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The Impact of the Laws of War in Contemporary Conflicts

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My subject is the impact of the laws of war in certain wars of the post-Cold War period in which the US-led coalitions have been involved, up to and including Iraq in 2003. The central questions I want to address are simple:

- a. Did the coalition forces in these wars make serious efforts to comply with the laws of war?
- b. Did the forces opposing the US-led coalitions make serious efforts to comply with the law?
- c. Is there a case for observing the law when fighting an adversary not observing the rules?
- d. Have failures to observe the laws of war become a basis for justifying uses of force?
- e. Are revisions to the laws of war necessary?

1. Four wars

The main focus of what follows is on four international armed conflicts of the post-Cold War period:

- The War over Kuwait (1990-1)
- The War over Kosovo (1999)
- The War in Afghanistan (2001-)
- The War in Iraq (2003 ongoing)¹

These wars have certain similarities. In all of them US-led coalitions have engaged in hostilities – though the coalitions have involved combat forces from progressively fewer countries.² In all, the US-led forces had more or less complete command of the air, and used air power (including precision-guided munitions) extensively. In all, they were fighting against one essentially third-world state that was more or less isolated diplomatically. In all, there was at some stage a civil war or regional rebellion ongoing in the country concerned, as well as an international war. In short, these were thoroughly unequal contests.

¹ I have deliberately not followed the common and ethnocentric practice of referring to the events of 1990-91 as 'the first Gulf War' and those of 2003 as 'the second Gulf War'. If there was a 'first Gulf War', it was the Iran-Iraq War of 1980-88, which was a more catastrophic event for both societies than either of the subsequent wars.

² I have used the term 'coalition forces' here as convenient shorthand for the US-led forces in all four wars. As regards Iraq in 2003, it is questionable whether the term is appropriate to describe what is principally a 'coalition' of only two armed forces, from the US and UK, with the addition of a few Scud-hunting Australian commandos in the western desert, and Polish troops assisting US Navy Seals in the south. The use of the term was much criticized, mainly because it was seen as implying the active involvement in the conflict of a larger grouping of countries than was in fact the case.

There were other similarities. In all, there was a predominantly Muslim population in at least part of the theatre of operations, and in at least one case (Kosovo) the protection of that population was a principal purpose of the military action. In all, the US and its allies brought military pressure to bear, not only on the armed forces of the adversary, but also on the power centres of the adversary's regime. In all, the US-led coalition succeeded in attaining its principal stated goals. In the first three cases, the ending of the major phase of hostilities was followed by a significant UN or UN-authorized role in the country concerned.

This survey necessarily excludes many key aspects of these four wars. For example, it completely neglects naval operations and the impact of the law on them. It also excludes the role of neutral states and of the law relating to neutrality. It says little about the international campaign against terrorism, except for certain aspects and issues that have arisen in connection with the war in Afghanistan since October 2001. The wars of the past two years in Afghanistan and Iraq are not yet over, and much important information about them has yet to emerge. Even on the subjects it does address, this survey is unavoidably parsimonious in its presentation and analysis of evidence. In respect of laws of war aspects of the first three of these four wars, what follows is partly based on fuller accounts that I have published elsewhere.³

2. *The law*

The law in question is what is variously called the laws of war, *jus in bello*, the laws of armed conflict, and international humanitarian law. I prefer the first of these terms as being the most concise, easily understood, and monosyllabic. Some, including the International Committee of the Red Cross (ICRC) and Amnesty International, prefer the term 'international humanitarian law'. These different terms for the same body of law carry subtly different overtones. In an article published in the *Washington Post* just before the outbreak of the present war David B. Rivkin and Lee A. Casey drew a sharp distinction between these two terms, stating for example that a strategy of striking Iraq with massive force would be consistent with the laws of war, but would be criticized by proponents of international humanitarian law.⁴ This purported distinction may distract attention from the central fact that there is just one body of law, even if there are some different names for it and interpretations of it.

It is a mistake to view the law as the unrealistic creation of high-minded idealists. It has been negotiated and agreed by states, including representatives of their armed forces, and it codifies lessons learned in wars and occupations of past centuries. It is not necessarily an impediment to the effective conduct of hostilities. As one US military manual puts it, 'the law of armed conflict complements and supports the principles of warfare embodied in the military concepts of objective, mass, economy of force, surprise and security.'⁵

³ See especially the following three surveys: 'The Laws of War in the 1990-91 Gulf Conflict', *International Security*, Cambridge, Mass., vol. 18, no. 3, Winter 1993/94, pp. 134-181; 'The Laws of War after Kosovo', *Israel Yearbook on Human Rights*, vol. 31 (2001), Martinus Nijhoff, The Hague, [2002], pp. 79-109; and 'The Laws of War in the War on Terror', *Israel Yearbook on Human Rights*, vol. 32 (2002), Martinus Nijhoff, The Hague, [2003], pp. 193-245. (Versions of these last two essays will also appear in the course of 2003 in two volumes in the 'Blue Book' series published by the US Naval War College, Newport RI.)

⁴ David B. Rivkin and Lee A. Casey, article in *Washington Post*, 16 March 2003.

⁵ United States, Department of the Navy (jointly with Headquarters, US Marine Corps; and Department of Transportation, US Coast Guard), *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M, Norfolk, Virginia, October 1995, p. 5-1.

It is also a mistake to assert that the entire corpus of the laws of war necessarily applies in each conflict – even in each international conflict. A few of the rules may not apply because they have fallen into desuetude. Certain agreements may not apply because particular belligerent states are not parties, and the rules in question cannot be considered to represent customary law, binding on all states.

What are the rules indisputably applicable in these wars? They start with the 1907 Hague Regulations on Land War: now almost a century old, and concluded before most of the technology now deployed in and around Iraq was even dreamt of, they are still accepted as customary international law because they spell out important and enduring principles on perennial matters such as the prohibition of looting, treatment of sick and wounded, the conduct of truces and surrenders, and the occupation of the adversary's territory.

Another ancient agreement that retains its legal force and relevance is the 1925 Geneva Protocol prohibiting the use of gas and bacteriological weapons in war. Iraq, the US and other states involved in the Iraq war are parties to this agreement. (Its prohibition of use of these weapons have been reinforced by the prohibitions on possession contained in the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention.) Part of the *casus belli* for the war in 2003 against Iraq originated with its violations of the Geneva Protocol's prohibition of the use of gas and chemical weapons, and the consequent imposition of a disarmament regime on the country.

The four 1949 Geneva Conventions constitute the core of the modern laws of war. They provide detailed rules for the treatment of four types of victims: sick and wounded on land; sick and wounded at sea; prisoners of war; and civilians. They reiterate and elaborate upon many of the Hague Regulations. No less than 190 states, including all the belligerent states in the current Iraq war, are parties to the Geneva Conventions.

