench gender roles by creating a situation whereby women are expected to cook and clean or even provide sexual services to fighters – to refuse is seen as unpatriotic or as a betrayal to the cause.<sup>1293</sup> Robin Morgan describes how women in long-standing conflicts are expected to compliantly produce the next generation of male fighters, for example, Palestinian women in the refugee camps are expected to produce several male children to this end.<sup>1294</sup> Any attempt

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<sup>1285</sup> UNHCR 'War's Human Cost: UNHCR Global Trends 2013' (UNHCR 2013) at 36, available at <<http://www.unhcr.org/5399a14f9.html>> and *ibid.*, at 564.

<sup>1286</sup> L. Comas-Díaz and M.A. Jansen, 'Global Conflict and Violence against Women' (1995) 1 *Peace and Conflict* 315.

<sup>1287</sup> UNHCR, 'Guidelines on the Protection of Refugee Women' (UNHRC Geneva 1991) <<http://www.unhcr.org/3d4f915e4.html>> accessed August 2015.

<sup>1288</sup> J.A. Mertus and J.A. Benjamin, *War's Offensive on Women: The Humanitarian Challenge in Bosnia, Kosovo, and Afghanistan* (Kumarian Press Bloomfield, CT 2000) at 1.

<sup>1289</sup> Commission on the Status of Women, 'Peace: Refugee and Displaced Women and Children' (Report of the Secretary-General 9 November 1990) UN Doc E/CN.6/1991/4.

<sup>1290</sup> Rehn and Sirleaf, 'Unifem Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-Building', at 14; Lindsey-Curtet, Holst-Roness and Anderson, 'Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document' at 12.

<sup>1291</sup> Lindsey-Curtet, Holst-Roness and Anderson, 'Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document' at 83.

<sup>1292</sup> Karima Bennoune, 'Do We Need New International Law to Protect Women in Armed Conflict' (2006) 38 *Case Western Reserve Journal of International Law* 363, at 385.

<sup>1293</sup> Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law* (Kluwer Law International, The Hague 2001).

<sup>1294</sup> Morgan, *The Demon Lover: On the Sexuality of Terrorism*.

by the women to take control of their bodies and reproductive rights is seen as selfish and undermining the Palestinian cause.<sup>1295</sup> This is because ‘an attack on the war is an attack on the nation.’<sup>1296</sup> Morgan highlights that, as is so often the case during conflict or nationalist struggles, women’s rights are seen as worth sacrificing for the greater good, as evidenced by their absence.

Women are also expected to conform to a stereotype and meet men’s needs either domestically or sexually. The most extreme case of this was the use of almost 200,000 ‘comfort women’ by the Japanese army during WWII. This atrocity was barely acknowledged, far less prosecuted in the wake of the war. Despite prosecutions for rape at the Tokyo tribunals,<sup>1297</sup> there was no attention paid to this mass enslavement of women.<sup>1298</sup> Rhonda Copelon notes how euphemisms such as ‘comfort’ and the depiction of the comfort stations as brothels, not rape camps, and the women as prostitutes, and not slaves, ‘obfuscated the horrors of the system through a suggestion of immorality and voluntariness.’<sup>1299</sup> Indeed, despite decades of fighting for justice and redress, it was not until the 1990s and amid growing international pressure that Japan officially apologised to the surviving victims who had been forced to act as sex slaves for Japanese troops.<sup>1300</sup> The dismissal of the surviving women’s calls for justice for so long, both by Japan and the international community highlights how such occurrences have often not been treated with the gravity they merit because men continue to see such instances as the spoils of war.<sup>1301</sup>

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<sup>1295</sup> *ibid.*

<sup>1296</sup> Kesic, ‘Women and Gender Imagery in Bosnia: Amazons, Sluts, Victims, Witches, and Wombs’, at 190.

<sup>1297</sup> The rape prosecutions at Tokyo are considered by many to be a breakthrough yet some scholars argue that the prosecutions were less about achieving justice for women and more about emphasising the power of the West over East by highlighting the barbarity and depravity of the Japanese. See further Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, Oxford 2008).

<sup>1298</sup> After considerable lobbying by women’s NGOs a People’s Tribunal was established in the 1990s to determine the criminal liability of Japanese officials as well as the Japanese state for the rapes and sexual slavery committed against the comfort women. A full judgment was issued at the Hague in 2001 although this quasi-formal institution had only moral authority. See further Christine Chinkin, ‘Women’s International Tribunal on Japanese Military Sexual Slavery’ (2001) 95 *American Journal of International Law* 335.

<sup>1299</sup> Rhonda Copelon, ‘Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law’ (2000) 46 *McGill Law Journal* 217, at 223.

<sup>1300</sup> L.A. Malone, ‘Beyond Bosnia and in Re Kasinga: A Feminist Perspective on Recent Developments in Protecting Women from Sexual Violence’ (1996) 14 *Boston University International Law Journal* 319.

<sup>1301</sup> Although it may also be the case that there was a reluctance to publicly prosecute those who perpetrated crimes against the ‘comfort women’ because of an awareness that this might involve further anguish to the victims and that public acknowledgement of such crimes could result in further stigma and ostracism.

A further worrying trend is that evidence suggests that when men are subjugated and emasculated during war it can lead to greater incidences of domestic violence against members of their family or household.<sup>1302</sup> Indeed it is asserted that women who suffer discrimination during peacetime experience it to a much greater extent during conflict,<sup>1303</sup> leading Bennoune to assert that ‘violence against women in armed conflict should be understood; as a (perhaps gross) magnification of “ordinary” violence and attitudes.’<sup>1304</sup>

In view of this, Gardner concludes that armed conflict reinforces gender stereotypes that contribute to the subordination of women because these same stereotypes can be used as propaganda for the conflict. Reports of sexual violence against ‘their’ women are often a good way to garner support for conflict and highlight the depravity of the enemy.<sup>1305</sup> Indeed Chinkin describes how the female image has typically been used ‘both to justify the use of armed force and to motivate men to join the armed forces’,<sup>1306</sup> while Obrad Kesic states that it is a truism that ‘victims of rape will be used to manipulate support for the cause of continuing the fight.’<sup>1307</sup> This co-option of the feminine image at once silences women and yet perpetrates the myth that women are being protected by men and so galvanises the masculinity of war. This image of women as victims appeals to ‘patriarchal notions of women as property and the responsibility of men for protecting their property and taking revenge on those who would pollute this property.’<sup>1308</sup>

## 2.2. The Risk of Sexual Violence During Conflict

In addition to general discrimination, women are particularly vulnerable to sexual violence during conflict. This is recognised by the UN, which has passed several key resolutions

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<sup>1302</sup> El Bushra J and Pia Lopes E, ‘Development and Conflict: The Gender Dimension’ (Report of an Oxfam AGRA workshop held in Thailand, 1994); Sarah Maguire, ‘Researching a Family Affair: Domestic Violence in FRY, Albania,’ in Caroline Sweetman (ed.) *Violence Against Women* (Oxfam 1998). It should also be noted that men who are subjugated during conflict situations are also often victims of conflict and suffer sexual abuse. That this is now recognized by the ICC is discussed further infra at section 2.2.2, yet the invisibility of male victims of sexual abuse is noted at section 4.1.1.

<sup>1303</sup> Marie Vlachova, *Women in an Insecure World* (Emerald Group Publishing Limited, Bingley 2006).

<sup>1304</sup> Bennoune, ‘Do We Need New International Law to Protect Women in Armed Conflict’, at 370.

<sup>1305</sup> Gardam and Jarvis, *Women, Armed Conflict and International Law*, at 35.

<sup>1306</sup> Christine Chinkin, ‘Peace and Force in International Law’ (1993) 25 *Studies in Transnational Legal Policy* 203.

<sup>1307</sup> Kesic, ‘Women and Gender Imagery in Bosnia: Amazons, Sluts, Victims, Witches, and Wombs’, at 194.

<sup>1308</sup> *ibid.*, at 198.

pertaining to sexual violence against women during conflict.<sup>1309</sup> The passing of landmark UNSC resolution 1325 calls on all parties to armed conflict to ‘take special measures to protect women and girls from gender based violence, particularly rape and other forms of sexual abuse.’<sup>1310</sup> Rape is often the most prevalent form of sexual abuse and has generally been regarded as a natural consequence or outcome of war.<sup>1311</sup> Indeed Susan Brownmiller notes that even the Bible sanctions the rape and kidnap of women during war.<sup>1312</sup> Historically, invading or conquering armies would encourage their soldiers to rape local women as their share of the spoils of war and in societies such as ancient Greece it was legitimate and legal to capture and even enslave enemy women.<sup>1313</sup> Such actions were viewed as acceptable because they served as an important incentive for men to fight, once again, allowing women’s autonomy and safety to take second place to men’s needs. Indeed Brownmiller notes that in military culture, the sexual abuse of women has been described as ‘standard operating procedure’<sup>1314</sup> in which rape of enemy women is to be expected.<sup>1315</sup> Even today, Thomas and Ralph note that rape ‘routinely serves a strategic function in war and acts as an integral tool for achieving particular military objectives.’<sup>1316</sup> As Brownmiller notes:

[Rape] by a conqueror is compelling evidence of the conquered’s status of masculine impotence. Defense of women has long been a hallmark of masculine success. Rape by a conquering soldier destroys all remaining illusions of power and property for men of the defeated side. The body of a raped woman becomes a ceremonial battlefield, a parade ground for the victor’s trooping of the colors. The act that is played out upon her is a

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<sup>1309</sup> UN Doc S/RES/1325 (2000); UN Doc S/RES/1820(2008); UN Doc S/RES/1888(2009); UN Doc S/RES/1889(2009); UN Doc S/RES/1960(2010); UN Doc S/RES2106 (2013); UN Doc S/RES/2122(2013).

