COMMENTS ON ILLEGAL WAR AND ILLEGAL CONDUCT: ARE THE TWO RELATED?

by Charles Garraway*

1. Introduction

2. 'Legal' wars
2.1 The Falklands/Malvinas War
2.2 The Iraq War 1990-1991

3. Wars of questionable legality
3.1 Kosovo 1999
3.2 'Global war on terror'
3.3 The Iraq War 2003

4. A common link?

5. The growth of human rights law

6. Conclusion

Abstract

This article examines whether there is a link between the legality or otherwise of an armed conflict under jus ad bellum *and the subsequent conduct of the campaign under* jus in bello*. This is done by comparing two conflicts where the legality was not in serious dispute, the Falklands/Malvinas conflict and the Iraq War 1990-1991, and three where the legality has been questioned, Kosovo 1999, the 'global war on terror' and the Iraq War 2003. In looking for a common link, the author is drawn away from concerns over the* jus ad bellum *to doubts over the content of the relevant law governing the conduct of hostilities. Uncertainties in the law have occurred both from the extension to non-international armed conflict of 'Hague law', traditionally applicable only in international armed conflicts,*

* Charles Garraway is a former Stockton Professor of International Law at the United States Naval War College, Newport Rhode Island. He is currently a Fellow of the Human Rights Centre, University of Essex. E-mail: charlesgarraway@hotmail.com.

Netherlands International Law Review, LIX: 473-492, 2012
© 2012 *T.M.C. Asser Instituut and Contributors*
doi: 10.1017/S0165070X12000307

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

and the overlap between human rights law and the law of armed conflict. The author concludes that there is a danger that the balance between military necessity and humanity may be disturbed so that the law will become impracticable in the cauldron of conflict to the detriment of all, soldier and civilian alike.

1. INTRODUCTION

The invasion of Iraq in 2003 has been the subject of great academic debate in terms of legality. It has been confirmed that Admiral Boyce, the Chief of Defence Staff of the United Kingdom, was sufficiently concerned as to ask for assurances from the Government's legal advisers that the war was legal.[1] Whilst such assurances were forthcoming, the reasoning behind those assurances has been challenged and even Government lawyers were divided on the issue. A senior Foreign Office lawyer resigned as a result.[2]

But how much are these issues that only involve those at a strategic level? The crime of aggression goes back at least to the London Charter and the International Military Tribunal at Nuremburg.[3] It was defined there and in subsequent cases as a 'leadership crime'[4] and this definition has been incorporated into the International Criminal Court Statute.[5] But to what extent does the legality of a conflict concern the individual soldier, sailor or airman? Is their position still more in common with the famous quote from Lord Tennyson:

> 'Theirs not to reason why, theirs but to do and die!'[6]

Indeed, despite the clear line adopted by Nuremberg and the International Criminal Court, it has been argued by some that aggression should be an offence open to all, senior and junior ranks alike.[7] This is part of the new 'revisionist just war

1. See statement by Admiral Lord Boyce to the Chilcot Inquiry into the Iraq conflict, pp. 2-3, accessed at <www.iraqinquiry.org.uk/media/51158/Boyce-Statement.pdf>.

2. See resignation letter of Elizabeth Wilmshurst, dated 18 March 2003, accessed at <www.iraqinquiry.org.uk/media/43719/document2010-01-27-100908.pdf>.

3. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 82 *UNTS* p. 280.

4. See the *Case of Von Leeb and others (The High Command case)*, in UN War Crimes Commission, *Law Reports of Trials of War Criminals, Vol. XII The German High Command Trial* (London, His Majesty's Stationary Office 1949) p. 1 at p. 67.

5. See definition of the crime of aggression adopted on 11 June 2010 by the Review Conference of the Rome Statute in Resolution RC/Res 6, accessed at <www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf>.

6. Alfred, Lord Tennyson, 'The Charge of the Light Brigade', in *The Works of Alfred, Lord Tennyson* (London, Macmillan & Co. 1915) p. 222.

7. See D. Rodin, 'Two Emerging Issues of Jus Post Bellum: War Termination and the Liability of Soldiers for Crimes of Aggression', in C. Stahn and J. Kleffner, eds., *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (The Hague, T.M.C. Asser Press 2008) pp. 53-75.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

theory' in which the principle of distinction has a subdivision of combatants into just and unjust combatants.[8] However, even if it is clear that, at present, no *legal* responsibility falls on the individual soldier where the campaign breaches the *jus ad bellum*, does this affect the conduct of the campaign, the application of the *jus in bello*? Do doubts on the legality of the war itself filter down the chain of command and affect the actual conduct of the hostilities? Is there a link here in practice, if not in law, between the *jus ad bellum* and the *jus in bello*?

The very nature of the question here being asked makes it difficult to provide a scientific answer because the question is not so much one of law but of practice. However, there is some empirical evidence that can be examined such that it might be thought that the subject matter would be perfect for a doctoral thesis. This article will not seek to answer the question directly but simply to put forward some thoughts, based largely on the author's own experience of 30 years as a military lawyer, working mainly in the operational law field. This comes with a large caveat. My experience is with a NATO army working for a Government whose underlying principle is to comply with the law. It follows that the issues that I have faced are where there have been doubts about the legal justification given by the Government for the use of armed force. Other considerations may come into play in cases where the *jus ad bellum* is simply ignored. In such cases, it is at least likely that, where the attitude of higher political and military command is that the law is irrelevant, that attitude will filter down to lower levels and it will therefore be difficult to instill in junior ranks any respect for law of whatever kind. This will have an inevitable effect on the conduct of operations. Examples of this can be found in many of the conflicts in Africa and, to a certain extent in the Balkans.

I therefore propose to concentrate on the more difficult cases where a Government purports to be complying with the *jus ad bellum* but there is doubt expressed publicly as to the justification for those claims. How far do such doubts affect the attitudes of Service personnel at the lower ranks and what effect does this have on the actual conduct of operations?

In order to examine these questions, I will look at three specific examples, Kosovo, the 2003 Iraq invasion and what was described as the Global War on Terror. I will look at the legality or otherwise of each war under the *jus ad bellum* and then review the conduct of the campaign itself to see if any connection can be drawn between breaches of the *jus in bello* and the questions over legality of the war itself. At the end I will try to draw some conclusions as to whether there is indeed a link here between legality under *jus ad bellum* and conduct under the *jus in bello*.

But first, we need two comparators, the Falklands/Malvinas War and the 1990/91 Iraq War.