Some other agreements on the laws of war have not been formally in force for all participants in all these wars, but have nonetheless had considerable impact on operations. The most significant such agreement is the 1977 Geneva Protocol I, which contains detailed rules on targeting and many other matters. Some 160 states are now parties to this agreement. However, in these wars many key belligerents (including the USA, Iraq and Afghanistan) were not parties to this agreement. The Protocol was therefore not formally in force as between these parties and their adversaries. However, most US allies, including the UK, have by now ratified this agreement: these allies generally seek to implement the Protocol's provisions even in a situation in which it may not be formally in force due to the adversary being a non-party. In addition, the USA has a policy of observing many, but not all, of the provisions of Protocol I: a policy reflected in the rules of engagement used by US forces, and in the US Army's operational law manual.⁶

Some organizations and individuals have tried to imply, heroically but unwisely, that a broader range of provisions has been in force in these wars than would be indicated by a strict interpretation of the state of legal obligations of states based on their specific acts of consent to be bound by treaties. For example, the ICRC issued communications to the relevant governments before each of these four wars in which, in the course of reminding the parties of their legal obligations, it drew extensively on certain provisions of 1977 Protocol I, claiming that they represent customary law. In many cases it is very doubtful whether they do so.

⁶ US Army, *Operational Law Handbook* (2002), International & Operational Law Department, The Judge Advocate General's School, US Army, Charlottesville, Virginia, issued 15 June 2001, ch. 2, p. 5. This annual publication is available at <https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf>

Unfortunately the effect on the governments receiving these communications has been to make them sceptical about legal interpretations coming from ICRC. This is unfortunate as the ICRC has huge legal as well as practical knowledge and expertise on which it can draw in guiding states and assisting victims of armed conflict.

3. *Connection with jus ad bellum*

In any armed conflict it is important to distinguish between the legality of resorting to force and the legality of the way in which such force is used. In strict legal terms, the law relating to the right to resort to the use of force (*jus ad bellum*) and the law governing the actual use of force in war (*jus in bello*) are separate. The *jus in bello* applies to the conduct of belligerents in international armed conflict irrespective of their right to resort to the use of force under the *jus ad bellum*.

Despite the lack of a formal connection between *jus ad bellum* and *jus in bello*, there are certain respects in which they interact in practice.

By observing *jus in bello*, a state or a coalition of states may contribute to perceptions of the justice of a cause in several ways. The following two are simply the most obvious. *First*, in all military operations the perception that a state or a coalition of states is observing recognized international standards may contribute to public support domestically and internationally. *Second*, if the coalition were to violate *jus in bello* in a major way, for example by the commission of atrocities, that would be likely to advance the cause of the adversary forces, arguably providing them a justification for their resort to force. In the course of the four wars that are my focus today, laws of war issues have been repeatedly cited in such a way as to feed back into the question of the legitimacy of the resort to war. For example, in all four wars, media reports and political leaders in some countries presented US bombing as indiscriminate. By contrast, others presented the conduct of coalition forces as restrained and discriminate. Both approaches had obvious implications for how the legitimacy of the military operations concerned was viewed both within the warring states and internationally.

There has been an additional way in which *jus in bello* has been intimately related to the *jus ad bellum*. This arises from the practice of the UN Security Council in repeatedly referring to humanitarian issues. Since early 1991, the question of whether or not external institutions should, on basically humanitarian grounds, organize or authorize military action within a state, whether with or without its consent, has arisen frequently. Within the UN Security Council, this issue (which goes beyond 'humanitarian intervention' narrowly defined) arose most sharply in the following nine cases. In all these cases there were Security Council resolutions (in the years given in brackets in the following list) citing humanitarian considerations, including violations of international humanitarian law, as a basis for action. In all nine cases there was multilateral military action, going well beyond traditional peacekeeping, by armed contingents from outside the country concerned. In all these cases such action, whether or not specifically authorized by the UN, had among its various purposes a stated purpose of implementing the relevant UN resolutions.

1. Northern Iraq (1991)
2. Bosnia and Herzegovina (1992-5)
3. Somalia (1992-3)
4. Rwanda (1994)
5. Haiti (1994)
6. Albania (1997)
7. Sierra Leone (1997-2000)

8. Kosovo (1998-9)
9. East Timor (1999)

There is no claim that this list is exhaustive. Indeed, Security Council resolutions before the interventions in Afghanistan in 2001 and in Iraq in 2003 contained a number of statements about violations of laws of war and other humanitarian norms by these countries. Four of the above nine cases (northern Iraq, Somalia, Haiti and Kosovo) can be considered as having involved at some stage a 'humanitarian intervention' within the strict meaning of the term.

The various connections between the laws of war and the *jus ad bellum* have come in for some criticism. For example, in 1994 the *Harvard International Law Journal* published two articles whose central proposition was that the laws of war had served to legitimize the actions of certain parties in wars, including particularly the coalition cause in the 1991 Gulf War.⁷ While much of their account and analysis was open to criticism, the central proposition is actually quite strong. They utterly deplored this purported legitimization of certain acts of military force, whereas I take a less condemnatory view. That is primarily because there are real benefits that arise from the application of the law in contemporary wars. I will try to illustrate that by mentioning a few key issues, starting with discrimination in bombing, and then looking at that grisly subject, numbers of casualties.

4. Discrimination in bombing

The development by US and allied forces of techniques of bombing that are more accurate than in previous eras has transformed the conduct of war. It has had a major effect on the capacity to use air power in support of land war operations; and it has also improved the prospects of certain air campaigns being conducted in a manner that is compatible with the long-established laws-of-war principle of discrimination.⁸ It has also demonstrated that, at least in some instances, air war can be compatible with the more specific rules about targeting contained in 1977 Geneva Protocol I.

The increased accuracy of air-delivered weapons is a momentous development in the history of war, yet its effects should not be exaggerated, as it cannot guarantee either success or no deaths of innocents. Precision-guided weapons are generally better at hitting fixed objects, such as buildings, than moving objects that can be concealed, such as people and tanks. Civilian deaths will still occur, whether because certain dual-use targets are attacked, because of the close proximity of military targets to civilians, or because of faulty intelligence and human or mechanical errors. In addition, malevolence and callousness can still lead to attacks on the wrong places or people. A further problem with the new type of US bombing campaign is that, in the eyes of third parties, it can easily look as if the US puts a lower value on the lives of Iraqis, Serbs or Afghans than it does on its own almost-invulnerable aircrews: a perception which can feed those hostile views of the US that help to provide a background against which terrorism can flourish.

⁷ Chris af Jochnick, 'The Legitimation of Violence: A Critical History of the Laws of War', *Harvard International Law Journal*, vol. 35, no. 1, Winter 1994; and Roger Normand and Chris af Jochnick, 'The Legitimation of Violence: A Critical Analysis of the Gulf War', *Harvard International Law Journal*, vol. 35, no. 2, Spring 1994.

⁸ The principle of discrimination, which is about the selection of weaponry, methods and targets, includes the idea that non-combatants and those *hors de combat* should not be deliberately targeted.

The principle that bombing should be discriminate was frequently repeated in all four wars. For example, in the first month of US operations in Afghanistan, General Richard B. Myers, the Chair of the Joint Chiefs of Staff, said:

The last thing we want are any civilian casualties. So we plan every military target with great care. We try to match the weapon to the target and the goal is, one, to destroy the target, and two, is to prevent any what we call 'collateral damage' or damage to civilian structures or civilian population.⁹

In all four of these wars the US was sensitive about accusations that it acted indiscriminately. The US asserted on numerous occasions that its opponents had faked civilian damage or, by illegally locating military assets in or close to civilian ones (for example putting gun emplacements next to mosques), had wilfully created a situation in which US bombing, if it went ahead, would be likely to cause civilian damage and incur international criticism.