<sup>1310</sup> UN Doc S/RES/1325 (2000).

<sup>1311</sup> Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Pearson Education, New Zealand 2005); Christine Chinkin, ‘Rape and Sexual Abuse of Women in International Law’ (1994) 5 *European Journal of International Law* 326, at 326.

<sup>1312</sup> Deuteronomy 20:14; 21:10-14 discussing the status of women captured in war, cited in Brownmiller, *Against Our Will: Men, Women and Rape* at 35.

<sup>1313</sup> Brownmiller, *Against Our Will: Men, Women and Rape*.

<sup>1314</sup> *ibid*, at 107.

<sup>1315</sup> Mertus and Benjamin, *War's Offensive on Women: The Humanitarian Challenge in Bosnia, Kosovo, and Afghanistan*, at 8.

<sup>1316</sup> Dorothy Q Thomas and Regan E Ralph, ‘Rape in War: Challenging the Tradition of Impunity’ (1994) 14 *SAIS Review* 81.

message passed between men-vivid proof of victory for one and loss and defeat of the other.<sup>1317</sup>

Thus, so ingrained is the view that rape is a natural phenomenon of war that even when the practice came to be prohibited it has failed to actually prevent women from becoming victims of sexual violence.

### ***2.2.1. Historical prohibitions on rape during conflict***

Throughout the Middle Ages, despite greater awareness and acceptance of restrictions on conduct in warfare, there remained little attention to the plight of civilians, and women in particular, as they were still thought of as the chattel of men.<sup>1318</sup> It was not until the publication of Grotius' *De Jure Belli ac Pacis* that international law began to view civilians as a protected category during warfare. It was generally accepted that the law of war did not prohibit rape because 'everything that belongs to the enemy should be at the disposition of the victor.'<sup>1319</sup> Yet Grotius argued against the prevailing view that the enemy was a collective body that included non-combatants, and instead insisted that civilians be afforded protection from violence and abuse: 'Rape should consequently not go unpunished in war any more than in peace. The latter view is the law not of all nations but the better ones.'<sup>1320</sup> His work was pivotal in influencing an intellectual shift towards acceptance that the rights of civilians, who were mainly women and children, ought to be protected and that rape, the main threat to women, should be prohibited.<sup>1321</sup> However, although this came to be accepted as the legal norm, there were few enforcement mechanisms and as such, gender based violence in warfare continued unabated.

### ***2.2.2. Contemporary prohibitions on rape during conflict***

It is often assumed (wrongly, say many feminists) that today's militaries are more disciplined, if not more civilised than their predecessors, and so rape is no longer seen as a forgone conclusion of war. A pivotal instrument enshrining this view was the prohibition

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<sup>1317</sup> Brownmiller, *Against Our Will: Men, Women and Rape*, at 38.

<sup>1318</sup> See *ibid.*

<sup>1319</sup> Grotius, *The Law of War and Peace: De Jure Belli Ac Pacis Libri Tres* bk.III, ch.VII, pts. II-III (1).

<sup>1320</sup> *ibid.*

<sup>1321</sup> Theodor Meron argues that Grotius was highly influenced by the work of Alberico Gentili and notes how in Gentili's treatise on war *De Jure Belli Libri Tres*, at p.257, Gentili warned leaders against allowing their troops to rape women. See Theodor Meron, *War Crimes Comes of Age*, (Oxford, Oxford University Press, 1998), at 129.

of rape as a capital crime by the Lieber Instructions.<sup>1322</sup> This view coincided with increased customary prohibitions against gender violence, which were codified in the Geneva and Hague Conventions at the end of the nineteenth century.<sup>1323</sup> Despite the absence of rape in the Nuremberg Charter, and in the Tribunal's prosecutions, Control Council Law No. 10 adopted by the Allies administering Germany after WWII, expanded the list of crimes against humanity to include rape.<sup>1324</sup> Furthermore the successful prosecution of rape as a war crime at the Tokyo Tribunal paved the way for rape to be included as a crime in the statutes of the ICTY, ICTR and also the ICC.<sup>1325</sup> Yet it was the work of the Women's Caucus for Gender Justice (an amalgamation of women's groups and NGOs) that was pivotal in ensuring that sexual abuses would be recognised as serious crimes. Their lobbying at the negotiations at the Preparatory Committee (PrepCom) meetings in the drafting of the ICC Statute meant that for the first time gender crimes were explicitly included as war crimes. Article 8 of the ICC Statute lists 'Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions' as war crimes.<sup>1326</sup>

Additionally, the ICTR has found rape to be a component of genocide,<sup>1327</sup> and a 'form of aggression whose central elements cannot be captured in a mechanical description of objects and body parts.'<sup>1328</sup> Further, both the ICTR and ICTY have held rape to be a war crime and a crime against humanity,<sup>1329</sup> and found that it can be used as an instrument of torture.<sup>1330</sup> This has led some to comment that the international regime has adopted a more robust and stricter approach to prosecuting rape than many domestic legal regimes. Indeed,

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<sup>1322</sup> Francis Lieber, Instructions for the Government of Armies of the United States in the Field, Art. 44.

<sup>1323</sup> Geneva Convention IV, Article 27; Protocol I, Article 76(1); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977), Article 4(2) (e). The fact that rape was not situated as a grave breach of the Convention has created considerable controversy. The consequences of this failure to situate rape as a grave breach are discussed further infra at section 3.1.1.

<sup>1324</sup> Article II (1) (c) of Control Council Law No. 10 denotes rape as a crime against humanity.

<sup>1325</sup> Article 5(g) of the ICTY Statute; Article 3(g) of the ICTR Statute and Article 7 (1) (g) of the ICC Statute denote rape as a crime against humanity.

<sup>1326</sup> Article 8(2) (b) (xxii) Rome Statute of the International Criminal Court.

<sup>1327</sup> *Prosecutor v Akayesu* (Judgment) (ICTR)-96-4-T, T Ch 1 (2 September 1998).

<sup>1328</sup> *ibid* at para 687.

<sup>1329</sup> *Prosecutor v Kunarac Kovac & Vukovic* (Judgment) (ICTY) IT-96-23-T & IT-96-23/1-T (22 February 2001) [hereinafter *Kunarac et al Trial Chamber Judgment*] at para 436; *Prosecutor v Furundzija* (Judgment) (ICTY) IT-95-17/1-T, T Ch II (10 December 1998) [hereinafter *Furundzija Trial Chamber Judgment*].

<sup>1330</sup> *Prosecutor v Delalic* (Judgment) (ICTY) IT-96-21-T (16 November 1998) [hereinafter *Celebici Trial Chamber Judgment*]; *Furundzija Trial Chamber Judgment*; *Kunarac et al Trial Chamber Judgment*.

the elements of the crime as formulated by both the ICTY and ICTR appear particularly progressive in that rape is understood to be gender neutral, as both men and women can be victims of rape. It also carries a wider definition than merely penetration of the vagina with the perpetrator's penis; the crime includes sexual conduct associated with the insertion of the perpetrator's sexual organs into other orifices and the insertion of other body parts or indeed objects into the victim's vagina or anus.<sup>1331</sup>

Yet, while it can be seen as a success for women that progressive legislation recognising such violence has been adopted, the need for such prohibitions at all still suggests that rape and sexual violence are widespread and likely outcomes of conflict. This is borne out by the increasing legislative role of the UNSC in the attempt to curtail sexual violence during conflict<sup>1332</sup> in the face of evidence that sexual violence remains widespread in conflict situations.<sup>1333</sup> Indeed faced with the unpalatable view that even military force deployed to protect civilians can contribute to sexual violence, some feminist commentators question whether law can ever claim to protect women during conflict, and if not then whether this might be a reason to rethink the security project.<sup>1334</sup>

### **3. The Myth of Legal Protection for Civilian Women**

Despite the legal regime's call to protect women, Gardam pragmatically notes that 'there is no obvious military advantage to be gained in protecting civilians or women – in fact quite often the reverse.'<sup>1335</sup> She argues that this is because, in the development of the law of

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<sup>1331</sup> Elements of Crimes for the ICC Statute Article 7(1) (g)-1.

<sup>1332</sup> S/RES/1325 (2000); S/RES/1820(2008); S/RES/1888(2009); S/RES/1889(2009); S/RES/1960(2010); S/RES/2106 (2013); S/RES/2122(2013). The UNSC also routinely inserts standard paragraphs into resolutions pertaining to conflict situations reminding the parties to take appropriate measures to refrain from, prevent and protect civilians from all forms of sexual violence. See further Heathcote, *The Law on Use of Force: A Feminist Analysis* at 1.