8. Ibid.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

2. 'LEGAL' WARS

2.1 The Falklands/Malvinas War

The Falklands/Malvinas conflict was unusual in being an inter-state conflict where both sides were – and still are – convinced of the justice of their own cause. It would take a decision of the International Court of Justice to decide on the legality of the claims of either side. Furthermore, during the conflict, both Governments accepted and sought to apply the laws of armed conflict. This was perhaps best illustrated by the remarkable 'Red Cross box' – an area of water north of the islands themselves where the two sides stationed their hospital ships and cooperated together.[9] There was occasional confusion, however, as when Margaret Thatcher denied the applicability of the 1949 Third Geneva Convention on Prisoners of War to Argentinean forces captured on South Georgia.[10] She was quickly corrected.

This leadership from the top filtered down the chain of command. At that time, the Cold War was still ongoing and the United Kingdom had not yet ratified Additional Protocol I to the 1949 Geneva Conventions. There was, however, regular training in the law of armed conflict in the British Forces and officers such as Lieutenant Colonel (later Major General) Tony Rogers were active in dissemination activities as well as playing a role in the development of the laws of armed conflict by advising UK delegations to diplomatic conferences on law of armed conflict treaties. It is fair to say that the subject was not as developed within the armed forces as it is today but this was to an extent counter-balanced by a greater ethical sense which perhaps pervaded those forces. The British Service personnel were fighting for Queen and country and that required the maintenance of certain standards of behaviour. The British forces consisted of volunteers and those deployed on operations were, in most cases, elite and used to working as a team. Let the standards down and you let down your own colleagues, as well as your unit.

The Falklands/Malvinas conflict itself was fundamentally conducted in accordance with the laws of war. Of course there were breaches – on both sides – but these were seen as the exception not the norm. Allegations were made at the time – and continue to be made – about individual incidents but nobody has alleged a pattern of violations.[11] One of the most controversial incidents was of course the sinking of the Belgrano with the loss of 323 lives. Whilst academics have long argued over the legality or otherwise of the attack, the military – on both sides –

9. See commentary to Rule 35, in J.-M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law* (Cambridge, Cambridge University Press 2005) p. 120.

10. See reply of the Prime Minister to a question by Sir Bernard Braine, *Hansard (House of Commons)*, Vol. 22, Col. 616, 26 April 1982.

11. There was an official inquiry following the publication in 1991 of the book *Excursion to Hell* (London, Bloomsbury) by Vincent Bramley who had fought in the conflict and made allegations relating to the treatment of Argentine prisoners of war. No prosecutions followed.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

have always accepted that this was a legitimate act of war.[12] No attempt was made to attack the escorting ships to enable them to pick up survivors. Over 700 people were rescued.[13]

At the end of the war, there was an interesting incident. The surrendering Argentinean forces were gathered on the airfield at Port Stanley. The weather was appalling and there was no shelter even for the British forces as all the tentage had been sunk with the Atlantic Conveyor. The ceasefire had meant that the huge flotilla of support ships including STUFT (ships taken up from trade) could be brought into shore. These included a number of requisitioned ferries, used to transport troops. It was suggested that the prisoners should be accommodated on the ships where they could be properly looked after but, since Napoleonic times and the experience of the prison hulks in the Medway, it had been understood that prisoners of war must be accommodated on land. But there was no accommodation.

The British Army lawyer who had travelled with the task force to advise on law of armed conflict matters discussed the dilemma with the representatives of the International Committee of the Red Cross. As hostilities had ceased, the United Kingdom was under an obligation to repatriate the prisoners. This would be inevitably done by sea and so it was agreed that the prisoners could be placed on the ships as the first stage in the repatriation process. This pragmatic solution was achieved by a sensible interpretation of the laws of armed conflict and again illustrated the care that the authorities took to comply with those laws.[14]

A further illustration arose from the death of an Argentine naval officer who was shot and killed whilst allegedly seeking to sabotage the captured Argentine submarine, the Santa Fe. A British Board of Inquiry was held which exonerated the guard who had fired the shot. This report was passed to the Argentine authorities who accepted it.[15]

The result of this acceptance of the underlying legal framework was to have a secondary role. The British armed forces developed considerable respect for their Argentinean opponents, particularly the pilots, and it was not long before the two armed forces were working side by side again on UN Missions. Indeed, this caused some difficulty as the politicians were some way behind the curve and sanctions against Argentina, particularly in the provision of military equipment, were still

12. In 2000, there was an attempt by relatives of the Belgrano dead to take the United Kingdom to the European Court of Human Rights. This was despite the findings by the Argentine Ministry of Defence in 1994 that the sinking was a 'legitimate act of war'. See 'UK Sued over Belgrano Sinking', BBC News Online, 29 June 2000, accessed at <http://news.bbc.co.uk/1/hi/uk/812146.stm>.

13. See para. 4, section 1, 'Operations in the Total Exclusion Zone', in CinC Fleet, Ministry of Defence, *Operation CORPORATE 1982, Key Documents concerning the Sinking of the BELGRANO*, accessed at <www.rna-10-area.net/files/belgrano.pdf>.

14. Personal conversation with the legal officer involved.

15. See H. Levie, 'The Falklands Crisis and the Laws of War', in A. Coll and A. Arend, eds., *The Falklands War, Lessons for Strategy, Diplomacy and International Law* (Boston, Allen and Unwin 1985) p. 72.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

in place.[16] Technically, therefore, there were limits in how far the British UN force could support their Argentinean colleagues. My understanding is that this was worked out in a pragmatic fashion on the ground.

The Falklands/Malvinas conflict illustrates the effect of leadership but also another more difficult concept – the power of the media. The British media were almost unanimously behind the attempt to recover the islands. The troops were seen as heroes.[17] This had a double effect. First, positively, it again emphasised those values that the British soldier, sailor or airman was supposed to represent and thus provided a moral boost. On the other hand, more insidiously, it meant that allegations of misconduct would either not be reported at all or treated with suspicion. How could it be possible that 'our brave boys'[18] (and it was then almost entirely men) could be guilty of such conduct? The burden of proof was on the accuser and Service personnel would always be given the benefit of the doubt.