What is the accuracy of the new airborne weaponry? The evidence from the three earlier wars is persuasive that there has been an extraordinary improvement in accuracy. In Afghanistan in 2001, about 60% of the 22,000 US bombs and missiles dropped were precision-guided: the highest percentage in any major bombing campaign before Iraq in 2003. If, as reported, only one in four bombs and missiles dropped by the US on Afghanistan missed its target or malfunctioned in some way, the 75% success rate was higher than that achieved in the 1991 Gulf War and the 1999 Kosovo War.¹⁰ This was a remarkable achievement. Such limited evidence as we have from the 2003 Iraq war suggests that accuracy in the delivery of airborne weaponry has further improved but is still not free of serious problems.

Despite the improvements in accuracy, there were excellent reasons why in all these cases the bombing campaigns aroused international concern. There were reports of many attacks causing significant civilian casualties and damage. Accuracy in hitting the intended target area did not itself necessarily eliminate such problems. The US bombing of the Amiriya bunker in Baghdad on 13 February 1991 caused approximately 300 civilian casualties. In the Kosovo war in 1999, a railway bridge was bombed when a passenger train was crossing it, with heavy loss of life. In Afghanistan, an ICRC warehouse in Kabul was hit twice, on 16 and 26 October 2001, leading to serious questions about failure to ensure that target lists were properly prepared and, after the first well-publicized disaster, amended.¹¹ The episode was subsequently investigated by the Pentagon.¹² In later incidents in Afghanistan, over a hundred villagers may have died in bombings on 1 December 2001 of Kama Ado and neighbouring villages, not far from the cave

⁹ Richard Myers, interview with *This Week* on ABC TV, 21 October 2001, <http://www.defenselink.mil/news/Oct2001/briefings.html>.

¹⁰ These preliminary figures come from interviews in the US in March 2002, and from Eric Schmitt, 'Improved U.S. Accuracy Claimed in Afghan Air War', *New York Times*, New York, 9 April 2002, p. A-16 (reporting on a detailed Pentagon assessment).

¹¹ Correspondence between ICRC and US Department of Defense, also UK Secretary of State for Defence, November 2001.

¹² On 19 March 2002 a CNN report datelined Washington stated that a preliminary Pentagon investigation into the bombings of the ICRC warehouse indicated that numerous clerical errors had led to the mistaken bombings, that the US commander in charge of the air campaign, Lt. Gen. Charles Wald, had 'exceeded his authority in ordering the strike' of 26 October, and that a key issue was that, while the target had been placed on a 'No Strike List' at the Pentagon, it was inadvertently left off a separate 'No Strike List' maintained by the US Central Command in Tampa, Florida.

complex at Tora Bora.¹³ On 1 July 2002, during an operation to hunt Taliban leaders, US aircraft attacked four villages around the hamlet of Kakrak. According to reports, this episode followed the firing of guns at two wedding parties, and resulted in killing over 50 people and injuring over 100. This led to another Pentagon investigation.¹⁴

In several cases in the two wars in Iraq and also in the Afghan war, bombings led to casualties among coalition forces. Such ‘friendly fire’ incidents further confirm the fact that precision bombing can produce terrible disasters if the intended target is incorrectly identified or a weapon incorrectly ‘locks on’ to the wrong target. ‘Friendly fire’ is not a laws-of-war issue as such. However, it is often a legal issue under the national law of the states concerned, and can lead to national legal action.¹⁵

5. Casualties

If the laws of war are to have a serious effect in reducing the horrors of war, one key test (but by no means the only one), is that observance of the law should contribute to, or at least be compatible with, a reduction in the number of casualties, both civilian and military. It is difficult to arrive at a reliable estimate of the overall number of civilian and military deaths caused in the four wars under consideration. Indeed, these have been the subject not only of dire and inaccurate prediction, but also wild generalizations even after the event. However some basic facts are available.

In all four wars, the casualties of the US and other coalition forces from outside of the country in which hostilities took place were, by historical standards, exceptionally low. The casualties of the adversary’s nationals, both civilian and military, were much higher than those of the US-led coalitions, but still appear to have been lower than many forecasts and estimates. Any claim that a new method of fighting war has been developed, much less costly of life on all sides than earlier forms of warfare, has to be understood in the light of the best available estimates of those actually killed in these wars.

a. *The 1991 Gulf war*

The number of casualties (dead and wounded, military and civilian) in the 1991 Gulf War has become a subject of considerable controversy. Coalition armed forces, all told, suffered a total of some 466 killed, and more than 350 wounded.¹⁶ A significant proportion of the coalition deaths were caused by so-called ‘blue-on-blue’ incidents, often known by the oxymoron ‘friendly fire.’

The controversies concern the number of Iraqi casualties resulting from the coalition air and ground offensives. The number is not known with any degree of precision. The many

¹³ See e.g. the early reports by Richard Lloyd Parry and Justin Huggler in *The Independent*, London, 2 December 2001, also available at <http://www.independent.co.uk>.

¹⁴ Dexter Filkins, ‘Flaws in U.S. Air War Left Hundreds of Civilians Dead’, *New York Times*, 21 July 2002, <http://www.nytimes.com>.

¹⁵ On 13 September 2002 two US pilots who mistakenly bombed and killed Canadian troops in Afghanistan on 18 April 2002 were charged – the first criminal charges against US pilots in connection with the events in Afghanistan. News report in *The Times*, London, 14 September 2002, p. 16.

¹⁶ Figures for coalition military dead: General Schwarzkopf gave a total figure of 466 in testimony to the Senate Armed Services Committee on 12 June 1991. *The Times* (London), 13 June 1991. The same total was given in a report in *Time*, 17 June 1991. This figure appears to include deaths in all types of incident, whether or not in direct combat, and whether or not caused directly by Iraqi hostile action.

military and civilian deaths in the uprisings within Iraq after the end of the war complicate an already confused picture.

As to Iraqi military casualties in the war, there have been many estimates of between 25,000 and 50,000 dead, with the number of wounded at up to 100,000.¹⁷ In May 1991 the US Defense Intelligence Agency (DIA) released an internal estimate (with an error factor of 50 per cent) of 100,000 Iraqi soldiers killed, and 300,000 wounded: figures later disavowed by the Pentagon.¹⁸ Ramsey Clark gives an even higher figure for Iraqi military deaths.¹⁹ In early 1993 John Heidenrich, a former military analyst with the DIA, in an estimate based on a clearer methodology than most, suggested that the total Iraqi military death toll may have been as low as 1,500, with about 3,000 wounded.²⁰ If the number of Iraqi military dead turns out to be closer to 10,000 than 100,000, as does seem possible, it will add strength to claims that the coalition campaign had some success in discriminating between military equipment and military personnel. The coalition did go to exceptional lengths, mainly through leaflets, to inform Iraqi soldiers that they would not be targets if they got out of their military vehicles and walked away from them.²¹

The exact numbers of civilian deaths in the 1991 war are also uncertain and the subject of controversy. The civilian casualties of the whole period of the Iraqi occupation of Kuwait have to be taken into account, and probably total considerably over one thousand.²² Estimates of Iraqi civilian deaths as a result of the coalition bombing campaign have included the very high one, of 150,000, offered by Ramsey Clark.²³ They have also included John Heidenrich's low

¹⁷ Estimates of Iraqi military dead in the war in January-February 1991: a figure of 'between 25,000 and 50,000' was given in William J. Taylor and James Blackwell, 'The Ground War in the Gulf,' *Survival*, Vol. 33, No. 3 (May/June 1991), p. 239. British officials were cited as estimating Iraqi military losses at 30,000 dead, 100,000 wounded. *Time*, 17 June 1991, p. 28. Roland Dannreuther suggests that the number of Iraqi soldiers dead 'might be in the region of 25,000 to 40,000.' *The Gulf Conflict: A Political and Strategic Analysis*, Adelphi Paper No. 264 (London: IISS, 1992), p. 57.