<sup>1333</sup> Rehn and Sirleaf, 'Unifem Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-Building; UN General Assembly 'A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations' (Report of the Secretary-General's Special Advisor, Prince Zeid Ra'ad Zeid al-Hussein 24 March 2005) UN Doc A/59/710; Paul Higate, 'Peacekeepers, Masculinities, and Sexual Exploitation' (2007) 10 *Men and Masculinities* 99; Kathleen M Jennings, 'Unintended Consequences of Intimacy: Political Economies of Peacekeeping and Sex Tourism' (2010) 17 *International Peacekeeping* 229; Keith J Allred, 'Peacekeepers and Prostitutes: How Deployed Forces Fuel the Demand for Trafficked Women and New Hope for Stopping It' (2006) 33 *Armed Forces & Society* 5.

<sup>1334</sup> Heathcote, *The Law on Use of Force: A Feminist Analysis*.

<sup>1335</sup> Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' at 62.

armed conflict, humanitarian considerations always take second place to military ones.<sup>1336</sup> Further, as regards gender crimes Kelly Askin notes that ‘there is little incentive for not committing sex crimes, particularly when it is against women of the opposing side during armed conflict and the harm inflicted is broad and collective’<sup>1337</sup> because there is rarely any recrimination for doing so.

Meanwhile, the Beijing Platform for Action concluded that international humanitarian law ‘is at times systematically ignored, and human rights are often violated in armed conflict, affecting the civilian population, especially women, children, the elderly, and the disabled’.<sup>1338</sup> Indeed, all too often, women and children are spoken of as the silent and faceless victims of war because they are almost always civilians. Gardam and Charlesworth note that the ‘trauma, experiences, and death of women as a result of armed conflict are disregarded.’<sup>1339</sup> Instead, they write that the usual emphasis is on the suffering and heroism of men, with the ‘glorification of the combatant’ seen as an integral part of the culture of warfare.<sup>1340</sup> Gardam highlights a potential hierarchy in the *jus in bello* when she suggests that states are much more likely to ratify agreements that do not interfere with the existing law of the Hague while resisting those which attempt to place limits on modes of conflict. She cites the USA’s reluctance to ratify Additional Protocol I to the Geneva Conventions because the enhanced protection for civilians it guaranteed would necessitate a restriction on combat operations and such restrictions were declared ‘unacceptable’ by the US Joint Chiefs.<sup>1341</sup> Indeed, so strong is the desire to view male combatants as heroes or protectors that this narrative prevails, despite overwhelming evidence that armies often perpetrate the abuse of women.<sup>1342</sup>

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<sup>1336</sup> *ibid.*

<sup>1337</sup> Kelly Dawn Askin, Helen Durham and Tracey Gurd, ‘The Jurisprudence of International War Crimes Tribunals: Securing Gender Justice for Some Survivors’ in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War* (Martinus Nijhoff, Leiden 2005), at 126.

<sup>1338</sup> Beijing Declaration and Platform for Action, at para 131.

<sup>1339</sup> Judith Gardam and Hilary Charlesworth, ‘Protection of Women in Armed Conflict’ (2000) 22 Human rights quarterly 148.

<sup>1340</sup> *ibid.*, see also, Judith Gardam, ‘Gender and Non-Combatant Immunity’ (1993) 3 Transnational Law & Contemporary Problems 345.

<sup>1341</sup> Gardam, ‘Gender and Non-Combatant Immunity’, at 553.

<sup>1342</sup> See ‘No One to Turn To’ A study into abuse by Peacekeepers by Save the Children <<http://www.savethechildren.org.uk/resources/online-library/no-one-to-turn-to-the-under-reporting-of-child-sexual-exploitation-and-abuse-by-aid-workers-and-peacekeepers>>; UN Sub-Commission on the Promotion and Protection of Human Rights, ‘Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Final Report’ (submitted by Special Rapporteur Gay J McDougall 22 June 1998) UN Doc

Certainly Theodore Meron notes that while there were many historical prosecutions of rape during war, all too often ‘rape has been given license, either as an encouragement for soldiers or as an instrument of policy.’<sup>1343</sup> Even if rape is not part of a wider strategy to terrorise or subordinate the population, but the obscene act of an individual soldier, then it is still usually overlooked and the perpetrators rarely punished. More worryingly, evidence suggests that even when military force is deployed in order to prevent conflict, peacekeepers have also perpetrated sexual violence against local women.<sup>1344</sup> Enloe cites the case of three US Marines who were charged with raping a twelve-year-old girl in Okinawa, Japan. Speaking to the media, the US Pacific Commander told reporters: ‘I think it was absolutely stupid, as I’ve said several times. For the price they paid to rent the car, they could have had a girl.’<sup>1345</sup> Similarly, when the head of the UN Commission in Cambodia was asked about accounts of UN peacekeepers abusing women and girls, he remarked that: ‘eighteen year old, hot blooded soldiers had a right to drink a few beers and chase after young beautiful things of the opposite sex.’<sup>1346</sup> As such, Heathcote argues that the UN’s ‘distinction between sexual exploitation and abuse and sexual violence does not adequately capture the dependence and use of sex by the spectrum of military actors.’<sup>1347</sup>

In fact, militarised, masculine culture seems to point to an acceptance of this abuse of women and views the sexual abuse and killing of women and children as an unfortunate but realistic outcome of conflict — a form of collateral damage. This view is premised on

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E/CN.4/Sub/2/1998/13.

<sup>1343</sup> Theodor Meron, ‘Rape as a Warcrime’, in Theodor Meron, *War Crimes Law Comes of Age* (Oxford, Oxford University Press, 1998), at 206.

<sup>1344</sup> The UNIFEM Report Women, War and Peace found evidence of sexual abuse and exploitation in almost every existing peacekeeping operation. See Rehn and Sirleaf, ‘Unifem Women, War and Peace: The Independent Experts’ Assessment on the Impact of Armed Conflict on Women and Women’s Role in Peace-Building.’ Statistics for allegations of sexual misconduct can be found at <<https://cdu.unlb.org/Statistics/OverviewofStatistics.aspx>>. In light of evidence of abuses committed by peacekeepers the UN has implemented a policy of zero tolerance for sexual misconduct by peacekeepers. See The Blue Helmets Standards of Conduct available at <<https://cdu.unlb.org/UNStandardsofConduct/TenRulesCodeofPersonalConductForBlueHelmets.aspx>> and the UN Strategy to eliminate sexual exploitation available at <<https://cdu.unlb.org/UNStrategy/Prevention.aspx>>.

<sup>1345</sup> Cynthia Enloe, ‘Spoils of War’ Ms Magazine, at 15. Cited in Jennifer Turpin, ‘Barbie in the War Zone’ (2003) 22 Social Alternatives 5.

<sup>1346</sup> A Betts Fetherston, ‘UN Peacekeepers and Cultures of Violence’ (1995) 19 Cultural Survival Quarterly 19, at 22. Cited in Turpin, ‘Barbie in the War Zone’.

<sup>1347</sup> Heathcote, ‘Feminist Politics and the Use of Force: Theorising Feminist Action and Security Council Resolution 1325’ at 32.

the basis that the overall outcome will merit such a sacrifice. It also leads to a situation whereby sending troops to remedy complex situations by military means can be viewed as both positive and desirable. This is because, as Pratt notes, ‘sexual violence committed by the “brown” parties to conflict is considered a war crime’, but sexual violence perpetrated by UN peacekeepers is a technical problem that can be managed with training.<sup>1348</sup> Such realities prompt Turpin to question why, if during war, gender differences become further reified and enforced, male aggression and violence are still celebrated.<sup>1349</sup>

### **3.1. The Myth of Legal Protection Against Rape**

While few would argue that war is desirable, there has long been an argument that the existence of international humanitarian law, which regulates the conduct of war, provides adequate safeguards for civilians, and in particular women and children who are afforded special protected status. Indeed the ICRC writes that ‘if women have to bear so many of the tragic effects of conflict, it is not because of any shortcomings in the rules protecting them, but because those rules are not observed.’<sup>1350</sup> However, there is growing feminist scholarship on the inadequacies of international humanitarian law to effectively protect civilians.<sup>1351</sup> Indeed, postmodern feminist scholarship in particular deconstructs this argument further and argues against the construction of women and children as a combined entity, and aims to dispel the ‘myth that women, like children, are incidental and not direct targets of persecution, or that their suffering, whether targeted or not, is insufficiently severe.’<sup>1352</sup>

#### ***3.1.1. Law’s inability to construct rape as a crime of violence***

A major construction which has been objected to, and in some part remedied, by feminist scholars is the construction of rape as crime against dignity, one that is less serious than those crimes listed as ‘grave breaches’ of the Geneva Conventions. Rape and other sexual abuses were categorised as a crimes against dignity rather than violence against persons

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<sup>1348</sup> Nicola Pratt, ‘Reconceptualizing Gender, Reinscribing Racial–Sexual Boundaries in International Security: The Case of UN Security Council Resolution 1325 on “Women, Peace and Security”’ (2013) 57 *International Studies Quarterly* 772 at 777. See also Duncanson, *Forces for Good?: Military Masculinities and Peacebuilding in Afghanistan and Iraq* at 24.