The role of the media was still not fully appreciated in the 1980s though the signs of their power had already been demonstrated in the Vietnam war where it has been said that the war was won in the paddy fields of Vietnam but lost on the television screens of America.[19] My Lai destroyed the image of the US GI in a manner that was to be repeated with some similarity at Abu Ghraib. But that story is still to come. In the Falklands/Malvinas conflict, the location and the nature of the hostilities meant that the authorities had control over the media in a way that was not to prove possible again. Whilst the media did indeed provide some support for the moral backbone of the armed forces, the nature of the reporting made it easier for aberrations to be overlooked or even excused.

2.2 **The Iraq War 1990-1991**

Less than ten years later, the United Kingdom was at war again – this time as part of a coalition ejecting Saddam Hussein from Kuwait following the latter's invasion and purported annexation of that country. Here, the legal basis for the operation was soundly based both on collective self-defence (assisting the exiled Kuwaiti Government) and on UN Security Council resolutions.[20] Indeed, it can be argued that it was only compliance with the letter of those resolutions that prevented the Coalition forces pushing on to Baghdad and removing Saddam Hussein from

16. The sanctions lasted until 1998. See Written Answer by Tony Lloyd, Minister of State, Foreign & Commonwealth Office, to Ben Chapman MP, *Hansard (House of Commons)*, Vol. 322, Col. 722, 17 December 1998.

17. *The Sun* newspaper was renowned for its jingoistic reporting and, in particular its headline 'GOTCHA' on the sinking of the Belgrano. See *The Sun*, 4 May 1982.

18. See Alan Rushbridger's thoughtful comments on the media role in *The Guardian* on 27 May 1982, accessed at <www.guardian.co.uk/uk/1982/may/27/falklands.world>.

19. See R. Elegant, 'How to Lose a War: The Press and Viet Nam', *Encounter* (London), Vol. LVII, No. 2, August 1981, pp. 73-90.

20. For an analysis of the legal arguments, see C. Greenwood, 'New World Order or Old? The Invasion of Kuwait and the Rule of Law', 55 *Modern L Rev.* (1992) pp. 153-178.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

power – an action that would have saved ten years of sanctions and a subsequent, highly controversial, intervention.[21]

Again, this was an unusual war. It was divided into two parts, the first an air campaign lasting from 17 January to 24 February 1991. There then followed a lightning ground campaign that lasted only 100 hours with a ceasefire called on 28 February.[22] The Coalition forces were again made up of primarily professional forces from the United States, the United Kingdom, France and Saudi Arabia. The Iraq forces, largely conscript apart from the elite Republican Guard, had little chance against the overwhelming air supremacy of the Coalition and the armoured divisions that poured through Southern Iraq into Kuwait.

Again the media played a substantial part. Western journalists were present in Baghdad during the air offensive and whilst suspicious of Iraqi propaganda, they were nevertheless prepared to report on any alleged failures on the Coalition side. It was therefore important that the campaign was not only conducted in accordance with the laws of war but seen to be so conducted. The unfortunate case of the Al-Amariyah/Al Firdos bunker is a perfect example. On 13 February, in the middle of the air campaign, US aircraft attacked what was alleged to be a command and control centre in the Amariyah district of Baghdad. Whether it was such a centre is still the subject of controversy; what is not in dispute is that the bunker was also being used as an air raid shelter and over 400 people died. As a matter of law, the attack may or may not have been justified (it is the expected incidental loss and damage that must be weighed against the anticipated military advantage).[23] What is without doubt is that the actual result threatened to split the Coalition and led to calls to move the bombing campaign away from Baghdad.

But how did all this affect the Service personnel themselves? Here I must declare an interest in that I was the senior UK Army lawyer deployed to theatre during that campaign. I was therefore in constant touch with soldiers both whilst carrying out training activities and, in my later role with the Prisoner of War Guard Force, whilst overseeing the handling of Iraqi prisoners of war. First, there can be no doubt that the feeling that our cause was just and that we had the support of our citizens was a factor. Whilst some of us, including myself, had had to be bussed to our departure airport in Germany through anti-war protestors, there was a strong feeling that we were going to right a wrong. Yet at the same time, there was another feeling that was apparent. Whilst we all felt that Saddam and his henchmen were bad, there was a surprising degree of empathy and sympathy with the Iraqi soldiers themselves. I stressed in training that when a British soldier captured an Iraqi he should view the man in front of him as a mirror image – himself but in a different uniform. Whilst I suspect that there may have been instances in the front line where

21. Though this is disputed. See Y. Dinstein, ed., *War Aggression and Self-Defence*, 3rd edn., (Cambridge, Cambridge University Press 2001) p. 211.

22. For a brief chronology, see 'Timeline: War in the Gulf', BBC News Online, 2 August 2000, accessed at <http://news.bbc.co.uk/1/hi/world/middle_east/861164.stm>.

23. For an interesting analysis of this incident, see G. Best, *War and Law Since 1945* (Oxford, Clarendon Press 1995) pp. 327-328.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

this broke down, the attitude at the prisoner of war camp itself was disciplined but calm. It was not unusual for me, when I did my rounds at night, to see British officers standing up against the wire talking to their Iraqi counterparts, some of whom of course were Sandhurst educated!

The atmosphere was best summed up by an incident before the main land war started. As we completed building the camp, we received our first prisoner, captured by a patrol operating behind enemy lines. Rather than put him in a vast empty compound, a decision was made to house him in a tent with the guard force, outside the prison compound. He had a guard on his tent but otherwise had the same conditions as the guard force. One afternoon, there was a SCUD missile alert and the guard force personnel all put on their nuclear, biological and chemical suits in case of a chemical attack. The guard noted that the Iraqi had none (equipment was due to arrive prior to the land offensive) and began to give him some of his own, putting himself at risk. When I later asked him why he had done it, he just said, 'Sir, it seemed like the right thing to do!'[24]

A number of the Iraqi prisoners wanted to give statements on alleged war crimes committed by their own side. Unfortunately, at that stage, we did not have sufficient interpreters or military police personnel to take the statements though I believe that both the United States and the United Kingdom later drew up extensive dossiers on war crimes for future use.[25] Certainly, most of the Iraqis that I spoke to had little enthusiasm for the cause but then they had already been captured and were not fighting to protect their own homeland as would be the case in 2003.

The Iraq War of 1990/91 was short and did not leave behind – at least in Kuwait – a legacy of insurgency. The Coalition troops were swiftly withdrawn once the Kuwaiti Government had been restored. The campaign itself was along conventional lines where the law was clear and there was an overwhelming feeling that the British were 'on the right side'. In some ways, there was no need to 'bend the rules'. Later campaigns were to be different.