¹⁸ *Time*, 17 June 1991, p. 28; and John G. Heidenrich, 'The Gulf War: How Many Iraqis Died?' *Foreign Policy*, No. 90 (Spring 1993), p. 109.

¹⁹ Ramsey Clark, *The Fire This Time: U.S. War Crimes in the Gulf* (New York: Thunder's Mouth Press, 1992), pp. 38 and 209, asserts that between 125,000 and 150,000 Iraqi soldiers were killed.

²⁰ Heidenrich, 'The Gulf War: How Many Iraqis Died?' pp. 121 and 124. He added, 'Maybe the figures are too low,' but concluded that the evidence suggests a total death toll of less than 10,000. See also the correspondence in *Foreign Policy*, No. 91 (Summer 1993), pp. 182-192. Although Heidenrich's figures seem improbably low, they result from serious inference on the basis of known facts, especially regarding the low numbers of wounded among the Iraqi prisoners taken by coalition forces. If, as in most wars, there was a fairly consistent ratio between numbers wounded and numbers killed, then it would be a legitimate inference that relatively few Iraqi soldiers were killed. A possible objection to Heidenrich's methodology is that these PoWs were an unusual group in that the great majority had surrendered without having been involved in significant combat operations – so any wounded soldiers would not be expected to show up in this group.

²¹ For full details of the campaign, which reportedly involved dropping 29 million leaflets, and an illustration showing one of them, see Patrick Cockburn, 'Iraqis 'Psyched out of the War',' *The Independent* (London), 27 September 1992, p. 16.

²² 'The Government of Kuwait estimates that 1,082 civilians were murdered during the occupation. Many more were forcibly deported to Iraq.' US Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (Washington D.C., April 1992), p. O-7.

²³ Ramsey Clark, *The Fire This Time*, p. 209. Although Clark cites some sources for civilian casualty figures, they give lower totals and do not provide a basis for the above-quoted figures, which

estimate of 'probably fewer than 1,000.'²⁴ According to a Greenpeace briefing, the Iraqi government stated that 2,278 civilians had died as a result of the bombing campaign.²⁵ Calculation of Iraqi civilian deaths is complicated by the difficulty of putting a precise figure to the many deaths that undoubtedly occurred (not only during, but also after the war) as an indirect result of damage by bombing to Iraq's infrastructure, and as a result of civil war and international economic sanctions.

At the very least there was a ratio of Iraqi to coalition military deaths of over 3:1, and by some estimates the ratio may have been 50:1 or even 100:1. One of the causes of the inequality in military casualties was undoubtedly the coalition, and especially the American, determination not to take any avoidable risks with their own soldiers' lives. This led to the decision only to launch the ground offensive after the air campaign had inflicted severe damage on the Iraqi military infrastructure and forces. There was a tendency in the United States to define success in terms of how few coalition casualties were suffered.²⁶ Even though the inequality of the casualty figures may not raise questions relating to proportionality as the idea has developed in the laws of war, they reinforced moral concerns about the inequality of this conflict.

b. The 1999 war over Kosovo

The 1999 Kosovo War between NATO members and the Federal Republic of Yugoslavia confirmed the importance of issues relating to the laws of war in contemporary conflicts, especially in coalition operations. It also exposed some problems in that body of law. A central issue in the war was the minimizing of civilian casualties. The NATO leadership recognized from the start that this was of major importance, for two main reasons: because the war was being fought with the stated purpose of protecting the inhabitants of Kosovo, and also because international opinion would not have tolerated a war on civilians.²⁷ An underlying question raised by the war is, thus, the extent to which international legal considerations and institutions can assist in protecting the civilian.

Although the number of Kosovar casualties of the Yugoslav military campaign in Kosovo before and during the NATO campaign of 1999 is not known with certainty, the number of casualties of the 78-day NATO bombing campaign is known with a high degree of accuracy. As a result of the NATO bombing approximately 495 civilians were killed and 820 wounded in documented instances.²⁸ The coalition forces suffered no casualties at all in combat – a remarkable demonstration of the extent to which the US and allies had total mastery of the air. Naturally there

have been reached by a process, which remains unclear. The puzzle is not solved by consulting a related work, Ramsey Clark and others, *War Crimes: A Report on United States War Crimes Against Iraq* (Washington, DC: Maisonneuve Press, 1992), pp. 24, 34, 49 etc.

²⁴ Heidenrich, 'The Gulf War: How Many Iraqis Died?', pp. 119 and 124.

²⁵ William M. Arkin of Greenpeace International, 'Gulf War Effect and Laws of War Briefing,' Geneva, 28 April 1992.

²⁶ This point was remarked upon by Gene I. Rochlin and Chris C. Demchak, 'The Gulf War: Technological and Organizational Implications,' *Survival*, Vol. 33, No. 3 (May/June 1991), p. 261.

²⁷ The importance of minimizing civilian casualties is stressed in the memoirs of the Supreme Allied Commander Europe during the period of the Kosovo War, Wesley K. Clark, *Waging Modern War: Bosnia, Kosovo and the Future of Conflict* (Oxford: Public Affairs Ltd., 2001), pp. 438-40 (2001).

²⁸ International Criminal Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, para. 53. Available on the ICTY website. Also published in 39 *International Legal Materials* 1257-83 (2000).

was much comment on the extraordinary inequality of the casualty figures. There were also suggestions that, by bombing from a safe height, coalition pilots were risking others' lives to save their own: an accusation which contained a kernel of truth, but failed to take account of the impressive evidence that pilots may be able to act more discriminately, and are under less pressure to release their bombs in a hurry, if they are not having to operate under enemy fire.

c. The 2001 US-Afghan war

As in the 1991 Gulf and 1999 Kosovo wars, in respect of Afghanistan the Pentagon was reluctant to issue figures. Whereas Yugoslavia in 1999 had a reasonably effective system of official record keeping in place, Afghanistan in 2001 did not. As a result of these factors, estimates of Afghan civilian deaths have been unofficial.

In 2002 a number of reports based on on-site examinations gave at least the beginnings of an evidence-based picture. In July the *New York Times* published the results of a review of eleven of the 'principal places where Afghans and human rights groups claim that civilians have been killed.' It found that at these sites 'airstrikes killed as many as 400 civilians'. A principal cause was poor intelligence.²⁹ In September a San Francisco-based human rights group, Global Exchange, estimated on the basis of a survey conducted in Afghanistan that 'at least 824 Afghan civilians were killed between October 7 and January 2002 by the US-led bombing campaign.'³⁰ A Human Rights Watch report on civilian casualties in Afghanistan is in preparation.

While even an approximate figure for civilian casualties of the bombing in Afghanistan may never be known, it appears certain that the number of civilian deaths in the period October–December 2001 was far more than the 500 in Yugoslavia during the war over Kosovo in 1999, and probable that it was over one thousand. The question then is how this was possible given that twice the percentage of precision-guided munitions was used and the overall number of weapons dropped was much less. Of the many possible factors meriting investigation, two were the imperfections of the intelligence/targeting process, and the uncertain identity of the combatants – both of which are generic problems in counter-terrorist operations.