<sup>1349</sup> Turpin, ‘Barbie in the War Zone’.

<sup>1350</sup> Lindsey, *Women and War*, at 580.

<sup>1351</sup> For an overview of such scholarship see Valerie Oosterveld, ‘Feminist Debates on Civilian Women and International Humanitarian Law’ 27 *Windsor Yearbook of Access to Justice* 385.

<sup>1352</sup> Patricia Tuitt, *False Images: Law’s Construction of the Refugee* (Pluto Press, London 1996).

because much like most domestic jurisdictions, rape was originally conceived of as a crime against a woman's honour, or against a man's property. In early humanitarian law, Article 46 of the Hague Regulations Annexed to the Hague Convention No. IV of 1907 states 'family honour and rights, the lives of persons and private property, as well as religious convictions and practice... must be respected by the warring parties.'<sup>1353</sup> While this can be broadly interpreted to include rape, in practise it has rarely been interpreted this way.<sup>1354</sup>

This oversight was only partially remedied in the four 1949 Geneva Conventions and 1977 Additional Protocols.<sup>1355</sup> Article 27 (2) of the Fourth Geneva Convention states that women are to be protected from attacks on their honour and specifies rape and forced prostitution as such acts. Yet this provision has been criticised for not being strong enough because sexual violence does not fall within the categories of crimes listed as 'grave breaches' of international humanitarian law.<sup>1356</sup> Where a crime is classified as a 'grave breach' states have an obligation to search for the perpetrators and bring them to justice. The failure to categorise rape as a 'grave breach' of international humanitarian law is telling because as Gardam notes, while sexual violence is one of the worst consequences of armed conflict, the law has not always shared this perception.<sup>1357</sup> While scholars acknowledge that sexual violence could theoretically be construed as falling within certain categories of 'grave breach' such as 'torture or inhuman treatment',<sup>1358</sup> and indeed the ICRC has declared that rape is a grave breach under Article 147 of the Geneva Conventions,<sup>1359</sup> the failure to explicitly cite rape or sexual violence within the list of grave

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<sup>1353</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (opened for signature 18 October 1907, entered into force 26 January 1910).

<sup>1354</sup> Theodor Meron, 'Rape as a Crime under International Humanitarian Law' (1993) 87 *The American Journal of International Law* 424, at 424.

<sup>1355</sup> Article 76(1) of Protocol I states that women are to be protected from rape. Article 4 (2)(e) of Protocol II prohibits rape as an outrage upon personal dignity.

<sup>1356</sup> Article 147 of the Fourth Geneva Convention lists grave breaches which include inter alia; willful killing, torture or inhumane treatment, willfully causing great suffering or serious injury to body or health.

<sup>1357</sup> Gardam, 'Women and the Law of Armed Conflict: Why the Silence?', at 76.

<sup>1358</sup> Wasantha Seneviratne, 'International Legal Standards Pertaining to Sexual Violence against Displaced Women in Times of Armed Conflict with Special Reference to the Emerged Jurisprudence at the ICTY and the ICTR' 20 *Sri Lanka Journal of International Law* 1, at 11.

<sup>1359</sup> ICRC, Aide-Memoire (3 December 1992).

breaches is problematic, not only practically but symbolically, as it implies hierarchical significance.<sup>1360</sup>

In addition to this, the specific reference to ‘honour’ in regard to these violations is problematic.<sup>1361</sup> Valerie Oosterveld argues that such conceptualisation means that ‘the words of IHL do not fully capture the harm done to victims of sexual violence and they do not indicate that sexual violence “is a crime of the gravest dimension.”’<sup>1362</sup> As such, many feminist writers have challenged the use of this particular term, arguing that referring to attacks like rape or forced prostitution as attacks against a women’s honour entrenches the notion of women as property and fails to properly categorise such attacks as incidences of violence and in doing so fails to reflect the seriousness of such attacks.<sup>1363</sup> Indeed both Wasantha Seneviratne and Copelon argue that ‘the phrase “women’s honour” implies that the victim of the sexual violence is somehow “dishonoured” in the attack.’<sup>1364</sup> Such feminist scholarship has also questioned whether it was the Convention’s intent to protect the honour of the woman or the woman herself and concludes, sadly, that it is the former.<sup>1365</sup> The Convention appears therefore to be less about protecting women and more about protecting group values because ‘in reality a woman’s honour is a concept constructed by men for their own purposes; it has little to do with women’s perception of

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<sup>1360</sup> The Final Declaration of the International Conference for the Protection of War Victims highlighted the worrying increase in sexual violence against women and children and called for such acts to be seen as grave breaches. See Final Declaration of the International Conference for the Protection of War Victims, (1993) 296 International Review of Red Cross, at 377. See also Commission on Human Rights, ‘Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission’ (Submitted by Ms Radhika Coomaraswamy Special Rapporteur on Violence Against Women in accordance with Commission Res1997/44 26 January 1998) UN Doc E/CN.4/1998/54, at 22, which recommends that the Geneva Conventions be re-examined to incorporate developing norms.

<sup>1361</sup> The four Geneva Conventions and the Commentaries state that rape is an ‘attack on women’s honour’ and that women should be protected from being ‘forc[ed] into immorality by violence.’

<sup>1362</sup> Oosterveld, ‘Feminist Debates on Civilian Women and International Humanitarian Law’, at 393.

<sup>1363</sup> Gardam, ‘Women and the Law of Armed Conflict: Why the Silence?’; Seneviratne, ‘International Legal Standards Pertaining to Sexual Violence against Displaced Women in Times of Armed Conflict with Special Reference to the Emerged Jurisprudence at the ICTY and the ICTR’; Catherine N Niarchos, ‘Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia’ (1995) 17 Human rights quarterly 649; Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* at 314; Kelly Dawn Askin, ‘Women and International Humanitarian Law’ in Kelly Dawn Askin and Dorean M Koenig (eds), *Women and International Human Rights Law* (Transnational Publishers, New York 1999)

<sup>1364</sup> Seneviratne, ‘International Legal Standards Pertaining to Sexual Violence against Displaced Women in Times of Armed Conflict with Special Reference to the Emerged Jurisprudence at the ICTY and the ICTR’, at 10.

<sup>1365</sup> Lindsey, ‘Women and War’; Copelon, ‘Surfacing Gender: Reconceptualizing Crimes against Women in Time of War’, at 249.

sexual violence.’<sup>1366</sup> Yet, while rape can be an assault or violation of dignity it is primarily a crime of violence.<sup>1367</sup> As such both Niarchos and Gardam argue that rape should be recognised as a crime motivated against gender rather than honour.<sup>1368</sup> In this way feminist scholarship challenges the assumption that women are adequately protected against sexual violence by international humanitarian law. They argue that violence against women, because they are *women*, is not taken seriously and that therefore it is incorrect to assume that women can be adequately protected during conflict by the existing legal regime.

### ***3.1.2. Feminist success in recasting rape as a crime against women***

Such feminist criticism was partly responsible for ensuring that, at the Prep Com negotiations of the ICC Statute, delegates chose to situate rape as a grave breach of Article 3 of the Geneva Conventions, equivalent in gravity to other crimes of universal jurisdiction and rejected calls for rape to be situated as humiliating and degrading treatment rather than a grave breach or serious violation. Oosterveld describes how this was a painstaking process because many of the progressive gender clauses came under sustained attack from ‘an alliance of fundamentalist religious and conservative organisations and those states that traditionally oppose the advancement of women’s rights.’<sup>1369</sup> Furthermore the Statutes of the ICTY and ICTR endow both tribunals with the power to prosecute sexual offences as crimes against humanity.<sup>1370</sup> The jurisprudence of the ICTY and ICTR along with the inclusion of gender crimes as war crimes in the ICC Statute speak to the success of this feminist project, while the jurisprudence of these tribunals has been particularly progressive with regard to sexual violence against women.<sup>1371</sup>

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<sup>1366</sup> Gardam, ‘Women and the Law of Armed Conflict: Why the Silence?’ at 57. See also United Nations Division for the Advancement of Women, ‘Sexual Violence and Armed Conflict: United Nations Response.’

<sup>1367</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, ‘Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Final Report’ (submitted by Special Rapporteur Gay J McDougall 22 June 1998) UN Doc E/CN.4/Sub.2/1998/13, at para 8.

<sup>1368</sup> Niarchos, ‘Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia’; Judith Gardam, ‘A Feminist Analysis of Certain Aspects of International Humanitarian Law’ (1992) 12 Australian Yearbook of International Law 265.

<sup>1369</sup> Valerie Oosterveld, ‘The Making of a Gender-Sensitive International Criminal Court’ (1999) 1 International Law FORUM du droit international 38, at 39.

<sup>1370</sup> Article 5 ICTY Statute; Article 3 ICTR Statute.

<sup>1371</sup> See Helen Durham, ‘International Humanitarian Law and the Protection of Women’ in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War* (Martinus Nijhoff, Leiden 2005), at 99; Anne-Marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia, Cambridge 2005), at 220-223.