3. WARS OF QUESTIONABLE LEGALITY

3.1 **Kosovo 1999**

Following the collapse of the Federal Republic of Yugoslavia into its component parts and the ensuing bloodshed, the status of Kosovo, an autonomous province of Serbia but overwhelmingly Albanian in population, had been put on the backburner. Serbia, headed by Slobadan Milošević, had removed the autonomy of Kosovo but the Albanian resistance at the time had been essentially passive, thus avoiding the chaos that had engulfed Bosnia and Croatia. However, this could not

24. Personal knowledge of the author.

25. In relation to the US collation, see M. Scharf and G. McNeal, *Saddam on Trial* (Durham, NC, Carolina Academic Press 2006) p. 11.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

last and as Albanian patience ran out, violence broke out and increased through the 1990s. Although initially, the Kosovo Liberation Army, the Albanian resistance, was seen in the West as a terrorist organisation, the response of Milošević in ordering a hardline crackdown on Albanians in general, led to a change of attitude. The international community became involved and despite numerous attempts to broker peace agreements, the violence on both sides continued.[26] On 23 September 1998, the UN Security Council in Resolution 1199[27] called on all parties to respect a ceasefire and the following day NATO issued an 'activation warning' envisaging a possible air campaign in Kosovo. There followed extensive diplomatic efforts to persuade Slobadan Milošević to 'cease and desist' but without success. The Security Council was unable to agree on further action and on 24 March 1999, NATO began an air campaign with the aim of forcing Milošević to withdraw Serb forces from Kosovo. This campaign lasted until 11 June and was not accompanied by land operations until after the ceasefire when NATO troops entered Kosovo as Serbian forces withdrew.[28]

The legality of the Kosovo campaign has engendered great debate. There was no supporting UN Resolution though NATO argued that the intervention was to prevent a humanitarian catastrophe caused by Milošević's attempts at ethnic cleansing by driving out the Albanian population. Perhaps the best summing up of the position was that of the Independent International Commission on Kosovo, established by the Prime Minister of Sweden. They concluded that the campaign was 'illegal but legitimate'.[29] This mixing of law and morality introduces further complications.

But did the doubts on the legality of the campaign as a whole have any effect on the conduct of the campaign? The answer is probably 'very little' because of the nature of the campaign. Most targets were pre-planned and it was therefore one of the most 'lawyered' campaigns in history. Whilst there could be arguments on the legality of certain targets such as the Belgrade TV station[30] and in some cases, arguments as to how attacks were carried out, for example the train bombing near Grdelica,[31] and arguments over faulty intelligence, as in the bombing of the Chinese Embassy,[32] the overall view was that the campaign had been conducted by NATO operating within the parameters of international law as they saw it.

One unusual aspect of the campaign was that it was conducted within the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia, somewhat

---

26. For a background account, see R. Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo* (Cambridge, Cambridge University Press 2007) pp. 69-75.

27. UN SC Res. 1199 (1998), 23 September 1998.

28. For a full account of the air campaign, see The Independent International Commission on Kosovo, *The Kosovo Report* (Oxford, Oxford University Press 2000) pp. 85-97.

29. Ibid., p. 4.

30. See *The Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, paras.71-79, accessed at <www.icty.org/sid/10052>.

31. Ibid., paras. 58-62.

32. Ibid., paras. 80-85.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

to the consternation of some politicians when they discovered this. As a result, the Prosecutor ordered an inquiry into the conduct of the campaign but the general view was that 'NATO was attempting to attack objects it perceived to be legitimate military objectives'.[33] Five incidents, including the three examples given above, were described as 'problematic' and looked at in greater detail by the inquiry but in none of them did the inquiry team consider that a full investigation was required by the Office of the Prosecutor. Whilst many have criticised the findings of the inquiry, nobody has suggested that the doubtful legality of the war under the *jus ad bellum* affected the conduct of the campaign under the *jus in bello*.

3.2 'Global war on terror'

However, the advent of the 21st Century would not provide the peace dividend that so many had hoped for after the fall of the Berlin Wall. Instead both the character of conflict and the nature of the laws that govern conflicts were to be shaken and challenged. The catalyst was the attacks on the United States on '9/11'. These attacks were the precursor of the 'Global War on Terror' and, indirectly, to the invasion of Iraq in 2003 with the ensuing breakdown of law and order in that country.

The initial response to the 9/11 attacks was a campaign, primarily conducted from the air, against Taliban and Al Qaeda targets in Afghanistan.[34] In addition, Special Forces assisted the Northern Alliance in their pre-existing civil war against the Taliban authorities. Initially, this response was seen as a legitimate exercise of self-defence by the United States and its allies though doubts were expressed in some circles as to the links between the Taliban and Al Qaeda and whether these justified what was in effect a campaign for regime change.[35] At this time, the fierce debates going on within the Bush Administration itself, many of which are now in the public domain, were still classified. It was not until the political rhetoric of a 'war on terror' began to take on a practical reality in terms of indefinite detention of terrorist suspects in Afghanistan and elsewhere, including the practice of extraordinary rendition, that the debate really began to take off.

That debate struck at the very basis of the laws regulating the conduct of hostilities in that it was alleged that the 'war on terror' was a 'new paradigm' outwith the existing treaty structure.[36] It followed that the applicable law was what President Bush decided appropriate. International law became increasingly side-lined

33. Ibid., para. 55.

34. See J. Murphy, 'Afghanistan: Hard Choices and the Future of International Law', in M. Schmitt, ed., *The War in Afghanistan: A Legal Analysis* (Newport, RI, US Naval War College 2009) pp. 83-86.