The deaths among the outside coalition forces in Afghanistan were remarkably low. Indeed, up to the end of January 2002, more reporters died while covering the war in Afghanistan than non-Afghan coalition military personnel.

d. The 2003 war in Iraq

With respect to Iraq in 2003, this war has been peculiarly unequal because of the extraordinary hollowing-out of the Iraqi armed forces that had occurred since 1991. There has yet again been a large disparity in the casualties in the military operations. The figures for the period from the beginning of hostilities on 19-20 March to today, when practically the entire country is in US-UK hands, are necessarily incomplete, especially as guerrilla action, terrorism, intra-Iraqi conflict and looting remain ever-present threats. As of today, about 100 US and some 30 UK deaths have been announced. We must unfortunately assume that these numbers will increase.

²⁹ Dexter Filkins, 'Flaws in U.S. Air War Left Hundreds of Civilians Dead', *New York Times*, 21 July 2002. This included reference to the Global Exchange survey mentioned below.

³⁰ *Afghan Portraits of Grief: The Civilian/Innocent Victims of US Bombing in Afghanistan* (San Francisco: Global Exchange, September 2002), p. 3. This short (16-page) report was based on a survey conducted by a 5-person team between March and June 2002. It emphasizes that 'it was impossible for our survey to be exhaustive and comprehensive', and that the figure of 824 'represents only a portion of civilian casualties' (pp. 3 and 6). It called on the US Government to establish an Afghan Victims Fund. Report available at <http://www.globalexchange.org>.

As for Iraqi casualties, these are clearly very much higher. Large numbers of casualties, civilian as well as military, appear to have been caused by ground fire as well as bombing. There have been apparently well-documented reports of civilians being killed when they were in cars that failed to stop when approaching coalition forces, and of market places in Baghdad being attacked. Such incidents need to be investigated, not least for the purpose of establishing the causes of these events, and considering whether or not there is a *prima facie* case of violations of the laws of war. Overall, it is much too early to estimate the Iraqi casualty figures. Indeed, a report from Doha in the *New York Times* suggests that we may never know. A particular problem in this war is likely to be the extreme difficulty of distinguishing, on the Iraqi side, civilian from military casualties.³¹

e. Conclusions about casualties

In all four wars there were remarkable disparities between the small numbers of deaths among coalition forces from outside, and the much larger number of deaths among the forces they were fighting and also among the adversary's civilian population. Indeed, in the Kosovo war there were no deaths of external coalition forces due to hostile action; and in the most active phase of the Afghan war, between October 2001 and January 2002, there were extraordinarily few.

This disparity in casualties is not in itself evidence that coalition conduct presents a problem *vis-à-vis* the laws of war. The laws of war do not require a state to be reckless with its own forces' lives, nor do they prohibit the energetic pursuit of the adversary's forces in the field. It is not self-evident that action taken to protect coalition forces has in general increased the risk to their adversaries. However, the disparity in the death tolls undoubtedly poses a problem regarding how these wars are perceived.

Overall, the numbers killed on both sides in these wars have been far fewer than the dire predictions made by many (and not only critics of these wars) before hostilities commenced. This development probably owes more to astute generalship and clever engineering than it does to the law of war, but the latter has helped. However, as the following list of problems indicates, the application of the law has not been simple in these wars.

6. Problems of implementation of laws of war

In all these wars since 1990 some difficult issues arose, on all of which the existing law offers important guidelines that have been, and will continue to be, tested and contested.

a. Targeting

Probably the law's most important contribution in these wars has been the part it has played in the larger overall process of improving discrimination in targeting, especially targeting of airborne weapons. In all of these wars there were major bombing campaigns that had a significant effect on the adversary's forces and/or political system. Since at least 1868 the laws of war have required that only armed forces and military targets should be attacked. The development of precision weapons has raised hopes that this ancient requirement can at long last have a chance of being implemented even in that most approximate of military arts, air bombardment. However, the use of precision weapons in recent wars has exposed at least three serious flaws in the process. First, no weapon is more accurate than the intelligence on which its use is based, and this may sometimes be wrong or out of date. Second, even when a target is

³¹ John M. Broder, 'Number of Iraqis Killed May Never Be Determined', *New York Times*, 10 April 2003, pp. B1 and B5.

accurately hit, there may be huge ‘collateral’ damage, including destruction of houses and deaths of civilians. Third, the US and its allies have developed a concept of war aimed at targeting the sources of an adversary’s power, not all of which may be strictly and narrowly military in character. The debate about the bombing of the TV station in Belgrade in 1999 exemplifies the difficulty of determining what is a legal target. So does the debate, during the Kosovo bombing, about what NATO should do when it started to run out of military targets. The most difficult question the Kosovo bombing raises so far as the laws of war are concerned is the following: did attacks on dual-use targets, and/or a perceived threat of further attacks directed at civilians and civilian objects, play a major part in the Yugoslav decision of 3 June to accept the terms that were being pressed upon it?³²

b. Obligations on the defender to distinguish military activities from civilian objects

There are extensive requirements that apply as much to defenders as to attackers, including the requirement not to locate military forces and equipment in civilian areas or in protected buildings such as hospitals or mosques. It appears that these legal requirements have been deliberately violated by adversaries in order to induce the US-led coalition into engaging in an attack that causes civilian casualties and destruction. In this reading of events, the law of war are being cynically misused in order to discredit the attacker by making the attacker’s actions appear indiscriminate and disproportionate. Some evidence from the 2003 Iraq War in particular suggests that this has been happening systematically. Such conduct, if it were proved to have the intention imputed here, would of course constitute a tribute of sorts to the practical importance of the principles of proportionality and discrimination.

c. Destruction of oil wells

This issue arose in the Iraq wars of 1991 and 2003. In 1991, Saddam Hussein destroyed the oil wells of Kuwait, causing huge environmental damage and losses. This was a clear violation of several provisions of the laws of war, including the prohibition of wanton destruction in the 1949 Geneva Civilians Convention. In his address on 17 March 2003, President Bush warned Iraq against any repetition. However, there is a complexity: the oil wells in question in 2003 being on Iraq’s own territory, it is not so clear that the rules against wanton destruction apply because there is a degree of recognition in the laws of war that not all ‘scorched earth’ tactics are necessarily illegal. The fact that the 2003 war has not led to massive destruction of oil wells is due, not so much to legal provisions, as to the facts of the war: the southern oil fields were seized by coalition forces in the first few days of the war; the pace of the coalition operations generally clearly threw the Iraqi leadership off balance; and there may have been some reluctance among Iraqi personnel to destroy their own oilfields on which the future wealth of Iraq depends.

d. Prohibition of use of gas and chemical weapons

In all four of these wars (unlike in the Iran-Iraq war of 1980-88) the prohibition of the use of gas and chemical weapons prevailed. In the 1991 and 2003 wars involving Iraq there were widespread fears that these weapons would be used. In both cases the US issued clear advance warnings to the Iraqi leadership and military personnel that they should desist from using such

³² For a challenging argument that the NATO bombing was a key factor in leading to the decision to back down, and that one element was a belief that the bombing would become less discriminate if Milosevic did not settle, see Stephen T. Hosmer, *The Conflict Over Kosovo: Why Milosevic Decided to Settle When He Did*, RAND report MR-1351-AF, 2001, pp. 91-107.