Yet, despite these welcome strides in enforcement, in reality rape and sexual violence are still an endemic consequence of conflict, which is treated as ‘extracurricular, as just something men do.’<sup>1372</sup> Indeed, recent times have seen the proliferation of rape as a deliberate weapon with which to target local populations to achieve ethnic cleansing,<sup>1373</sup> and it is well established that rape is used as a strategy of war in a deliberate and organised fashion to strike fear and dismay into civilian populations.<sup>1374</sup> Eisenstein calls this ‘a form of war in yet another inhumane form; an integral form of war rather than an effect.’<sup>1375</sup> This method of warfare was brought to mainstream attention during the conflict in the former Yugoslavia when reports of mass camps holding women prisoner in order to rape and impregnate them horrified the world, again conveniently fitting within the genocide narrative.<sup>1376</sup>

Accordingly, whilst the efforts of the women’s lobby have had positive consequences for law’s ability to provide justice for the victims of sexual violence during war, it is questionable whether legal provisions and prohibitions can ever provide adequate protection or ever prevent gender violence from occurring during conflict. Such awareness has thereby prompted a schism in feminist camps, whereby the traditional feminist project through liberal feminism continues to push for further legislative protection that would situate gender crimes on a par with grave breaches of the Geneva Convention. In opposition to both the liberal and hawkish feminist projects therefore emerges a strand of postmodern feminist discourse, which questions not only the ability of the law to redress gender violence, but the desirability of fixating on such violence.<sup>1377</sup> The remainder of this chapter considers and utilises this alternative feminist discourse to mount a challenge against those who argue that war can be an effective tool with which to curb human rights

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<sup>1372</sup> Catharine Mackinnon, *Turning Rape into Pornography: Postmodern Genocide*, in Alexandra Stiglmayer and Marion Faber (eds), *Mass Rape: The War against Women in Bosnia-Herzegovina* (University of Nebraska Press, Lincoln 1994), at 80.

<sup>1373</sup> See UN Security Council ‘The Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)’ (6 May 1994) UN Doc S/1994/674, which concluded that there was an overriding policy advocating the use of rape as a method of ethnic cleansing.

<sup>1374</sup> See UN SC Res 1820 S/Res/1820 (2008).

<sup>1375</sup> Eisenstein, *Sexual Decoys: Gender, Race and War in Imperial Democracy*, at 28.

<sup>1376</sup> See for e.g. ‘Report on the Situation of Human Rights in the Territory of the Former Yugoslavia’ (Note by the Secretary-General 26 February 1993) UN Doc A/48/92-S/25341.

<sup>1377</sup> See Nicola Henry, ‘The Fixation on Wartime Rape: Feminist Critique and International Criminal Law’ [2013] *Social & Legal Studies*.

abuses because legal protections mean that force used by the West does not impact negatively on civilians.

#### **4. The Postmodern Feminist Project: An Alternative Approach?**

The postmodern feminist project engages much more widely and critically with gender crimes in international criminal law. It questions whether gender provisions and the specific protections given to women are in fact desirable. The crux of this argument is that feminists may be putting too much faith in the ability of law to protect women from rape and other gender harms. In this vein, Nicola Henry questions whether focussing on the redefining of rape as a grave breach or serious harm implies a misguided faith in law's potential to adequately redress rape.<sup>1378</sup> Indeed the very benign motivation to ensure that rape is taken seriously in international law may in fact have the troubling unintended effect of creating hierarchies of harm and also elevating the stereotype of the 'authentic victim'.

##### **4.1. Unintended Consequences of the Binary Rape Narrative**

###### ***4.1.1. Privileging the 'authentic' victim***

Like domestic legal systems, international law has now become over-reliant on a dominant narrative of the 'authentic' rape victim. In this narrative Ni Aolain tells us that other gender crimes are ignored<sup>1379</sup> and instead the 'authentic victim has come to dominate'.<sup>1380</sup> Female rape victims have become shorthand for the horrors and abuse inflicted on civilians in conflict situations yet only when they fit the stereotype of helpless innocent victims. This is because the bestowal of victim status revolves around constructions of worthiness, and to be considered worthy the victim must convey innocence and be 'rescue-able'.<sup>1381</sup> As Meghana Nayak notes 'good victims are vulnerable and helpless in the face of evil, while bad victims choose to remake the relationship between sexuality and power.'<sup>1382</sup> It is this authentic victim that becomes synonymous with the extreme victim paradigm. This is alluded to by Chandler who highlights how aid agencies deplored the tactics of Western journalists who frequently contacted them looking for a 'rape victim to interview' because

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<sup>1378</sup> *ibid.*

<sup>1379</sup> Fionnuala Ní Aoláin, 'Political Violence and Gender During Times of Transition' (2006) 15 *Columbia Journal of Gender & Law* 829.

<sup>1380</sup> Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics'.

<sup>1381</sup> Jiwani, 'Trapped in the Carceral Net: Race, Gender, and the "War on Terror"', at 21.

<sup>1382</sup> Nayak, 'Orientalism and 'Saving' US State Identity after 9/11', at 55.

that was the story that the news networks, and indeed the public had come to expect.<sup>1383</sup> This binary representation of wartime victimisation is one of the concerns of postmodern scholarship.<sup>1384</sup> While this criticism does not intend to deny the very real crimes that are committed against such victims, the danger of this narrative is that it can have the effect of positioning some victims as ‘authentic’ thereby silencing other less conventional narratives, and obscuring the role that colonialism, capitalism and sexism play.<sup>1385</sup>

Moreover, the privileging of certain victims also creates a perfect victim paradigm. One danger of this is that it implies that only women are raped, and therefore can minimise rape and sexual assaults against men, which can also be a real consequence of conflict.<sup>1386</sup> It is notable that in *Tadic*, the ICTY *did* convict the accused of the sexual assault and genital mutilation of male detainees,<sup>1387</sup> yet despite this, Doris Buss claims that certain rapes are ‘paradigmatic or overtly visible in international criminal law’<sup>1388</sup> because they subscribe to this one-dimensional narrative. She writes how the rapes of Hutu men and women have not been pursued by the ICTR because the ‘authentic’ victim in the Rwandan conflict is the female Tutsi genocide victim.<sup>1389</sup> Similarly C.Sarah Soh argues that such a narrative operates in regard to the Japanese ‘comfort’ women and allows the blame of this tragedy to be laid squarely on imperial Japan. Such simplified vilification works to obscure the ‘more complex and varied lived experiences anchored to the painful sediment of [the women’s] lifelong suffering.’<sup>1390</sup> Such experiences include the effect of Korean patriarchy and the strict moral codes that saw many of these women ostracised by their own families.

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<sup>1383</sup> Chandler, *From Kosovo to Kabul and Beyond: Human Rights and International Intervention*, at 36.

<sup>1384</sup> Kapur, ‘The Tragedy of Victimization Rhetoric: Ressurecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics’.

<sup>1385</sup> Henry, ‘The Fixation on Wartime Rape: Feminist Critique and International Criminal Law’.

<sup>1386</sup> This point is highlighted by Sandesh Sivakumaran in his articles discussing the prevalence of sexual violence against men during conflict. He cautions against a reductivist view that sees only women as victims of rape and highlights the Abu Ghraib abuses wherein male detainees were sexually abused by female guards. Sandesh Sivakumaran, ‘Sexual Violence against Men in Armed Conflict’ 18 (2007) EJIL 2 (2007). See also Miranda Alison, ‘Wartime Sexual Violence: Women’s Human Rights and Questions of Masculinity’ (2007) 33 Review of International Studies 75.

<sup>1387</sup> Prosecutor v Tadic (Judgment) (ICTY) IT-94-1 (26 January 2000).

<sup>1388</sup> Doris Buss, ‘Rethinking “Rape as a Weapon of War”’ (2009) 17 Feminist Legal Studies 145, at 159-160.

<sup>1389</sup> *ibid.*

<sup>1390</sup> C Sarah Soh, *The Comfort Women: Sexual Violence and Postcolonial Memory in Korea and Japan* (The University of Chicago Press, 2008).

#### 4.1.2. *Infantilising women*

A further consequence of feminist advocacy of rape is the unqualified acceptance of the assertion that rape is the worst thing that can happen to a woman during conflict. Both Halley<sup>1391</sup> and Grossman<sup>1392</sup> question this acceptance and highlight how in the case of German women at the end of WWII, for many, rape was not the worst experience they suffered. Halley uses the example of women in Berlin who, in the lead up to German surrender and witnessing the invasion of the Soviet army, forged relationships with Soviet officers or commanders in order to gain food, money or protection. Whilst Halley acknowledges that the majority of these relationships would not have occurred but for the drastic situation, and that for many women they were entirely about ensuring their survival, she is uncomfortable with the knowledge that under today's legal regime, many of these continued encounters and mutually agreed relationships of convenience could be prosecuted as rape.<sup>1393</sup> Dianne Otto refers to such situations as 'survival sex' or 'sex in exchange for payment' and argues that sometime, this may be all that civilians have left to ensure their survival.<sup>1394</sup> Yet the ICC, ICTR, and ICTY have all adopted rules of evidence and procedure relating to rape victim testimony, which stipulate that there can be no defence of consent against charges of sexual crimes where the victims were subjected to or threatened with violence.<sup>1395</sup> This approach was in part a response to initial proposals that there should be a presumption at the ICTY that women did not (and presumably could not) consent, based on the coercive and distorted circumstances of war.<sup>1396</sup> This is also reflected in the ICC's adoption of the newer crime of sexual slavery, which Alona Hagay-Fey notes

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<sup>1391</sup> Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict'.