35. See M. Reisman, 'International Legal Dynamics and the Design of Feasible Missions', in ibid., pp. 68-69.

36. White House Memo, 'Humane Treatment of Al Qaeda and Taliban Detainees', dated 7 February 2002, printed in K. Greenberg and J. Dratel, eds., *The Torture Papers – The Road to Abu Ghraib* (Cambridge, Cambridge University Press 2005) p. 134.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

to the delight of some on the American Right who considered that international law was designed as a shackle by Lilliputian powers to limit the power of the United States.[37]

The particular areas of dispute were the geographic location of conflict, the nature of the participants and the powers of detention. This inevitably flowed over into the treatment of detainees. To the advocates of the 'global war on terror', the war was exactly that – global. The United States had the right to exercise the powers of a belligerent wherever and whenever they wanted. A terrorist was as much a lawful target on the streets of London as he or she was in the mountains of Afghanistan. Furthermore, this was a war in which there were no 'combatants' in the traditional sense. As President Bush put it, 'Either you are with us or you are with the terrorists.'[38] Thus not just those who carried out terrorist acts could be acted against but also those who assisted them, including financiers, and even family members who provided food and shelter. To stay at a Taliban guest house was used as evidence sufficient to make someone liable to transportation to Guantanamo.[39]

As to treatment, the Geneva Conventions were deemed not to apply to detainees, either from the Taliban or Al Qaeda though for different reasons. The Taliban, though acknowledged for these purposes as the Government of Afghanistan, had forfeited their rights by their conduct. As for Al Qaeda, they were a non-State party and therefore outside the treaty regime in any event. As the conflict was geographically global, Al Qaeda could not even rely on the fundamental principles contained in Common Article 3, governing non-international armed conflicts. In a chilling statement, President Bush required that 'detainees be treated humanely and, *to the extent appropriate and consistent with military necessity*, with the principles of Geneva'.[40] The emphasis is mine but the doctrine of *Kriegsraison*, rejected internationally for a very long time, seemed now to be back in fashion. This doctrine led to a downward spiral of treatment standards and to interrogation techniques which are now generally acknowledged to have amounted to torture.[41] Indeed, there were those who openly argued that military necessity provided an

37. See, for example, John Bolton, '"Legitimacy" in International Affairs: The American Perspective in Theory and Practice', remarks to the Federalist Society, Washington, DC, 13 November 2003.

38. Speech by President George W. Bush to a Joint Session of Congress on 20 September 2001, accessed at: <www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html>.

39. See *Moath Hamza al Alwi* v. *George W. Bush*, Civil Case No. 05-2223 (RJL), US District Court for the District of Columbia, Memorandum Order, 30 December 2008, accessed at <www.scotusblog.com/wp-content/uploads/2008/12/al-alwi-order-12-30-08.pdf>.

40. *Supra* n. 36, p. 135.

41. See *Farhi Saeed Bin Mohamed* v. *Obama*, US District Court for the District of Columbia, Memorandum Opinion, 19 November 2009, at p. 64, accessed at <www.scribd.com/doc/27361532/Farhi-Saeed-Bin-Mohammed-v-Barack-Obama-05-1347-Habeas-Corpus-Judgment>.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

exception to the prohibition on torture.[42] The problem here was therefore not so much soldiers – or other Government employees – acting on their own initiative in an illegal manner but in many cases acting, as they saw it, in accordance with the legal directives coming out from their own Government. The law itself was now in doubt.

3.3 **The Iraq War 2003**

This problem was compounded in 2003 with the invasion of Iraq. Again, the legal position in relation to *jus ad bellum* was in doubt. There was at least a suspicion, subsequently confirmed to a great extent, that certain segments of the US Administration saw Iraq as 'unfinished business' and decided at an early stage to use '9/11' as a convenient excuse for action.[43] The UK Government, a key ally, was faced with a dilemma. What in fact went on in the corridors of power in Whitehall is currently the subject of a public inquiry under Sir John Chilcot, the report of which is still awaited.[44]

The position of the Attorney General, Lord Goldsmith, has come under considerable scrutiny. By tradition, the advice given by the Attorney General is not made public in accordance with the doctrine of legal privilege. However, in this case, as concern had been expressed as to the legal position even by Service Chiefs, the Prime Minister, Tony Blair, released a short advice by Lord Goldsmith dated 17 March 2003, in which he appeared to consider that Security Council Resolution 678, the original authority relied upon for the use of force against Iraq in 1991, had been revived and remained valid.[45] Subsequent events, in particular the resignation of the Deputy Legal Adviser at the Foreign and Commonwealth Office, Elizabeth Wilmshurst, and the Chilcot Inquiry itself, led to the admission that this was the last of a number of advice minutes that had been given to the Prime Minister during the build-up to the war and also revealed how that advice had evolved over that period.[46] Perhaps the critical minute was that of 7 March 2003 which outlined at some length the various legal justifications put forward.[47] In so far as the argument relating to the revival of Resolution 678 was concerned, Lord Goldsmith was of the view that 'the language of resolution 1441 leaves the position unclear and the statements made on adoption of the resolution suggest that there

---

42. See J. Bybee, Memorandum for Alberto R Gonzales, Counsel to the President, 'Re: Standards of Conduct for Interrogation under 18 USC §§ 2340-2340A', 1 August 2002, printed in *The Torture Papers*, *supra* n. 36, pp. 172, 207.

43. See 'BBC Profile: Dick Cheney', 3 September 2004, BBC Online, accessed at <http://news.bbc.co.uk/1/hi/world/americas/3344815.stm>.

44. See The Iraq Inquiry official website at <www.iraqinquiry.org.uk/>.

45. See written answer by Lord Goldsmith to Baroness Ramsay, *Hansard (House of Lords)*, 17 March 2003, Vol. 646, Part No. 65, Col. WA 2.

46. See statement by Lord Goldsmith to the Iraq Inquiry, 4 January 2011, accessed at <www.iraqinquiry.org.uk/media/50118/lord-goldsmith-statement-to-the-inquiry.pdf>.

47. Advice by Lord Goldsmith to the Prime Minister, 7 March 2003 (7 March Advice), accessed at <www.guardian.co.uk/politics/2005/apr/28/election2005.uk>.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

were differences of view within the Council as to the legal effect of the resolution. Arguments can be made on both sides.'[48] He went on to say 'I accept that a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution.'[49] It was this 'reasonable case' that he outlined in his later advice minute dated 17 March.

It is only fair to point out that Lord Goldsmith was dubious as to the effect of the 'reasonable case'. He stated clearly

> 'But a "reasonable case" does not mean that if the matter ever came before a court I would be confident that the court would agree with this view. I judge that, having regard to the arguments on both sides, and considering the resolution as a whole in the light of the statements made on adoption and subsequently, a court might well conclude that OPs 4 and 12 do require a further Council decision in order to revive the authorisation in resolution 678.'[50]

Like many corporate lawyers, he had put the legal options before his employers and it was for them to make the policy decision, taking into account the risk of an adverse court decision. It appears that Tony Blair was prepared to take that risk and so asked for a further minute outlining the 'reasonable case'. It should not be thought that that later advice minute of 17 March reflected Lord Goldsmith's full and considered view on the matter.