weapons. The non-use of these weapons in these wars may owe at least as much to deterrence by the US as to the existence of an international legal prohibition. However, the existence of the legal prohibition probably made it easier for the US to insist forcefully on the non-use of this class of weapons; indeed, it contributed to the view that they constituted a special class of weapons, different from all others.

e. Humanitarian aid

The obligations to provide humanitarian aid, and to assist the security of humanitarian workers, apply as much to the belligerents as they do to international bodies and NGOs. During and after these wars the US-led coalitions put considerable emphasis on humanitarian aid, but not all the actions taken in this regard were well judged or successful. Humanitarian assistance, like any other form of delivery of scarce goods, requires an effective distribution system – which few armies can provide. In Afghanistan, the air-dropping of food in packaging of the same colour (yellow) as cluster bombs created the risk of tragic incidents. Today, the humanitarian situation in Iraq is particularly urgent because of the vulnerability of a largely urban population, and because of its remarkably high level of dependence on the existing oil-for-food programme, which has a complex (and hitherto effective) distribution network.

f. Surrender

A problem that proved difficult in several instances in these wars was surrender. In particular, what exactly constitutes evidence that the adversary wishes to surrender, and how can the other party be certain that surrender is not being feigned? In the 1991 war, an incident involving the deaths of Iraqi soldiers on a Kuwaiti oil platform led to a US Navy board of investigation. In 2003, there were many reports of feigned surrenders by groups of Iraqis preparatory to attacks on coalition forces.

g. Treatment of prisoners

The treatment of prisoners has been one of the most difficult and emotive laws-of-war issues to have arisen in recent conflicts. Although very few personnel from US-led coalitions have been taken prisoner, there have been particular problems regarding their treatment in the two Iraq wars. Iraq's overall record of treating prisoners of war, and of granting ICRC access to them, is dire. In 2003 this has led to worries for the coalition personnel in Iraqi custody, who were mercifully very few in number. On 9 April 2003 a congressional resolution condemned Iraqi treatment of PoWs, called for Iraqi compliance with the Geneva PoW Convention, and also called for ICRC access to the prisoners.³³

The particular rule against exposing prisoners to 'insults and public curiosity', contained Article 13 of the 1949 Geneva Convention III, has become prominent in debates about PoWs because violations of it are, by their very nature, highly publicized. In 1966 North Vietnam showed film of American prisoners being through the streets of Hanoi, where they were exposed to public wrath. In the 1991 Gulf War some coalition prisoners were shown on Iraqi TV in humiliating circumstances. In the 1999 war over Kosovo between the US-led coalition and the Federal Republic of Yugoslavia, some captured American servicemen were similarly shown on TV, and this happened again, notoriously, in Iraq in March 2003. In all these cases, a reason for the showing of captured PoWs on TV appears to have been that this is one way that a less developed state, under airborne assault from a militarily superior adversary, can demonstrate

³³ Concurrent resolution of the two houses of the US Congress (S. Con. Res. 31), passed 9 April 2003.

that it has at least some power. By extracting statements and confessions, it can help to reinforce popular hatred of the adversary. These possible reasons for such actions do not add up to a legal defence. There is widespread agreement that the public exposure of prisoners in these cases was unlawful.

What about other cases involving media depictions of PoWs? Is any photo or videotape showing captured PoWs a violation of the Geneva Convention? There is no general and unambiguous answer to these questions. The authoritative ICRC volume of commentary on the Geneva PoW Convention offers no assistance on this matter.³⁴ The actual practice seen in modern wars may be the best guide. If a practice is accepted by other states it may come to be considered legal. A sound general rule is that photos that enable individual prisoners to be identified, and those which seem to involve humiliation of the prisoner, are unlawful.

The biggest issue about prisoners in recent wars has concerned the treatment, and legal status, of Taliban and al Qaeda personnel captured in connection with the war in Afghanistan from 2001 onwards. The US treatment of prisoners in the 'war on terror' has exposed the US to the criticism that it has itself avoided full application of the 1949 Geneva PoW Convention. US Defense Secretary Donald Rumsfeld's suggestion on 11 January 2002 that unlawful combatants had no rights under the Geneva Convention, although later modified, did lasting damage. The early expressions of policy by the Pentagon and the White House caused anxiety among military lawyers in the US armed forces, who recognized that US forces might be subject to capture and had an interest in reciprocal application of the rules, even in circumstances that varied from what was laid down in the Geneva Convention.

The legal situation of the detainees at Guantanamo is roughly as follows. All them have been classified as 'unlawful combatants' not entitled to PoW status, but the US policy is to treat them 'in a manner consistent with' the PoW Convention. The category of 'unlawful combatant' is not new, and its application to some of the Guantanamo prisoners can be defended. Furthermore, there is evidence that the actual treatment accorded to prisoners has been consistent with international standards.

What has been problematic about the US position is not just the initial and damaging hesitancy about the application of the Geneva Convention, and the assumption that the category of 'unlawful belligerent' fits all the Taliban prisoners in Guantanamo. A major problem has been the US failure to make clear that it accepts the full application of certain fundamental guarantees of humane treatment, especially those spelt out in Article 75 of 1977 Geneva Protocol I.³⁵ This refusal to state publicly that it accepts these fundamental guarantees is particularly odd in light of the fact that the US has largely followed the Article 75 guarantees (without saying that it was doing so) in the detailed regulations on the conduct of proceedings of the projected military commissions which may at some future date conduct trials of non-US terrorist suspects.³⁶

Iraqi violations of the Geneva rules regarding PoWs began long before Guantanamo and cannot be justified by reference to US actions. On the other hand, the US has much work to do

³⁴ Jean S. Pictet (ed.), *Commentary on Geneva Convention IV* (Geneva: ICRC, 1958).

³⁵ Although the USA is not a party to the 1977 Geneva Protocol I as a whole, it has stated in general terms that Article 75 is one of the articles in the agreement that it accepts and will implement. Article 75 elaborates a range of fundamental guarantees that are intended to provide minimum rules of protection for all those who do not benefit from more favourable treatment under other rules.

³⁶ US Department of Defense, Military Commission Order No. 1, 'Procedures for Trials by Military Commissions of Certain Non-United States Citizens In the War Against Terrorism', 21 March 2002. These regulations draw heavily on 1977 Geneva Protocol I, Article 75(4)(j).

to convince a sceptical world that it is fully committed to consistent application of all aspects of the law of war. It has a good case – few if any armed forces have such serious manuals on the application of the law of war – but in recent years that case has not been well presented. In particular, the US position on prisoners in Guantanamo has not been well thought-through or well presented, with the result that a fundamentally reasonable policy has been intensely controversial and much criticized around the world. Perhaps because of the controversy caused by Guantanamo, when in 2003 US forces detained Iraqis wearing civilian clothes and suspected of being involved in guerrilla attacks against coalition forces, the US authorities were very cautious in their statements and actions in regard to them.

h. Conduct of military occupations

The main rules relating to military occupations are spelt out in the 1907 Hague Regulations and the 1949 Geneva Civilians Convention. This body of rules is compatible with a wide variety of forms of external administration, which may or may not contain one or another variant of the pejorative term ‘occupation’, and which may range from overt foreign military government of a territory to various other forms of authority and mechanisms of control. The occupying power has a wide range of responsibilities, including for maintaining public order, ensuring the supply of humanitarian relief, and managing the territory generally in a trustee-like manner on behalf of the inhabitants.