<sup>1392</sup> Atina Grossman 'A Question of Silence: The Rape of German women by Occupation soldiers' (1995) 72 October 42.

<sup>1393</sup> Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict'.

<sup>1394</sup> Dianne Otto, 'Making Sense of Zero Tolerance Policies in Peacekeeping Sexual Economies'.

<sup>1395</sup> Rule 96(ii) of the ICTY Rules of Procedure; Rule 96 of the ICTR Rules of Procedure and Evidence, 29 June 2005, UN Doc IT/32; Rule 70 of the Rules of Procedure and Evidence of the International Criminal Court, 3-10 September 2000, Doc ICC-ASP/1/3.

<sup>1396</sup> For a discussion of the issue of consent as a defence at the ICTY see Rhonda Copelon, 'Proposals relating to the Prosecution of Rape and Other Gender-Based Violence to the Judges of the International Criminal Tribunal for the Former Yugoslavia' in Jennifer Green et al, 'Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique' (1994) *Hastings Women's Law Journal* 171, at 201-203; Patricia Viseur Sellers, 'The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law' in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (Kluwer Law International 2000).

has become the ICC prosecutor's preference when prosecuting rape and other sex crimes.<sup>1397</sup> She posits that this preference is because the term slavery 'embeds in it the presumption of lack of consent.'<sup>1398</sup> As such, Halley notes that whilst the adopted provision is well intended, it has the effect of denying agency and the ability to consent to women in situations where agency may be the only autonomy they have left.<sup>1399</sup> It also furthers the traditional legal paternalism, whereby women, like children, must be protected, not only from the enemy, but from their own decisions.

This argument is similar to those frequently advanced by certain feminist scholars that the recent trend towards legislating to address women's concerns has resulted in a paternalistic approach, which only serves to further entrench gender roles and maintain binary stereotypes of women as victims<sup>1400</sup> as evidenced in the shorthand of the heroic narrative. Indeed Otto argues that such paternalism can be seen throughout CEDAW and also in early anti-trafficking discourse.<sup>1401</sup> She argues that such a protectionist approach is rooted in male anxiety over female sexuality. Likewise Heathcote asserts that: 'production of a restrictive female sexuality, vulnerable to attack from rogue male actors, is a reiteration of the sexed and gendered discourse which was prevalent in security discourse prior to the global war on terrorism.'<sup>1402</sup>

#### **4.2. Is the Protectionist Approach of Modern International Courts Detrimental to Women?**

Engle is similarly critical of the dominant rape narrative within international criminal law, which, she argues, postulates that women can only ever be *victims* of rape. It obscures and obfuscates other narratives whereby women may choose to have consensual sex with men.<sup>1403</sup> Indeed Halley demonstrates how this can be problematic by removing the agency

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<sup>1397</sup> Alona Hagay-Fey, *Sex and Gender Crimes in the New International Law Past, Present, Future* (Martinus Nijhoff Publishers, Leiden 2011) at 150.

<sup>1398</sup> *ibid.*

<sup>1399</sup> Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict'.

<sup>1400</sup> See Pratt, 'Reconceptualizing Gender, Reinscribing Racial-Sexual Boundaries in International Security: The Case of UN Security Council Resolution 1325 on "Women, Peace and Security"'.  
<sup>1401</sup> Otto, 'Disconcerting "Masculinities": Reinventing the Gendered Subject (S) of International Human Rights Law', at 119.

<sup>1402</sup> Heathcote, 'Feminist Reflections on the End of the War on Terror', at 20.

<sup>1403</sup> Engle, 'Feminism and Its (Dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina'; Karen Engle, 'Judging Sex in War' (2008) 106 *Michigan Law Review* 941.

and capacity of women to consent or choose to have sex with their captors.<sup>1404</sup> She cites the *Kunarac* trial<sup>1405</sup> where the accused was alleged to have committed mass rape of Bosnian Muslim girls held in detention centres in Foca. The accused raised the defence of consent, stating not only that the victim had consented but that she had ‘seduced’ him.<sup>1406</sup> The victim testified to a closed session of the court that she did take the lead with the accused, but did so because her captors threatened to kill her if she did not satisfy him.<sup>1407</sup> However feminists such as Halley and Engle are uneasy that the blanket dismissal of consensual sex means that men who engage in consensual sexual activity with enemy women can be convicted of torture or sexual slavery.<sup>1408</sup>

Such argument against removal of women’s agency recalls the feminist debates over anti-trafficking legislation such as the 2000 Palermo Protocol to the Transnational Organised Crime etc...<sup>1409</sup> Such legislation, while welcomed by many feminists, is often criticised by radical feminists for drawing a false distinction between forced trafficking and prostitution.<sup>1410</sup> Yet anti-trafficking laws have also been criticised by other feminists who argue that such protectionist legislation makes sweeping assumptions about women who enter the sex trade.<sup>1411</sup> While such legislative initiatives exist purportedly to protect women they tend to only view women as victims and fail to acknowledge or engage with women who wish to commodify their bodies across international borders.<sup>1412</sup> In this vein Engle notes how:

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<sup>1404</sup> Halley and others, ‘From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism’.

<sup>1405</sup> *Kunarac* at al Trial Chamber Judgment.

<sup>1406</sup> *Kunarac* et al Trial Chamber Judgment, at para 970.

<sup>1407</sup> *ibid.*

<sup>1408</sup> Halley, ‘Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict’; Engle, ‘Feminism and Its (Dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina’.

<sup>1409</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Conventions Against Transnational Organised Crime (2000).

<sup>1410</sup> For a discussion of trafficking and prostitution see Catharine MacKinnon, ‘Prostitution and Civil Rights’ (1993) 1 *Michigan Journal of Gender & Law* 13; Kathleen Barry, *Female Sexual Slavery* (New York University Press, New York 1984).

<sup>1411</sup> Vanessa Munro and Jane Scoular, ‘Abusing Vulnerability? Contemporary Law and Policy Responses to Sex Work in the UK’ (2012) 20 *Feminist Legal Studies* 189; Ratna Kapur, ‘Faith and the “Good” Liberal: The Construction of Female Sexual Subjectivity in Anti-Trafficking Legal Discourse’ in Vanessa E Munro and Carl Franklin Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish, Abingdon 2007); Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism*; Jo Doezema, ‘Ouch! Western Feminists’ “Wounded Attachment” to the “Third World Prostitute”’ (2001) 67 *Feminist Review* 16.

<sup>1412</sup> Mary Joe Frug, ‘A Postmodern Feminist Legal Manifesto (an Unfinished Draft)’ (1992) 105 *Harvard Law Review* 1045; Vanessa Munro, ‘Stopping Traffic? A Comparative Study of Responses to the Trafficking

The restrictions on trafficking raise questions about the representation of women with regard to trafficking, whether women should be able to sell their sexuality both here and abroad, and the extent to which anti-trafficking efforts function to restrict migration and avert attention from the socioeconomic pressures that make women and children vulnerable to trafficking.<sup>1413</sup>

Once again, it is clear that even progressive legislation that purports to engage with feminists and gender issues is often still grounded in patriarchal assumptions over women's roles and anxiety about their sexuality. Indeed in a report on UNSC Resolution 1325 the UN itself describes women as 'a vulnerable subset',<sup>1414</sup> language that Heathcote calls misguided.<sup>1415</sup> Furthermore, as Nayak highlights, President Bush's much lauded support of the anti-trafficking legislation actually relied on nineteenth century patriarchal religious rhetoric that was grounded in a discourse of fear over immorality.<sup>1416</sup> As such, the post-modern critique of international law can help to bring a further critical approach to the study of women in international law, and suggests that greater legislative initiatives are not necessarily evidence of a move towards gender equality in international law. Such scholarship also assists us in answering the question as to whether war is good for women, noting that legislative responses such as UNSC Resolution 1325 not only serve to normalise war and the masculinist protection paradigm,<sup>1417</sup> but also normalise 'the same radicalised and sexualized hierarchies that underpin the "War on Terror,"'<sup>1418</sup> which perpetrate the view that war is good, ignoring the fact that war is a cause of women's oppression rather than the solution.

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in Women for Prostitution' (2006) 46 *British Journal of Criminology* 318; Vanessa E Munro, 'Of Rights and Rhetoric: Discourses of Degradation and Exploitation in the Context of Sex Trafficking' (2008) 35 *Journal of Law and Society* 240; Julia O'Connell Davidson, 'Will the Real Sex Slave Please Stand Up?' (2006) 83 *Feminist Review* 4.

<sup>1413</sup> Engle, 'Liberal Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States', at 439.