However, it is not my task here to consider the arguments for or against the legality of the invasion of Iraq in 2003. It is sufficient that there was considerable dissension both at the time and thereafter which extended even to the armed forces. Despite the assurances given to the Chief of Defence Staff, Admiral Sir Michael Boyce (now Lord Boyce),[51] many Service lawyers, including this author, were unconvinced by the 17 March advice, published as it was on its own. However, it was accepted that the advice put forward an arguable case and it was for the Government to decide whether that arguable case was sufficient to justify going to war. Once that decision was made, it was for the Service lawyers to ensure that any operations were carried out legally under the *jus in bello*.

But did these doubts on the legality of the war itself affect the conduct of hostilities? That is a difficult question to answer as the war itself must be set in the context of the on-going 'war on terror' and the legal arguments that beset that. It is perhaps worthy of note that the advice minute of 7 March went further than a discussion of the legality of proceeding to war. It also had a section which discussed 'Possible consequences of acting without a second resolution'.[52] The Attorney General issued a warning that '[a]ggression is a crime under customary international law which automatically forms part of domestic law. It might therefore be

48. Ibid., para. 26.
49. Ibid., para. 28.
50. Ibid., para. 30.
51. *Supra* n. 1.
52. 7 March Advice, *supra* n. 47, paras. 32-35.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

argued that international aggression is a crime recognised by the common law which can be prosecuted in the UK courts.' This danger was nullified by a later decision by the House of Lords, decided in ignorance of the views of the Attorney General.[53] However, Lord Goldsmith also pointed out that '[g]iven the controversy surrounding the legal basis for action, it is likely that the Court will scrutinise any allegations of war crimes by UK forces very closely'.[54]

Again, I must declare an interest having served as part of the Coalition Provisional Authority in Baghdad for three months in late 2003. The problem that seemed to be primary was not whether to comply with the law but what the law was. To most of the professional military in Iraq, the law was comparatively straightforward though Coalition forces had little experience of applying the law of occupation. However, there was immense political pressure to develop the law 'in the interests of the Iraqi people'. The conservative nature of occupation law was replaced by a move towards transformative occupation.[55] The Iraqis, understandably, objected to being told what was best for them and the atmosphere changed, even within the Green Zone. The 'liberators' were now seen as 'occupiers' and soon as 'foreign invaders'. Calls for resistance were heeded and soon Iraq was caught up in a series of internal conflicts as well as an insurgency against the Coalition forces.

The problems of Afghanistan now spread to Iraq, particularly in relation to detention and interrogation. For the American forces, Abu Ghraib[56] will remain a stain on their reputation for years to come. For the British, the Baha Mousa case, where an Iraqi detainee was tortured and killed by British forces, will also reverberate for years to come.[57] But why did such cases occur and was it as a result of the initial uncertainty as to the legality of the war itself?

There have been extensive inquiries in the United States into Abu Ghraib[58] and in the United Kingdom, similarly, a public inquiry took place in relation to the Baha Mousa case.[59] None seem to have looked in to the possible effect on soldiers of doubts as to the legality of the campaign as a whole.

An interesting account of the effect of the war on soldiers is to be found in *None of Us Were Like This Before: American Soldiers and Torture*.[60] This is not a legal textbook but an attempt by a journalist to understand what lay behind the actions

---

53. *R* v. *Jones* (Appellant) (On Appeal from the Court of Appeal (Criminal Division)) (formerly *R* v. *J* (Appellant)), etc., (2006) UKHL 16.

54. 7 March Advice, *supra* n. 47, para. 33.

55. See A. Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', in M. Schmitt and J. Pejic, eds., *International Law and Armed Conflict: Exploring the Faultlines* (Leiden, Nijhoff 2007) pp. 439-495.

56. For a summary, see 'Iraq Prison Abuse Scandal', BBC Online, 11 January 2008, accessed at <http://news.bbc.co.uk/1/hi/world/americas/3701941.stm>.

57. See Introduction to *The Report of the Baha Mousa Inquiry*, published on 8 September 2011, accessed at <www.bahamousainquiry.org/f_report/vol%20i/Part%20I/Part%20I.pdf>.

58. For example, *Investigation of Intelligence Activities at Abu Ghraib* (Fay-Jones Report), August 2004, printed in *The Torture Papers*, *supra* n. 36, pp. 987-1131.

59. See the Baha Mousa Report, *supra* n. 57.

60. J. Phillips, *None of Us Were Like This Before* (London, Verso 2010).

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

(or inaction) of ordinary American soldiers. To those of an older generation, it brings back unhappy memories of Vietnam and the degenerative affect that that war had on the conduct of soldiers, culminating in the infamous My Lai massacre.[61] Other examples of misconduct come to mind ranging from the allegations of atrocities committed by British forces in the Malayan insurgency[62] and the Mau Mau fighting in Kenya,[63] through to the Canadian airborne regiment's experiences in Somalia.[64] Certainly in the last case involving Somalia, there was no question arising over the legality of the intervention since it was a UN operation and so the *jus ad bellum* issue does not arise.

4. A COMMON LINK?

Looking at these incidents for a common link, we are led away from *jus ad bellum* to *jus in bello*. This misconduct seems to arise in 'dirty wars' where the law is not observed by one side leading to pressure on the other side. Soldiers, as a whole, are not the best educated parts of society. The average reading age of a British infantry soldier is reported to be 11.[65] When the enemy do not seem to be bound by any rules, it takes strong leadership to prevent soldiers taking the law into their own hands and exacting their own retributive justice. This is not helped when command authorities seek to dehumanise the enemy by indicating that they are lesser beings, '*untermenschen*' as the Nazis described them.[66] This has been so ever since the Romans introduced different rules for the conduct of warfare depending on whether the enemy were fellow Romans or 'barbarians',[67] and it was not new then. Dehumanising the enemy has often been used as a weapon in war but it has its unfortunate side effects in unleashing the baser instincts of man. Those wars between professional soldiers where the arcane word 'chivalry' can still be found are less likely to lead to such conduct.

---

61. The best account of the massacre and of the subsequent investigations is probably to be found in the *Report of the Army Review of the Preliminary Investigations into the My Lai Incident* (The Peers Report), 14 March 1970, accessed at <www.loc.gov/rr/frd/Military_Law/pdf/RDAR-Vol-I.pdf>.

62. See 'New Documents Reveal Cover-up of 1948 British "Massacre" of Villagers in Malaya', Guardian Online, 9 April 2011, accessed at <www.guardian.co.uk/world/2011/apr/09/malaya-massacre-villagers-coverup>.