The main cases of occupation in these wars have both been in Iraq. In the last days of February 1991 coalition forces occupied a large but thinly populated area of southern Iraq, which they held until April. During this period, as internal revolt in Iraq was followed by brutal repression, many Iraqis fled to the occupied area; and when the coalition forces withdrew, some 20,000 of these Iraqis preferred to go to a refugee camp in Saudi Arabia rather than return home. In the occupied area, some incidents occurred of Kuwaitis entering Iraq for revenge and not being stopped. In this case some of the problems which arose may have been due to the unusual circumstance that a large area, originally with a very small population and requiring little administration, then attracted people from outside, necessitating more administration than was at first available.

In 2003 the occupation will be far more demanding, because it is geographically more extensive and requires the reconstruction of the apparatus of government of a large country that is deeply divided. A long and difficult period of political, social and economic engagement awaits those who win victories over fractured and violent societies. Unfortunately the US appears to be much better at winning wars than at the long slog of subsequent reconstruction. Its anti-colonialist traditions and convictions make it reluctant to stick at such a role. When announcing the goals of *Operation Iraqi Freedom* soon after it commenced, Donald Rumsfeld stated that the eighth and final goal of the operation was: ‘to help the Iraqi people create the conditions for a rapid transition to a representative self-government that is not a threat to its neighbors and is committed to ensuring the territorial integrity of that country.’³⁷ It remains to be seen whether transition to representative self-government can be rapid without leading to new conflict and oppression.

Whether or not the occupation administration operates through Iraqi political bodies, and whether or not it secures formal international backing, it will be obliged to abide by basic

³⁷ Donald Rumsfeld, news briefing at the Pentagon, 21 March 2003; available at <http://www.defenselink.mil/news/Mar2003>

international norms. These include rules requiring that natural resources (such as oil) must be managed in a trustee-like manner, on behalf of the population of the occupied country.

In one key respect the role of the US-led coalition in Iraq in 2003 must vary from that which is envisaged for an occupying power in the conventions. The normal assumption is that an occupant should ensure observance of the existing laws and institutions of the territory. In this case the main point of the occupation is to change the political system of Iraq. Because such radical change is needed, it would be desirable to secure some degree of international (preferably UN) involvement, if only in order to allay suspicions of the US acting unilaterally. The case for some such involvement is especially strong in view of the fact that an effective process of democratization cannot be quick. Key elements of an effective constitutional and legal system have to be put in place before national elections are held. International involvement, especially that of the UN, could reduce the risk of damaging criticism that the US role was improperly straying beyond what had been envisaged in the Hague and Geneva conventions.

7. Conclusions

These conclusions are nothing more than scaffolding for the discussion that is to follow. They suffer from the inherent limitations of any attempt to generalize about the lessons that may be learned from four wars, each one of which was unique.

a. Did the coalition forces make serious efforts to comply with the laws of war?

In respect of all four conflicts, there is a wide range of evidence that the US and its coalition partner states were concerned to comply with the laws of war. The evidence can be found first and foremost in the actions of the armed forces, in the policy statements made by governments and military leaders, and in subsequent official investigations and reports. There was a general concern to avoid civilian casualties, and to ensure proper treatment of those who were *hors de combat*. In all these wars, the USA, though not a party to 1977 Protocol I, observed many of its provisions – whether because of their customary law status, because it was policy to support them anyway, or because of a need to harmonize targeting and other matters with allies.

The most significant development in these wars, so far as the laws of war are concerned, was the increased accuracy of the coalition weaponry, especially bombing. Although there were exceptions, this had the general effect of making it possible to hit targets with far less loss of life or incidental damage than would have occurred in previous eras. However, this was an advantage given only to one side in these wars.

The use of new and more accurate weaponry was not an unmixed blessing for the coalition forces: technical and intelligence failures, operational errors, and the sheer confusion of events, led to many disasters. Episodes in which coalition military action resulted in large-scale civilian deaths were invariably seen as damaging to the coalition cause. Whenever coalition actions caused general carnage, especially of civilians, this led to an upsurge of criticism within coalition states and internationally.

However, the coalition successes in these wars may have owed something to the use of strategies and weapons that raise questions about their compatibility with the laws of war. The strategy of attacking a wide range of regime targets as well as targets that are more strictly and narrowly military in character may at times involve a broad definition of military targets. In the Kosovo War in particular there were strong pressures to attack targets that were not narrowly military in character. It was argued that their destruction, or the threat of further such destruction, could help to shorten the war.

As regards casualties in these wars, the overall numbers were by historical standards relatively low, and for the coalition side they were astonishingly low. This was due to many causes. Rules relating to proportionality and discrimination may have assisted this development, but so did the work of engineers and strategists.

The disparity in the death tolls led to the criticism that risk was deliberately being transferred from the coalition forces to their adversaries. Of course it is natural for any forces engaged in war to seek to transfer risk to their adversaries, and in principle, at least as far as concerns casualties among the adversary's armed forces, this does not necessarily involve a violation of the laws of war. However, it is by no means self-evident that the overall effect of reduction of risk to coalition forces has been to increase the risk to, or death toll amongst, either enemy forces or civilians. For example, reducing the risks to pilots may improve the prospects of that they will only release their weapons when they are certain that they have correctly identified the target. Further, an awareness of the relative invulnerability of coalition forces may encourage their adversaries to end the war quickly.

Only in one of these campaigns was there a formal inquiry into the coalition conduct with a view to establishing whether war crimes had been committed. In the case of NATO's military action over Kosovo, the ICTY Prosecutor's Office established a committee to review the NATO bombing campaign against the Federal Republic of Yugoslavia. It did so because of the odd circumstance that NATO had gone to war in an area in which such actions were within the ICTY's jurisdiction. The review committee concluded that any NATO failures to observe the law during the war were not such as to trigger further investigation or prosecution by ICTY.

The fact that efforts were made to comply with the law, and that there was no further ICTY investigation, does not mean that coalition conduct is above criticism. While some coalition disasters may not have involved violations of the laws of war, many coalition actions and methods were questionable in that regard.

Certain weaponry used by the coalition forces in all these wars was criticized. For example, the use of cluster bombs, while not illegal under the existing treaty law, raises questions about their compatibility with the underlying principles of the laws of war. As was best documented in Afghanistan and Kosovo, cluster bombs resulted in many deaths of innocent civilians, usually after the main military operations were over. There was also criticism of the use of weapons containing depleted uranium, but there is as yet insufficient scientific evidence regarding its radiological and/or toxic effects, and its use is not illegal under existing treaty law.

A particular problem in coalition operations concerned the conduct of local allies within the country concerned. This problem was most serious as regards the Northern Alliance in Afghanistan, which failed repeatedly to observe even the most basic rules in its handling of prisoners in 2001 and after. There were also violations of the law by the Kosovo Liberation Army in 1998-9, leading to investigations by ICTY. In the case of the KLA, the degree of US presence and potential influence at the time of alleged violations is even more uncertain.

Another possible criticism of coalition conduct, in the 2003 war, is the apparent toleration of looting. The Hague and Geneva conventions contain clear prohibitions against looting. Although there had been some Iraqi looting at the end of the 1991 Gulf War, there was inadequate preparation to address this problem in 2003. Lawlessness was particularly marked in Basra on 8 April, and is now very serious in Baghdad.

b. Did the forces opposing the US-led coalitions make serious efforts to comply with the law?