<sup>1414</sup> Editorial, 'Cross Cutting Report on Women, Peace and Security' Security Council Report (2) October 2010 available at <http://www.securitycouncilreport.org/cross-cutting-report/lookup-c-glKWLeMTIsG-b-6239031.php>

<sup>1415</sup> Heathcote, 'Feminist Politics and the Use of Force: Theorising Feminist Action and Security Council Resolution 1325', at 28.

<sup>1416</sup> Nayak, 'Orientalism and "Saving" US State Identity after 9/11', at 55.

<sup>1417</sup> Pratt, 'Reconceptualizing Gender, Reinscribing Racial-Sexual Boundaries in International Security: The Case of UN Security Council Resolution 1325 on "Women, Peace and Security"', at 777; Cohn, 'Mainstreaming Gender in UN Security Policy: A Path to Political Transformation?'

<sup>1418</sup> Pratt, 'Reconceptualizing Gender, Reinscribing Racial-Sexual Boundaries in International Security: The Case of UN Security Council Resolution 1325 on "Women, Peace and Security"', at 779.

## **5. Conclusion**

This chapter began by exploring the alliance between feminists and military hawks, questioning if the resultant hawkish feminism benefits women. It did so by challenging the main assumption on which hawkish feminism is based: namely that military force can secure liberation for women. It examined and analysed arguments that military action is a viable tool for promoting and securing women's rights and highlighted the plethora of academic scholarship that describes how war can create a devastating tear through the fabric of women's lives. In addition to the physical risks of residing in a conflict zone, this scholarship demonstrates that there are many indirect effects that can have lasting harmful effects on women. As well as the practical hardships, these effects are also problematic symbolically because the evidence demonstrates that patriarchy is further entrenched during and after times of conflict, and women who experience oppression during peacetime experience this much more during conflict. Therefore, promoting or acquiescing to military solutions is very much at odds with feminist philosophy, and it is therefore difficult to justify militarism in the face of such overwhelming evidence that documents the harmful effects of war on women. As such this chapter disputes the idea that war can be framed as an unqualified positive outcome for women, because the evidence overwhelmingly suggests that women are made more vulnerable through conflict both in terms of their physical integrity and their status in society.

Yet despite the abundance of such evidence, this chapter notes that there is still a dominant narrative which frames military intervention as a positive solution with which to address human rights and gender abuses. This narrative operates to present complex geo-political situations as mere crises which can be solved by Western intervention. Indeed such framing allows feminist hawks to overlook the fact that conflict is a main contributor to oppression. This chapter further notes how those advocating military intervention often seek to dispel any counter arguments by highlighting the protections afforded to civilians, particularly women and children, by international humanitarian law to suggest that women are afforded strong protection during conflict. However, feminist legal scholarship argues that such a position fails to appreciate the gendered nature underpinning humanitarian law or how the socially symbolic construction of women in its provisions is problematic. To highlight this gendered construction in international humanitarian law this chapter focused

on the problem of systematic sexual assault and rape of women during war. It did so to highlight the fact that, despite greater awareness and sensitivity of the proliferation of rape during war, and the adoption of a stronger legal regime with which to prosecute offenders, such remedies afford little protection to women during violence, or redress after the conflict has ceased. Furthermore, this chapter outlined some of the postmodern feminist approaches to international law, which argue that enhanced legal protections for women can obscure the reality and promote the myth of legal protection for women during war. They also argue that such legal protections can in fact entrench paternalism by cementing the assumption that a woman's only role during war is as a victim.

This chapter concludes that despite hawkish protestations that intervention can be clean and humanitarian, overwhelming evidence suggests the contrary. Further, despite the attempt to cite progressive jurisprudence as evidence of the protection of women, this chapter concludes that international humanitarian law is not capable of offering protection or redress to individual women and should therefore not be used to promote the myth that war is without risk to civilians.

Ultimately this chapter set out to dissect the unholy marriage between feminists and hawkish interventionists. While conceding that feminist hawks are motivated by strong desires to advance women's rights, this chapter is unconvinced of their methods. As such, rather than celebrating this 'marriage' this chapter cautions against the motivations of those who co-opt feminist methods in order to fight terrorism, and concludes that for feminist legal scholars as well as activists, aligning with military hawks is a dangerous and regressive approach.

## Chapter 6 Conclusion

### Thesis Summary

This thesis has argued that Operation Enduring Freedom, the first military operation in the so called ‘War on Terror’ was not ostensibly legal under the relevant tenets of international law and so necessitated legitimation through the deployment of a gendered heroic narrative. Chapter 1 explored the requirements under customary law and the UN Charter for a use of force to be legal. It concluded that since the US-led OEF was not authorised by the UN Security Council, the only available justification was the doctrine of self-defence as enshrined in Article 51 of the UN Charter. Chapter 1 then explored the conditions under which a state may legally resort to self-defence, namely when it has suffered an armed attack. It discussed whether the 9/11 attacks constituted an armed attack and concluded that they did not. As such, Chapter 1 concluded that OEF did not constitute an exercise in self-defence under the UN Charter. Despite this, the chapter noted that the US and its allies had gone to extensive lengths to invoke an aura of legitimacy for their actions through invoking the language of international law and also by co-opting the discourse of humanitarianism. As such, although the military action was not legal under the law governing self-defence, these states took care to act as though they were operating within the framework of the law. Chapter 1 thus concluded that this dubious legality was remedied in national and international discourse by presenting the operation as a humanitarian mission as well as an enforcement one.

Having established that OEF could not necessarily be justified as self-defence, this thesis set out to ascertain by what means OEF came to be conceptualised as legitimate in public discourse. Thus the remainder of the thesis analysed the argument that the operation was legitimated through the promulgation of a heroic narrative that presented the US and its military as the heroic saviours of oppressed Afghan women. So accepted was this narrative as the central means of understanding the operation that it was virtually impossible to dislodge. Yet, as this thesis argued, this narrative was premised on the idea that military intervention would benefit, and liberate, Afghan women. In order to interrogate the power and appeal of this narrative as a means of understanding, and thereby legitimating, OEF, Chapter 2 of this thesis firstly outlined the realities of life in Afghanistan. It briefly

summarised the history and culture of Afghanistan, drawing on the work of historians, sociologists and anthropologists as well as reports from NGO's and international organisations to highlight the continuous state of civil war and the effect that this had on civic society. It then outlined how many of the situations under which Afghan women live, are in fact a result of very longstanding highly conservative cultural norms which pre-date Taliban rule. This meant that contrary to what was claimed in the media by those proposing to liberate women, the oppression under which Afghan women lived could be attributed to a myriad of complex social factors, many outwith the understanding of the Western media. As such, Chapter 2 concluded that the binary narrative promulgated by the Western media, that the Taliban and their fundamentalist ideology were to blame for the restrictions imposed on women, was not entirely factually accurate. Instead the chapter highlighted how many of the restrictions on women's behaviour were in place before the Taliban came to power, as most of them reflected the dominant cultural and religious codes that govern life in Afghanistan.

Chapter 2 then outlined the legal changes and new constitutional framework that had been adopted in Afghanistan by the post-Taliban regime. It highlighted that although there was now ostensible legal protection for women, this had failed to actually translate into protection for Afghan women because traditional patriarchal understandings were still dominant. The chapter concluded that for many women in Afghanistan, life is indistinguishable now from life under the Taliban regime. This was due to a number of complex factors, including corruption, misogyny, economics, and a patriarchal culture, but mainly the continuing power and influence of the local warlords and commanders who controlled parts of the country during its long civil wars. As such, Chapter 2 concluded that there had been very little change for the people of Afghanistan, as the UN agencies and transitional authorities lacked the power to tackle any of the root problems the country faced. Chapter 2 thus concluded that the removal of the Taliban had failed to bring about any lasting changes to the lives of the majority of Afghan women. Yet despite this, the removal of the Taliban was presented as an unqualified good, which would in itself and inevitably allow Afghanistan to function as a liberal, developed Western state.

In view of the assertion that OEF failed to liberate the women of Afghanistan, Chapter 3 of this thesis then engaged in a theoretical dissection of the heroic narrative underpinning OEF. The Chapter sought to unravel the attraction of this narrative as a framing of the military intervention in Afghanistan. It engaged with Orford's critical legal scholarship in order to outline the requirements for the heroic narrative to operate and how the 9/11 attacks and subsequent 'War on Terror' lent themselves especially well to this framework. It then argued that the heroic narrative holds a particular attraction to Western audiences because it serves to frame military interventions in foreign states as benevolent humanitarian operations. Such attraction hints at a colonial hangover whereby the justification for intervening in developing states is presented as a concern for Third World peoples, yet is actually motivated by concern for the West. As such, this thesis asserts that the concern for Afghan women is merely based on a fantasy of the West and orientalist assumptions of the East, where the problems of the developing world are presented as simplistic issues that military intervention will fix. The thesis therefore argued that, while such framing was understandable and attractive, the heroic narrative is dangerous as it is ultimately emotionally self-serving for the West. It also demonstrated how this narrative serves to silence other less favourable analyses of the 'War on Terror'. In view of this, the thesis then highlighted the problems arising from the heroic narrative's almost unanimous endorsement, even by many feminists. The attraction and seduction of this framing meant that Afghan women were reduced to a homogenous stereotype of victim. This lack of engagement with actual Afghan women, particularly given their own calls not to engage militarily, was highlighted and the consequences of this were identified.