63. See 'Mau Mau Torture Claim Kenyans Win Right to Sue British Government', Guardian Online, 21 July 2011, accessed at <www.guardian.co.uk/world/2011/jul/21/mau-mau-torture-kenyans-compensation>.

64. See *Report of the Somalia Commission of Inquiry, Executive Summary*, published 2 July 1997, accessed at <www.forces.gc.ca/somalia/vol0/v0s1e.htm>.

65. See 'Record Numbers of Army Recruits Drop Out', Telegraph Online, 9 July 2012, accessed at <www.telegraph.co.uk/news/uknews/1579703/Record-numbers-of-Army-recruits-drop-out.html>.

66. Although originally taken from the 1922 pamphlet by Lothrop Stoddart, 'The Revolt Against Civilization: The Menace of the Under-man'.

67. See C. Phillipson, *The International Law and Custom of Ancient Greece and Rome*, Vol. 2 (London, Macmillan 1911) p. 195.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

There is perhaps a further common link, uncertainty as to the law itself. This is again not so much the *jus ad bellum* but more the *jus in bello*. Until 1949, there was no international law governing internal armed conflict and even then there were only the basic guarantees of Common Article 3 to the four 1949 Geneva Conventions.[68] Many of the colonial wars were fought in this legal vacuum where it was left to commanders themselves to decide what was acceptable and what was not. Again clear moral leadership was required. Vietnam was a hybrid war with elements of internal armed conflict and elements of international. Whilst this does not excuse atrocities, it is perhaps easier to overstep the line when the line itself is not clear.

This is perhaps best illustrated by the Canadian experience in Somalia. Inquiries and even courts found it difficult to work out exactly what law applied to a UN mission of the type in which the Canadians were involved. Was it 'armed conflict' subject to the traditional laws of armed conflict or was it something else requiring a different mind-set?[69] 'If the trumpet give an uncertain sound, who shall prepare himself to the battle?'[70]

But in the last thirty years, there has been an explosion of law regulating armed conflict of every sort. The 1977 Additional Protocols to the 1949 Geneva Conventions[71] began the process and they have been followed by huge developments in both treaty and customary law. Perhaps the largest contribution here has been made by the resurrection of international criminal law and the judgements of criminal courts, particularly the International Criminal Tribunals for the Former Yugoslavia and Rwanda, ICTY[72] and ICTR.[73] Faced with legal uncertainty as to the nature of the conflict(s) in the Former Yugoslavia, the ICTY neatly circumvented the problem by declaring large chunks of the law relating to the conduct of hostilities in international armed conflict to be applicable also as a matter of customary law in non-international armed conflict.[74] This was followed by the influential International Committee of the Red Cross study into customary international humanitarian law that went even further.[75]

---

68. Common Article 3 to the four Geneva Conventions of 12 August 1949, reprinted in A. Roberts and R. Guelff, eds., *Documents on the Laws of War*, 3rd edn. (Oxford, Oxford University Press 2000) pp. 198, 223, 245 and 302 respectively.

69. *Supra* n. 64.

70. St Paul's First Letter to the Corinthians, Chapter 14, verse 8 (Authorized Version).

71. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (AP I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (AP II), reprinted in *Documents on the Laws of War*, *supra* n. 68, pp. 422 and 483 respectively.

72. See UN SC Res. 827, 25 May 1993.

73. See UN SC Res. 955, 8 November 1994.

74. *Prosecutor* v. *Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, 35 *ILM* (1996) p. 32.

75. See *Customary International Humanitarian Law*, *supra* n. 9.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

5. THE GROWTH OF HUMAN RIGHTS LAW

It might be thought that there can no longer be any room for uncertainty as to the law but in fact too much law can be as dangerous as too little, particularly if the law seems to conflict with itself. Another feature of the last thirty years has been the growth of the influence of human rights law. Whilst seen initially as part of the law of peace, it has in recent years, been made clear by the International Court of Justice, that human rights law does not cease to apply in times of armed conflict.[76] The European Court of Human Rights has given judgements in a number of cases involving armed conflict, both international and non-international.[77] In the United Nations, when inquiries are called for, whether into Lebanon in 2006,[78] Gaza in 2008-2009[79] or Syria in 2012,[80] it is the Human Rights Council that has been called into action rather than the International Humanitarian Fact Finding Commission established under Article 90 of the 1977 Additional Protocol I to the 1949 Geneva Conventions.[81] Violations of the laws of armed conflict are increasingly designated as 'human rights violations' and frequently they are but the two great legal frameworks, human rights and the law of armed conflict are different. They are based on different foundations and each has a different guiding philosophy.

Louis Henkin writes that '[h]uman rights are rights of individuals in society'.[82] They seek to protect individuals from the power of the state. Any restriction of those rights by the state has to be justified and some rights are deemed so fundamental as to permit no derogation. Human rights are exactly that – rights, not aspirations. The UN Charter in its Preamble refers to the determination 'to reaffirm faith in fundamental human rights, [and] in the dignity and worth of the human person'.[83]

The law of armed conflict on the other hand has two distinct strands. The newest that dealing with the protection of victims and sometimes referred to as 'Geneva law' has a marked similarity to human rights law, growing out of the experiences of Henry Dunant on the battlefield of Solferino.[84] It places the protection of victims of armed conflict as its highest priority and seeks to provide those victims with

---

76. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 43 *ILM* (2004) p. 1009 at p. 1048.

77. Cases have arisen from the UK involvement in Iraq in 2003, as well as from the Chechnya conflict in Russia.

78. See *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1*, UN Doc. A/HRC/3/2, dated 23 November 2006.

79. See *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* (Goldstone Report), UN Doc. A/HRC/12/48, dated 25 September 2009.

80. See The Independent International Commission of Inquiry on the Syrian Arab Republic, established pursuant to resolution A/HRC/S-17/1, 18 August 2011.

81. See Art. 90, AP I, *supra* n. 71, p. 473.

82. L. Henkin, *The Age of Rights* (New York, Columbia University Press 1996) pp. 1-5.

83. Preamble, Charter of the United Nations, 24 October 1945, reprinted in I. Brownlie, ed., *Basic Documents in International Law*, 5th edn. (Oxford, Oxford University Press 2002) p. 2.

84. Henry Dunant, *A Memory of Solferino*, repr. edn. (Geneva, ICRC 1986).

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

'rights'. On the other hand, the branch of the law of armed conflict that deals with the conduct of hostilities, sometimes known as 'Hague law' has a different foundation. It grew out of agreements amongst states and was thus always more state-centric. It sought to balance 'the necessities of war with the laws of humanity'.[85] The interests of the state were thus given an equal priority.