In connection with all four wars there were suggestions from the coalition states and also from other bodies that certain violations of the laws of war had been committed by the adversary

state. One common accusation concerned deliberate location of military assets and personnel in, or close to, civilian objects and personnel. In some instances this may have been with the purpose of protecting the military assets from attack, while in other instances it may have been to induce the coalition to damage civilian objects or kill civilians and thereby provide a propaganda gift to its adversary.

In the two Iraq wars there were also numerous suggestions that captured Kuwaiti citizens, and captured coalition military personnel, had been maltreated by their Iraqi captors; and that ICRC staff had been denied proper access to such prisoners. However, at the end of the 1991 war the Iraqi regime belatedly turned to the ICRC for the transfer of prisoners. It appears that at no time did Iraq deny that it was bound by the Geneva PoW Convention.

The fact that there were violations on these or related matters does not mean that the picture is entirely negative. It appears that not all prisoners of the Iraqis in 2003 were treated as shockingly as many certainly were in 1991. In both of the Iraq wars (1991 and 2003), chemical and bacteriological weapons were not used in combat – in both cases after brutally explicit US warnings that Iraq should not resort to such weapons. In the Kosovo War, although there were Yugoslav violations against the inhabitants of Kosovo, in other respects the Yugoslav Army was a much more disciplined and professional force than those encountered in Iraq and Afghanistan. For example, it kept good records of minefields it had laid, and at the end of hostilities handed these over to the NATO-led intervention force, greatly facilitating mine clearance.

In all of these wars, accusations that war crimes had been committed by the coalition's adversaries led to demands for trials. Some trials did ensue, including most notably the trial of Slobodan Milosevic at the ICTY on charges that include a range of offences in Kosovo. There may also now be trials for offences committed by Iraqis in the 1991 and 2003 wars. It remains to be seen whether actual and impending trials will have any deterrent effect as regards future violations, and also whether they will contribute to peace in the territories concerned.

The reasons for the violations by the coalition's adversaries that occurred in these four wars are probably varied. They include poor or non-existent training in the law; short-term tactical opportunism; and sheer thuggery. However, they also involve factors that suggest a structural difference in attitudes to the laws of war in contemporary conflicts. In some instances the coalition's adversaries may have made a calculation that co-locating military assets with civilians and civilian objects, by inducing the coalition to do huge civilian damage, would help to discredit the coalition cause; and in some instances there may have been a sense that observance of the law favours the more powerful and better organized party to a conflict, while the weaker side may need to hide among the population and engage in forms of war that blur the distinction between soldier and civilian. Certain offences against prisoners may have been a deplorable consequence of the inability to strike effectively at coalition forces in the air or on the battlefield.

In all four wars, it is doubtful whether the adversary derived any significant advantage from its violations. However, this would not justify a comfortable conclusion that violations can never yield an advantage. In particular, the threat of terrorist action in the theatre of operations, even after the end of the war, makes it extremely difficult for coalition forces to work normally alongside the inhabitants in the process of reconstruction.

c. Is there a case for observing the law when fighting an adversary not observing the rules?

While it would be misleading to present these wars as a simple case of one side observing the rules and the other side failing to do so, there is enough of a distinction between the conduct of the sides to make this question relevant, and even to provide elements of an answer.

Far from hampering the coalition forces in these four wars, observance of basic rules may have assisted the professional and effective conduct of military operations. In particular, observance of the laws of war may have had the following effects.

- Aiding the establishment of clear limits about the use of weapons (e.g. the non-use of gas and chemical weapons) and about what is or is not a legitimate target, and the observance of at least some of those limits by the adversary.
- Contributing to the application of force being characterized by economy and precision.
- Assisting adversary surrenders, especially in cases where adversary forces were confident of receiving good treatment as PoWs.
- Helping to maintain the legitimacy of the coalition cause, both domestically within each coalition state, and internationally, especially as between coalition members. This was particularly important as in each of the four cases part of the stated rationale for going to war was a concern for the humanitarian situation in the adversary state.
- Facilitating the maintenance of internal discipline in the coalition forces, especially due to rules prohibiting looting and requiring all military action to have a defensible purpose.
- Reducing the risks of popular backlash inherent in the conclusion of hostilities and the subsequent interactions with the population of the adversary state.

It is possible that some of these considerations were of particular importance in these wars in view of the fact that the imbalance of power between the coalition and its adversaries was so marked. In an uneven contest, to behave brutally would be to violate basic ideas about what constitutes acceptable conduct.

d. Have failures to observe the laws of war become a basis for justifying uses of force?

In each of these cases, actions by the adversary that were alleged to be violations of the laws of war and other fundamental norms played an important part in statements made by coalition governments in the period preceding their initiation of the use of force. UN Security Council resolutions also referred to such considerations. It is hard to avoid the conclusion that there is indeed a close connection in this regard between the *jus in bello* and the *jus ad bellum*.

e. Are revisions to the laws of war necessary?

The considerable experience of war in the post-Cold War period has raised many issues regarding the interpretation and possible revision of the laws of war. Before rushing to spot problems and advocate new agreements, three points may be noted.

First, ensuring observance of existing rules should be a priority. Some of the belligerents in these wars failed to observe some existing rules of indisputable status. An example is the Iraqi failure to comply fully with the basic requirement of ICRC access to PoWs as required by 1949 Geneva Convention III.

Second, treaty-making has already got ahead of practice. Many countries, including the USA, China and Russia, and also certain states that have been involved in armed conflicts, are not parties to several existing agreements on the laws of war. To rush to create more law when there is much catching up or reassessment to do in relation to the existing law could be a mistake.

Third, much change in the law comes through practice rather than through treaty-making. Some practice may implement existing treaty rules that were not binding on the state concerned, some may negate, vary or modify existing rules, and some may create new rules. In

recent wars there has been some conduct of these types that may, with time, assist the evolution of customary law. Possible examples include the specific warnings to adversaries about the importance of not using gas or chemical weapons; the emphasis on attacking regime targets as well as more narrowly military equipment and personnel; the use of radio transmissions and air-dropped leaflets to advise enemy military personnel and civilians how to avoid the effects of bombing; the emphasis on trials for war crimes, genocide and crimes against humanity; and, in respect of the treatment of terrorist suspects at Guantanamo, the US indication that there were certain provisions of the 1949 PoW Convention that it would not apply. (While many aspects of the US Guantanamo policy were intensely controversial, this indication was not criticised, and may contribute to a sensible reinterpretation of the law in certain types of case.)

There are some specific issues on which, as a result of the experiences of recent conflicts, there have been demands for new agreements. These include proposals for:

- A convention defining and prohibiting terrorism – a matter that straddles *jus in bello* and *jus ad bellum*. The proposal for this has got stuck in the UN General Assembly.
- An agreement on cluster bombs – a matter undergoing consideration in the framework of the 1980 UN Convention on Certain Conventional Weapons.
- An agreement prohibiting use of weapons containing depleted uranium – a matter that is not likely to make any progress unless and until there is clear medical evidence about the toxic and/or radiological effects of such weapons.

Despite the serious case for revisions that emerges from examination of key problems that have arisen in the post-Cold War period, the broad overall lesson from these four wars is that the existing laws of war are important in contemporary conflicts, and are compatible with the professional conduct of military operations.

A final question arises. In the event of a conflict between states that were more evenly balanced than the belligerents were in these four wars, would one reach so positive a conclusion about the value of the contemporary laws of war? Mercifully, that is a matter on which we can only speculate.

End

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