Thus, in view of the suggested illegality of OEF, and the limits of the heroic narrative's capacity to offer a realistic critique or understanding of military intervention, Chapter 4 of this thesis sought to explore how and why the 'War on Terror' came to be enveloped in the heroic narrative and what such framing achieved as regards the legitimacy of the operation and wider 'War on Terror'. The chapter outlined the rhetorical process by which the 9/11 terrorist attacks were transformed into a call to arms. It discussed how the language and phrasing of politicians in the days and weeks after 9/11 was deliberate and targeted and how it was rooted in a sense of fear and paranoia, which has been proven to make the electorate more malleable. Chapter 4 especially highlights how 9/11 could have

been conceptualised differently, but notes the determination to conceptualise the 9/11 attacks as unique and taking place out of time and history. As such the chapter outlined the basic theory of propaganda in order to demonstrate that throughout time it has always been necessary to sell wars to the public and that this has been done in a remarkably consistent manner. It therefore argued that the narrative framing of 9/11 within the heroic narrative merely operated as a sophisticated form of propaganda in which a fearful public were told that military action was necessary against an evil enemy. Failure to support this military operation would result in the threat of further attacks against the US, and also allow the evil enemies to continue to abuse their own people. In the face of such rhetoric the chapter then argued that it was difficult for the public to conceive of OEF as anything other than necessary and altruistic mainly because of the media's general acceptance and promulgation of the official narrative and the tendency of mainstream media to silence any critical discourse.

Chapter 4 then turned to how the 'War on Terror' was legitimated and sold under different guises in both the US and UK. It argued that in the US the heroic narrative was analogised as the new Cold War. This in turn meant that the both the Taliban and Al Qaeda could be thought of as the evil, intent on attacking the US way of life, while OEF itself was conceptualised as a reimagining of WWII. This meant that the rhetoric and framing of OEF resonated strongly with the American public. OEF was conceptualised as an unqualified good. Similarly in the UK, OEF was framed within the heroic narrative, but in a more subtle and slightly altered manner. The UK framing drew on fantasies of colonialism and constructed the UK as the world's moral leader. The chapter explored how this was enveloped in New Labour's ethical and humanitarian policy. This meant that supporting war against the Taliban, who oppressed women, allowed the UK to appear to be targeting some of the injustices in the world and allowed the British public to participate in a fantasy of ethical foreign policy. The chapter ultimately concludes that such framing particularly resonated with the British and American public, and fuelled support for the 'War on Terror', because there was also very little reason not to support it. Modelling the heroic narrative on methods of propaganda meant that there was remarkably little critical discourse on OEF removing any possible counter narrative. Ultimately this meant that

there was no need for an examination of the legal credentials of the operation, because how could an operation grounded in such altruism ever possibly be illegal?

Finally, as a further rejoinder to the argument that OEF was for the benefit of women and to look beyond the heroic framing of OEF and argue that the rescue of Afghan women was a convenient alibi, this thesis then turned to the wider assertion that war is rarely ever in women's interests. It availed itself of critical feminist scholarship to argue that feminist calls for military intervention in order to liberate women are premised on simplistic understandings of violence and often rely on a perfect victim paradigm. As such, Chapter 5 explored the troubling relationship between feminists and military hawks. It traced how feminists had been seduced by the power of military discourse as a panacea to liberating oppressed women. As such the chapter cautioned against unqualified acceptance of this discourse and argued that, as war and conflict are known to present serious consequences to women, it is problematic to support military operations as the solution to complex structural inequalities that many women face. In order to further evidence this assertion, the chapter then utilised the example of sexual violence as a framework to explore how attempts at legalising and criminalising harms committed during war also subscribe to this fallacious narrative. The chapter then noted how sexual violence against women during conflict is an endemic problem and even though the ICC, ICTY and ICTR have produced progressive jurisprudence that seeks to reconceptualise many of these harms as criminal acts and prosecute them accordingly, this turn to judicialisation does little to actually stem or prevent such harms from occurring. While the feminist successes in criminalisation of sexual violence are noted, the chapter cautioned against putting too much faith in law's ability to manage violence against women during conflict. As such, the chapter engaged with post-modern feminist approaches in order to reject the approach of the hawkish feminists.

Chapter 5 then also highlighted that one of the consequences of feminist engagement with conflict was the solidification of paternalistic ideologies, which is again problematic for feminism. It took as an example women's agency as regards sexual activity with enemy men and explored the governance-feminists approach to this in their lobbying at the drafting of the Statute of the ICC. It argues that such an approach displays elements of the

heroic narrative, in that, this too conceptualises women as homogenous infantilised victims. It argues that such a protectionist approach is deeply at odds with feminist beliefs in agency and supporting of women's lived experiences. By failing to acknowledge the differences in women's lived experiences and refusing to engage with the choices of women, in particular those who engage in sexual activity with men for forms of remuneration or protection, the governance feminism model can be accused of patronising women and being overly protectionist. Accordingly, the chapter concludes that, even the ostensibly progressive, women-friendly legal regime for prosecuting violence which arises out of conflict fails to address root problems of wartime gender violence. Further, conflict is all too often a situation that disproportionately affects women and as such can never be in their interests. Therefore, the feminist hawks' collusion with power, particularly in relation to the 'War on Terror', is especially damaging.

### **Key Conclusions**

The war in Afghanistan was justified by recourse to a gendered heroic narrative in which the US-led coalition liberated the oppressed women of Afghanistan. However, this thesis maintains that war is never in the best interests of women, even when couched in rhetoric that insists that it is so. Nevertheless, the 'War on Terror' was almost universally perceived as being in the interest of Afghan women. The crux of this thesis was therefore to explore and explain the reasoning behind such an axiomatic position. As such, this thesis posited that the framing of OEF as beneficial to women was accepted because the appeal of the heroic narrative meant that it was difficult to challenge this dominant construction that frames military intervention as a positive solution to human rights and gender abuses. Indeed the lure of the heroic narrative is so seductive that it obscures the reality that war is often a contributor to women's oppression and instead it presents the view that intervening militaries, usually Western, are benign and humanitarian.

In view of such a problematic and inaccurate dogma this thesis sought to question why many feminists chose to endorse the 'War on Terror'. It concluded that even many of those commentators who historically highlighted how the political establishment rarely prioritised women's rights and who were often sceptical of hawkish conservatives were, nevertheless, fatally seduced by the heroic narrative. Such 'conversion' is problematic and

worrying because the feminist endorsement provided a convenient veneer of legitimacy to the premise that OEF was intended to liberate women. This veneer further elevated the narrative in public discourse and so serves as a cautionary warning against endorsing future military operations.

This thesis further concludes that feminist engagement with the war project is deeply problematic and founded on misguided principles. It demonstrates how the feminist project's focus on enhancing the legal protection of women during war actually served to obscure the brutal reality of conflict and was in danger of promoting a myth that war can be pain free and that women can be protected. This myth is dangerous because it once again allows hawkish conservatives to continue to advocate military interventions under the guise that they are not harmful to women. This thesis also highlights that a related problem is that the construction of women as victims in need of protection actually entrenches women's role as victims and is also often based on orientalist and paternalistic notions, which once more reify and promulgate the heroic narrative's casting of women as damsels in distress.

This thesis therefore criticises the deployment of the heroic narrative and the almost universal acceptance of this narrative drawing attention to the lack of sustained academic critique. It dismisses claims that the 9/11 attacks were a unique situation or that the recourse to military force was founded on anything other than retaliation. Instead it argues that OEF was justified in the same way that wars are always justified – by using propaganda tools that close discussion and dissent of official policy and narratives, and frame war as altruistic or for protecting a way of life from an evil enemy. OEF is therefore a classic example of such framing. The use of the heroic narrative was extremely successful in framing the intervention as altruistic and humanitarian. It dissociates the operation from the realities and consequences of conflict. This works as a method of propaganda in making this conflict seem different from all the rest by highlighting the unique circumstances which make war the only solution with the Western military portrayed as heroes rather than invaders. Such an approach closes discussion and so the parties of the conflict are reduced to stereotypes of 'good guys' and 'bad guys', evidenced

through each's treatment of women. The failure of the academy to adequately interrogate this is highlighted.

This thesis therefore concludes that recourse to the heroic narrative as justification for OEF is deeply problematic as it oversimplifies complicated geo-political issues; reasserts a hawkish, conservative masculine approach to international law and international relations, and co-opts the language of human rights and women's rights, while doing little to further these causes. More worryingly, the unquestioning acceptance of this narrative as a justification serves as a barometer of how the ideology of neo-liberal interventionism maintains a grip on Western policy making. It also makes a mockery of the international legal regime that seeks to limit the use of force by allowing certain powerful states to sidestep legal safeguards and instead frame military interventions as 'legitimate' on the basis that they are enforcing human rights standards.

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