Although it has often been stated that these two strands were brought together in the 1977 Additional Protocols to the 1949 Geneva Conventions,[86] there remained an inevitable tension between the disparate foundation premises. That tension has now been exacerbated by the growing influence of human rights law. Hague law recognises that in time of war, people will get killed and things will get broken. It allows the killing of individuals based on their status alone. Even innocent individuals may die provided that the anticipated military advantage sufficiently outweighs the expected incidental loss of life and damage. This is in total contradiction to the fundamentality of the right to life under human rights law. Which law should prevail and in what circumstances?

An example of this confusion can be found in the circumstances surrounding the death of Sergeant Roberts during the 2003 Iraq War. On 24 March 2003, the fourth day of the Iraq War, a roadblock was established at Az Zubayr, 8 miles to the South West of Basra, which had yet to be occupied by British troops. It was captured on 6 April. An incident occurred which culminated in Sergeant Roberts, the senior non-commissioned officer at the checkpoint, becoming isolated and unarmed. He was being stoned by an Iraqi. The soldiers on the checkpoint opened fire and killed the Iraqi. Unfortunately, they also kill Sergeant Roberts.

An inquiry followed. What was the applicable law? If it was the law of armed conflict, then the soldiers simply had to ask themselves whether the Iraqi was taking a direct part in hostilities. If so, lethal force could be exercised. If it was human rights law, the test was different. What was the minimum force required to counter the threat?

Three years later, on 27 April 2006, the soldiers involved were finally cleared and murder charges withdrawn. The reason given by the Attorney General when he announced the decision to the UK Parliament was that the evidence showed that the Iraqi was attacking Sergeant Roberts and the soldiers acted to defend him.[87] This is basically a human rights test. The soldiers concerned left the Army.

The exact relationship between the law of armed conflict and human rights law is becoming increasingly confused. The International Court of Justice stated in the 'Barrier' case:

> 'As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law;

85. 1868 St Petersburg Declaration, reprinted in *Documents on the Laws of War*, *supra* n. 68, p. 55.

86. *Supra* n. 71.

87. Statement of Lord Goldsmith, *Hansard (House of Lords)*, Vol. 681, Col. 262, 27 April 2006.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

> yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.'[88]

However the Court did not try to put flesh on that skeleton and has avoided doing so in subsequent cases. Human rights courts have not been so reticent. In its decision in the *Al-Jedda* case, the European Court of Human Rights seemed to imply that human rights provisions limiting the power of detention could only be overruled by the law of armed conflict where the latter imposed an 'obligation' to detain.[89] This would indicate a priority for human rights law even in situations where the law of armed conflict is clearly applicable, such as occupation. It also shows a misunderstanding of the law of armed conflict. The law of armed conflict does not impose 'obligations' to detain even prisoners of war, any more than it imposes an 'obligation' to kill enemy combatants. It 'allows' certain activities that would otherwise be unlawful.[90] On that basis, the law of armed conflict can never override human rights law. Even if a derogation from human rights law is permitted, it will be for a human rights court to decide upon the extent and applicability of that derogation.

Soldiers are governed in their use of force by rules of engagement. These rules are not the law but should reflect the law, as well as other political and military considerations. They cannot go beyond the law but can be, and frequently are, more restrictive than the law. With the law itself becoming increasingly unclear, rules of engagement may, by necessity, become increasingly restrictive to the extent that soldiers feel that they can no longer adequately carry out their mission. That could lead the law into disrepute.

6. CONCLUSION

And so I return to the question that I posed at the beginning: Do doubts on the legality of the war, itself filter down the chain of command and affect the actual conduct of the hostilities? I come to the conclusion that at least so far as professional armies are concerned, the direct answer is in the negative. However, there are two aspects of a legally controversial war which themselves may affect the actual conduct of hostilities. The first is uncertainty over the applicable *jus in bello*. If there has been an attempt to avoid the strict rules of *jus ad bellum*, then it is quite possible that the restrictions on the conduct of hostilities imposed by the *jus in bello* may be seen as irksome. It is noticeable how, during the 'war on terror',

88. *Supra* n. 76.

89. *Al-Jedda* v. *United Kingdom*, European Court of Human Rights, 7 July 2011, para.107.

90. See J. Pejic, 'The European Court of Human Rights' Al-Jedda Judgment: The Oversight of International Humanitarian Law', 93 *IRRC* (2011) pp. 837-851.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press

the 1949 Geneva Conventions, the foundations of the law of armed conflict, were described as quaint and even obsolete.[91]

The second and related effect is that it may be difficult to get public opinion behind such a war. At the very least, there will be divisions and these divisions may have effect in two particular areas. First, if the law of armed conflict is seen as being weak or misused, those against the war will turn to other legal arguments, particularly those based on human rights law which will be seen as a means of restricting operations. Secondly, the press will be divided and there will be those seeking 'bad news stories', again to cast doubt on the wisdom of the operation as a whole. The 'Support our Boys' attitude which dominated in the Falklands War and the 1990/1991 Gulf War may be replaced by a more circumspect approach where allegations of misconduct are more readily accepted and published.[92] This may make it appear that misconduct is more widespread in such wars than in wars with a more solid legal foundation.

The law of armed conflict, certainly in its 'Geneva' strand, began as the soldier's friend. It was designed to protect the soldier on the battlefield when he became *hors de combat*.[93] The danger today is that the law is increasingly being seen as the soldier's enemy, tying him down and restricting him even to the extent of putting his (or increasingly her) own life at greater risk. The law of armed conflict is exactly that, the law *of* armed conflict. It respects the existence of conflict and again in the terms of the St Petersburg Declaration, seeks to balance 'the necessities of war with the laws of humanity'.[94] If that balance gets too much out of kilter in either direction, the law of armed conflict will cease to have any relevance in the cauldron of conflict. That would be to the detriment of all, soldier and civilian alike.

91. See Alfred Gonzales, Memorandum for the President, 'Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban', 25 January 2002, printed in *The Torture Papers*, *supra* n. 36, pp. 118-121.

92. See the warning given by the Attorney General over Iraq, *supra* n. 54.

93. The First Geneva Convention of 1864 was for the Amelioration of the Condition of the Wounded in Armies in the Field.

94. *Supra* n. 85.

https://doi.org/10.1017/S0165070X12000307 Published online by Cambridge University Press